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REPORTS OF CASES
DECIDED IN THE
SUPREME COURT OF APPEALS
OF VIRGINIA.

BY PEACHY R. GRATAN.

VOLUME XXVI.

FROM MARCH 1, 1875, TO JANUARY 1, 1876.

JUDGES
OF THE
SUPREME COURT OF APPEALS
DURING THE TIME OF THESE REPORTS.

R. C. L. MONCURE, PRESIDENT.
JOSEPH CHRISTIAN, FRANCIS T. ANDERSON,
WALLER R. STAPLES, WOOD BOULDIN.

Attorney General, RALEIGH T. DANIEL.

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CASES

DECIDED IN THE

Supreme Court of Appeals of Virginia.

The Western Union Telegraph Company v. The City of Richmond.

March Term, 1875, Richmond.

1. **Interstate Commerce—Foreign Insurance Companies—Taxation.**—The council of the city of Richmond has authority, under the charter of the city, to impose a license tax upon a foreign telegraph company having an agency in the city and doing business therein. And there is nothing in the constitutions and laws of the state or of the United States which forbids such a tax, if it is equal and just in its provisions.
2. **City Ordinance—Construction.**—Though the ordinance of the city imposing taxes speaks only of persons or firms doing business in the city, yet it imposes a tax in terms on telegraph companies, and obviously intends to include incorporated companies as well as individuals.
3. **Same—Corporations—When Deemed "Persons."**—Corporations are to be deemed and taken as persons when the circumstances in which they are placed are identical with those of natural persons expressly included in a statute.
2. ***4. Federal Agencies—State Power to Tax.**—For a thorough and exhaustive investigation of the power of a state, and its limitations, to tax agencies of the United States government, see the opinion of STAPLES, J.
3. **Same—Same—Power of Congress to Exempt.**—Corporations which derive their existence and exercise their franchises under authority of state laws, but are employed by the national government for certain duties and services, whilst Congress may exempt them from any state taxation which will really prevent or impede such services, yet in the absence of legislation by Congress to indicate that exemption is deemed essential to the performance of governmental services, it cannot be claimed on the mere ground that the corporation is employed

as an agency of the government. And the tax may be either upon the property or business of the corporation.

6. **Same—Same—Distinction.**—The cases recognize a distinction between taxation of the property belonging to a private corporation employed by the government, and taxation of the instrumentalities or means of the government in the possession of such corporations. The state may tax a banking institution; but it cannot tax the currency or the government's bonds belonging to such bank. It may tax the railroad, but not the mail or the munitions or other property of the government. It may tax the contractor with the government, though not the contract.

This was an action of assumpsit in the Circuit court of the city of Richmond, brought in May 1873, by the Western Union Telegraph Company against the city of Richmond, to recover the sum of one hundred and twenty-five dollars, the amount of a license tax which the company had been compelled to pay to the city of Richmond. The only questions in the cause were, whether the company could be subjected to pay a license tax to the city under the laws and constitutions of the state of Virginia and of the United States, and whether corporations were included in the terms of the city ordinance.

The Western Union Telegraph Company is a corporation chartered by the legislature of the state of New York, and has an office and transacts business in the city of Richmond. The ordinance of the city classified telegraph companies and this company was placed in the third class, and the tax on the companies *in this class was fixed by the ordinance

***Telegraph Companies—Interstate Commerce.**—In *Western Union Tel. Co. v. Seay*, 132 U. S. 472, 10 Sup. Ct. Rep. 161, the court held that telegraph companies which have accepted the provisions of Rev. St. U. S. sections 5203-5208, cannot be taxed by the authorities of a state for any messages or receipts arising therefrom, from points within the state to points without the state and *vice versa*, as this is interstate commerce, but may be so taxed or messages carried wholly within the state.

†**Corporations—When Deemed to Be Persons.**—In *Lynchburg v. Railroad Company*, 80 Va. 237, it was held that a section of the charter of the city of Lynchburg which grants authority to impose a license tax upon persons engaged in certain enumerated callings, and "upon any other person or employment, which it may deem proper, whether such person or employment be herein specially enumerated or not" does not empower the city to impose such tax upon a railroad corporation, which is neither a person or employment within the ordinary acceptation of these words. The decision is

based on the rule of *ejusdem generis*. In support of the rule that corporations are to be deemed and taken as persons when the circumstances in which they are placed are identical with those of natural persons, see *Stribbling v. The Bank of the Valley*, 5 Rand. 180; *Railroad Co. v. Gallahue*, 12 Gratt. 663; *U. S. Bank v. Merchants' Bank of Baltimore*, 1 Rob. 573. In *Miller v. Com.*, 27 Gratt. 110, it was held that corporations are included under the term "persons" unless they are exempted by its terms, or by the nature of the subject to which the statute relates. See *Crafford v. Supervisors of Warwick County*, 87 Va. 116, and cases cited. In that case, act of March 2, 1888 (Acts 1887-88, p. 465) providing that the judge of the county court should, upon the application of persons paying one-third of the taxes on real estate in the county of Warwick, order a poll to be opened to ascertain the sense of the qualified voters as to whether or not the site of the courthouse should be changed, was continued and it was held that the word "persons" used in the act, included corporations.

at one hundred and twenty-five dollars. This tax the agent of the company refused to pay, until the property of the company was levied on by the officer, when he paid it under protest. The case was submitted to the decision of the judge without a jury, and he rendered a judgment in favor of the city. And thereupon the company applied to this court for a writ of error; which was awarded. The laws and ordinances, as well as the facts, are sufficiently stated in the opinion of Staples, J.

F. L. Smith, for the appellant.

1. There is no mode provided in the ordinance whereby the proper classification of chartered companies could be ascertained; and the placing said telegraph company in the third class for taxation, and subjecting said company to a tax of \$125, was wholly unauthorized by the said ordinance or any law whatsoever, state or municipal.

There is no law which authorizes the city of Richmond, by its ordinance, to declare that the word "person" or "firm" should embrace bodies politic or corporate.

2. That the statute of the state of Virginia in relation to commissioners and collectors of the public revenue for the year 1872 provides that but one license shall be required of a telegraph company; and that, upon the issuing of which license, messages and communications may be transmitted through any county or corporation in the state.

That the city of Richmond a municipal corporation, deriving its powers from the legislature, has no power, in violation of this exclusive grant, to require

4 another license and superadd another tax upon the business of the said telegraph company.

3. That the action of the corporate authorities of the city of Richmond, in requiring a license from the Western Union Telegraph Company, and imposing a tax thereon, is in violation of the third clause of section eight of article one of the constitution of the United States, which gives to Congress the power to regulate commerce among the several states.

The agreed facts, stated in the record, show that the messages sent by this company often pass through many states; and, beyond all doubt, such communications constitute, within the meaning of the constitution, commerce or intercourse.

In *Gibbons v. Ogden*, 9 Wheat. R. 189, Chief Justice Marshall said: "Commerce undoubtedly is traffic; but it is something more, it is intercourse. It describes the commercial intercourse between nations and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

So in *Corfield v. Coryell*, 4 Wash. C. C. R. 371, 379, Judge Washington says: "Commerce with foreign nations and among the several states can mean nothing more than intercourse with those nations and among those states for the purpose of trade, be the object of trade what it may; and thus intercourse must include all the means by which

it can be carried on, whether by free navigation of the waters of the several states, or by a passage overland through the states, where such passage becomes necessary to the commercial intercourse between the states."

In *State of Pennsylvania v. The Wheeling & Belmont Bridge Company*, 18 How. U. S. R. 431, Nelson, J., said: "The regulation of commerce includes intercourse and navigation."

5 In *Crandall v. State of Nevada*, 6 Wall. U. S. R. 35, "the Supreme court of the United States unanimously declared a statute of Nevada unconstitutional which imposed a tax on every passenger leaving the state.

So in *Minot v. The Phila. Wilm. & Balt. R. R. Co.*, 2 Abbott's U. S. R. 324, it is decided that a tax imposed under a statute of the state of Delaware on the use of locomotives and cars on railroads in that state was unconstitutional, so far as it applied to locomotives and cars used in commerce between the states. That the transportation of persons or property through a state is beyond its power of taxation, under the commercial clause of the constitution of the United States.

In the case of *The Western Union Telegraph Co. v. The Atlantic and Pacific States Telegraph Co.*, 5 Nevada R. 102, the act of Congress, approved July 24th, 1866, entitled "an act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military and other purposes," came under review before the Supreme court of Nevada. The question was directly raised, whether telegraph communication between the states was a part of commercial intercourse within the jurisdiction of Congress, under the commercial clause of the constitution of the United States and the court held that it is. They say: "Is telegraphy any branch of commercial intercourse? To ask the question is to answer it. So interwoven has the custom of communication by telegraph become with trade and traffic, that to separate it, without serious disturbance of vast trade relations and financial transactions, would be a task as difficult as to cut the pound of flesh without a drop of blood. It is the life and soul of civilized commercial transactions: many of the most important are daily ruled by telegraph. The banker, the merchant, the farmer, the broker, all traders, depend upon the telegraph for

6 speedy information and means of intercourse in their various business and traffic. If the ship that carries the cargo comes within the constitutional power of Congress to regulate commerce, as it confessedly does, as a means of commercial intercourse, certainly the instrumentality through which is directed the lading, sailing and unlading of the ship, the purchase and sale of the cargo, and all the minutiae of the venture and the voyage, is equally a means, only of a higher and more advanced grade."

The decisions of the Supreme court of the United States, which review the power of

Congress on this subject, are fully examined by the court in that case.

We beg leave also to refer to the cases of *Brown v. The State of Maryland*, 12 Wheat. R. 419, 429; and the *Passenger Cases*, 7 How. U. S. R. 283.

In the case of *The Phila. & Reading R. Co. v. The Commonwealth of Penn.*, recently decided by the Supreme court of the United States, and not yet reported, the power of Congress to regulate commerce among the several states is fully considered. The court held that a tax imposed under an act of the legislature of the state of Pennsylvania of August 25, 1864, on articles carried through the state, or articles taken up in the state and carried out of it, or articles taken up without the state and brought into it, is unconstitutional and void.

Waves of electricity are quite as fully subjects of exclusive dominion and property as any other external thing.

The wire of a telegraph line is nothing but a way, a means of passage; and the thing passing is not the less property because it is one of the imponderable elements.

"There is no distinction in principle 7 between electric *fluid conveyed through a parish, and water conveyed through a parish." *Alderson, J., Electric Tel. Co. v. Overseers of Poor of Salford*, 24 L. J. Ex. 151-'2, new series, p. 324. It has repeatedly been ruled by the Supreme court of the United States that no state can tax either persons or property passing through it. It is an interference with interstate communication and intercourse, which is declared illegal. If this be true, then by what authority can the state of Virginia, and still less a municipal corporation created by its legislature, lay a tax on a license for sending telegraphic messages through the state, or out of the state into other states?

The power of taxation condemned in the Pennsylvania case above cited does not, in principle, differ from that exercised by the city of Richmond in imposing a license tax on the Western Union Telegraph Company. If Virginia can tax a telegraphic communication passing through it from other states, however distant, why may not such other states do the same thing, and thereby break down the whole system of telegraphic communication by onerous taxation.

By the statement of facts set out in the record, the Western Union Telegraph Company is one of the important agencies of the Federal government in the management and conduct of its various departments and national affairs; and, as such, no state or municipal corporation has a right to impose a license tax upon it, whereby the operations of the government may, at least to the extent of the usefulness of this instrumentality, be obstructed and impaired. We would refer on this question to the following authorities: *Cooley Const. Lim. ch. 14*, pp. 480-'1, -'2; *McCulloch v. Maryland*, 4 Wheat. R. 316, in which the court held that the law of

8 Maryland imposing a tax *on the Bank of the United States was un-

constitutional. In the unanimous opinion delivered by Chief Justice Marshall, he says: "The result is a conviction that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared." *Weston v. Charleston*, 2 Peters. R. 449, in which the court (Judge Marshall again delivering the opinion) say that a tax on stock of the United States, held by an individual citizen of a state, is a tax on the power to borrow money on the credit of the United States, and cannot be levied by or under the authority of a state consistently with the constitution. *Bank Tax Case*, 2 Wall. U. S. R. 200. A tax laid by a state on banks, "on a valuation equal to the amount of their capital stock paid in, or secured to be paid in," is a tax on the property of the institution; and when that property consists of stocks of the Federal government, the law laying the tax is void. *Bank of Commerce v. New York City*, 2 Black's R. 620; *The Banks v. The Mayor*, 7 Wall. U. S. R. 16; *Bank v. Supervisors*, 7 Wall. U. S. R. 26; *Brown v. Maryland*, 12 Wheat. R. 419; *Osborn v. Bank United States*, 9 Wheat. R. 738-859; *Dobbins v. Commissioners Erie County*, 16 Peters. R. 435.

The learned counsel for the appellee refers to the case of *Railroad Co. v. Peniston*, 18 Wall. U. S. R. 5. In that case most of the authorities bearing on this question are cited, and the distinction is there broadly drawn between a tax on property and a tax on the business and operations of a corporation—the former being held liable to taxation, but the latter not so liable.

9 I *ask the special attention of the court to that case. At page 35, the court expressly decide that a tax on the operations of an instrument employed by the general government to carry its powers into execution is unconstitutional. The court say (page 36): "This distinction, so clearly drawn in the earlier decisions, between a tax on the property of a government agent and a tax on the action of such agent, or upon his right to be, has ever since been recognized;" and such continues the distinction to the present time.

J. R. V. Daniel and L. Page, for the appellee.

The appellant objects that the tax complained of was unauthorized by any law whatsoever, state or municipal; that the city of Richmond, acting under delegated authority, exceeded their authority in the imposition of this tax; that by the use of the words "person" or "firm" the ordinance did not include a body corporate, such as the Western Union Telegraph Company; and that the statute of the state of Virginia by implication forbids taxation on the part of the city.

The legislature of Virginia, by its act providing a charter for the city of Richmond (Sess. Acts 1869-'70, p. 138, § 70), expressly grants to the municipal authority power to "grant or refuse licenses," and to "require taxes to be paid on such licenses to agents of insurance companies (and several other specified employments), to commission merchants, and all other business which cannot be reached by the ad valorem system under the preceding section." The preceding section provides for taxation of property by assessment. We submit that the business of the Western Union Telegraph Company comes fairly under the head last mentioned.

10 "A corporation is a political person, capable, like a natural person, of enjoying a variety of franchises." 1 Kyd. 15. "The construction is that when 'persons' are mentioned in a statute, corporations are included, if they fall within the reason and design of the statute." Angel & Ames on Corporations, p. 3, § 6. "A corporation has been held to be included in the term 'individual' in a tax law." Otis &c. v. Ware, 8 Gray R. 509. In an important Virginia case it is settled that when the word "person" is used in a statute, corporations, as well as natural persons, are included for civil purposes. Baltimore & Ohio R. R. Co. v. Gallahue's adm'rs, 12 Gratt. 655. It will hardly be questioned that corporations "fall within the reason and design" of the ordinance, when it is observed that the section containing the words objected to, viz., "person and firm," refers by the number of the section to "express companies and telegraph companies."

In regard to the assertion that the right of the city of Richmond to tax the Telegraph Company is taken away by the statute for the assessment of taxes, licenses, &c., for the year 1872 (Sess. Acts 1871-'2, p. 194, § 143), the appellee contends that the words of the statute refer only to the commonwealth's revenue, and that, in securing this to herself, she does not intend to deprive the city of Richmond of its reasonable income. There are no words to inhibit the city from the exercise of its chartered right. The words, "one license for the same company shall be sufficient," are explained by the remainder of the clause, "and this section shall not be construed to require a license for each office of the same company." It merely declares that the company, as a whole, and not each office for itself, shall obtain from the state authority a

11 "license, subject to the conditions prescribed. Taking this whole section together, and applying to it the just rules of interpretation, its true intent and meaning will be seen to be that the incorporated company, having complied with the statutory regulations, is discharged from further requirements and demands on the part of the state. Ould & Carrington v. City of Richmond, 23 Gratt. 464; Gilkeson v. Frederick Justices, 13 Gratt. 577; Orange & Alex. R. R. Co. v. Alexandria, 17 Gratt. 176. The appellant further objects that the tax

imposed by the city is unconstitutional, because it violates that clause of the constitution of the United States which gives to Congress the power to regulate commerce among the several states. It is asserted that telegraphic messages are a most important element of commercial intercourse between the states, of which Congress has exclusive control. This objection is well answered by the Supreme court in its decision of the case of Paul v. Virginia, 8 Wall. U. S. R. 168.

In that case the state of Virginia required of a foreign insurance company, not only to pay a license tax, but to make a large deposit of bonds, as a condition precedent to carrying on its business within its territory: these requirements, it was contended, were unconstitutional, because the issuance of policies of insurance was a commercial transaction, the parties being domiciled in different states, and that the legislation in question was a regulation of commerce. But the court held otherwise; and in replying to the argument in support of the appellant's view, it was said, that such "policies are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent
12 *of the parties to them. They are not commodities to be shipped or forwarded from one state to another and then put up for sale."

There is much else in the opinion delivered in that case deserving of attention here, but we content ourselves with the brief citation we have made.

The appellee respectfully insists that the communications transmitted across the electric wires are no more articles of commerce, in the view taken above, than are contracts of insurance made by companies chartered in one state with citizens of another. "In Nathan v. Louisiana, 8 How. U. S. R. 73, the court held that a law of that state imposing a tax on money and exchange brokers, who dealt entirely in the purchase and sale of foreign bills of exchange, was not in conflict with the constitutional power of Congress to regulate commerce. The individual thus using his money and credit, said the court, 'is not engaged in commerce, but in supplying an instrument of commerce. He is less connected with it than the ship builder, without whose labor foreign commerce could not be carried on.' And the opinion shows that although instruments of commerce, they are the subjects of state regulation, and, inferentially, that they may be subjects of direct state taxation."

Instruments of commerce, then, are the subjects of state taxation. It will hardly be claimed that the electric telegraph is more than an instrument of commerce.

Cooley v. Board of Wardens of Port of Philadelphia, 12 How. U. S. R. 299, 319; License Cases, 5 Id. 504, and therein opinion of Taney, C. J., (explaining Gibbons v. Ogden) p. 581; Wilson v. Blackbird Creek Marsh Co., 2 Peters. R. 245, 251. In the li-

13 cense cases it was decided that the grant of a general authority to regulate commerce is not, therefore, a prohibition to the states to make any regulations concerning it within their own territorial limits, not in conflict with an act of Congress. A state statute on this subject is valid, unless in opposition to an act of Congress repugnant to it, passed in the exercise of the power to regulate commerce. "The act (of the state) is not in violation of this power in its dormant state." 2 Peters. R. 252.

In the Passenger Cases, 7 How. U. S. R. 283, cited by the appellants, Justice McLean, in delivering the opinion of the court, adverse to the authority of the state in that case, uses these words: "A state cannot regulate foreign commerce, but it may do many things which more or less affect it. It may tax a ship or other vessel used in commerce, the same as other property owned by citizens. A state may tax the stages in which the mail is transported; but this does not regulate the conveyance of the mail any more than taxing a ship regulates commerce. And yet, in both instances, the tax on the property in some degree affects its use." From the decision of the court dissent Taney, C. J., and Justices Daniel and Woodbury. See opinion of Chief Justice, pp. 470 and 480.

The case of Brown v. Maryland was a direct tax on imports (vide p. 448 of 12 Wheaton). And see Woodruff v. Parham, 8 Wall. U. S. R. 123, and opinion of court concerning Brown v. Maryland.

Osborn v. Mobile, 16 Wall. U. S. R. 479. In this case the question was whether an ordinance, in requiring payment for a license to transact in Mobile a business extending beyond the limits of the state of Alabama, was repugnant to the provision of the constitution vesting in Congress the power "to regulate commerce between the several states."

14 Osborn, agent of an express company chartered by the state of Georgia, was fined for conducting his business without a license in Mobile. The Chief Justice, delivering the opinion of the court, decided that the ordinance was constitutional. The whole of his brief and forcible opinion bears upon the present case.

A statute of Maryland required all traders resident within the state to take out licenses and to pay therefor certain sums from \$12 to \$150, according to a certain scale. The statute also required from all persons who were not permanent residents of the state, offering for sale any goods or merchandise not manufactured in Maryland, an annual license, for which \$300 was to be paid. Held (Ward v. Maryland, 12 Wall. U. S. R. 418), that the statute imposed a discriminating tax upon non-resident traders, and that it was pro tanto repugnant to the Federal constitution and void. Mr. Justice Clifford, giving the unanimous opinion of the court, says: "Possessing, as the states do, the power to tax for the support of their own governments, it follows that they may

enact reasonable regulations to provide for the collection of taxes levied for that purpose, not inconsistent with the power of Congress to regulate commerce, nor repugnant to the laws passed by Congress upon the same subject. Reasonable regulations for the collection of such taxes may be passed by the states, whether the property taxed belongs to residents or non-residents; and in the absence of any congressional legislation on the same subject, no doubt is entertained that such regulations, if not in any way discriminating against the citizens of other states, may be upheld as valid."

The appellant further alleges that the Western Union Telegraph Company is one of the important agencies of the Federal government, and, as such, that no state or municipal corporation has a right to 15 impose a tax upon it, whereby it is said the operations of the government may be obstructed or impaired. On this point they refer to Cooley on Const. Limitations, and McCulloch v. Maryland, 4 Wheat. R. 316. The discussion in the former work is based upon the latter case. It was there decided that the State of Maryland could not tax the Bank of the United States, a creation of the Federal government, and its particular agent and servant, such as the mail, the mint, patent rights, and other similar federal creations, which the chief justice enumerates as belonging to the same class. "The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by congress, to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not." The rest of his opinion clearly shows that, by "those means employed by congress," the chief justice refers to the governmental creations to which we have alluded. In the Bank Tax case, 2 Wall. U. S. R. 200, the capital consisted of stocks of the Federal government, and the decision in McCulloch v. Maryland applied.

These views are further maintained in the case of National Bank v. Commonwealth, 9 Wall. U. S. R. 353, and especially to the opinion of the court, pp. 361-2. Directly to the point is the case of Thomson v. Pacific Railroad, 9 Wall. U. S. R. 579. In this latter case, the chief justice, in the opinion of the court, says: "We are not aware of any case in which the real estate, or other property of a corporation not organized under an act of congress, has been held to be exempt in the absence of express legislation to that effect, to just contribution, in common with other property, to the 16 general expenditure for the common benefit, because of the employment of the corporation in the service of the government. It is true that some of the reasoning in the case of McCulloch v. Maryland seems to favor the broader doctrine. But the decision itself is limited to the case of the bank, as a corporation created by a law of the United States, and responsible, in the

use of its franchises, to the government of the United States." "We do not think ourselves warranted therefore in extending the exemption established by the case of *McCulloch v. Maryland* beyond its terms. We cannot apply it to the case of a corporation deriving its existence from state law, exercising its franchise under state law, and holding its property within state jurisdiction and under state protection."

In *Railroad Co. v. Peniston*, 18 Wall. U. S. R. 5, a question arose whether a railroad company chartered and aided by congress, partly controlled by the government and subject to its future regulations, the charter of the company conditioned that if the terms are not complied with, or the loans not paid, the road shall come under the control and management of congress, and subject moreover to the use of the government at all times for transmission of mails, dispatches, troops, stores, &c., was subject to state taxation. It was decided to be so subject.

"There are," says the court in its opinion, "we admit, certain subjects of taxation which are withdrawn from the power of the states, not by any direct or express provision of the federal constitution, but by what may be regarded as its necessary implications. They grow out of our complex system of government, and out of the fact that the authority of the national government is legitimately exercised within the states. While it is true that govern-

17 ment cannot exercise its *power of taxation so as to destroy the state governments, or embarrass their lawful action, it is equally true that the states may not levy taxes, the direct effect of which shall be to hinder the exercise of any powers which belong to the national government. The constitution contemplates that none of those powers may be restrained by state legislation. But it is often a difficult question, whether a tax imposed by a state, does, in fact, invade the domain of the general government, or interfere with its operations to such an extent, or in such a manner, as to render it unwarranted. It cannot be that a state tax, which remotely affects the efficient exercise of a federal power, is for that reason alone inhibited by the constitution. To hold that, would be to deny to the states all power to tax persons or property. Every tax levied by a state withdraws from the reach of federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which federal taxes may be laid. The states are, and they ever must be, co-existent with the national government. Neither may destroy the other. Hence the Federal constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the states, or prevent their efficient exercise." He then considers the case of *Thomson v. Pacific Railroad*. "It may therefore be considered

as settled, that no constitutional implications prohibit a state tax upon the property of an agent of the government, merely because it is the property of such an agent. A contrary doctrine would greatly embarrass the states in the collection of their necessary revenue, without any corresponding advantage to the United States. A very large

18 proportion of the property within the states is employed *in execution of the powers of government. It belongs to governmental agents, and it is not only used, but it is necessary for their agencies. United States mails, troops and munitions of war are carried upon almost every railroad. Telegraph lines are employed in the national service. So are steamboats, horses, stage coaches, foundries, ship yards, and multitudes of manufacturing establishments. They are the property of natural persons, or of corporations, who are instruments or agents of the general government, and they are the hands by which the objects of the government are attained. Were they exempt from liability to contribute to the revenue of the states, it is manifest that the state governments would be paralyzed." He then refers to the cases relied on by the complainants in the case before him, and by the appellants in the present case, viz: *McCulloch v. Maryland*, and *Osborn v. Bank of U. S.* In the former of these cases the tax "was not upon any property of the bank, but upon one of its operations; in fact, upon its right to exist as created. It was a direct impediment in the way of a governmental operation performed through the bank as an agent." "In *Osborn v. The Bank*, the tax held unconstitutional, was a tax upon the existence of the bank, upon its right to transact business within the State of Ohio. It was, as it was intended to be, a direct impediment in the way of those acts which congress for national purposes had authorized the bank to perform."

This last decision of the Supreme court, to our apprehension, is absolutely conclusive of all controversy upon the questions raised in the case at bar.

If a private corporation, created by the laws of another state, for individual gain, unable to come into our midst and carry on its business, except by permission 19 *of the laws of Virginia, is not subject to the taxing power of the commonwealth and its governmental agencies, because, forsooth, this corporation is a contractor with the Federal government, it would be difficult to say what persons or property are legitimate subjects of taxation. This monstrous proposition is, as we have seen, unsupported by authority, and is plainly repugnant to reason and justice. If maintained, it consummates the overthrow of all that is left of state government.

Staples, J., delivered the opinion of the court.

The charter of the city of Richmond authorizes the city council to raise annually, by taxes and assessments, such sums of money as they shall deem necessary to

defray the expenses of the same," and in such manner as they shall deem expedient, in accordance with the laws of the state and of the United States.

In the execution of the powers thus confided to them, the city council may grant licenses or refuse them. They may require taxes to be paid on such licenses to agents of insurance companies, and all business which cannot be reached by the *ad valorem* system. Acts of 1869-'70, page 138, secs. 69 and 70. In the case of *Ould & Carrington v. City of Richmond*, 23 Gratt. 464, this court construed these provisions as conferring upon the city council the general power of taxation, except only as it may be limited by the laws of the state or of the United States, and including all persons and subjects of taxation. It was also further held, that the mode of assessment adopted by the city council with reference to attorneys at law was sustained by the charter and by the constitution.

The plan adopted by the city council in assessing *telegraph companies is substantially the same as that pursued with reference to attorneys at law. They are divided into four classes, and required to pay a license tax graduated by the character of the business done by the company. The plaintiffs are placed in the third class, and are subjected to a license tax of one hundred and twenty-five dollars. The authority of the city council in the premises, and the validity of the assessment, must therefore be considered as adjudicated and settled by the decision of this court. It is said, however, that the ordinance of the city only applies to "persons or firms," and not to chartered companies. It is very true that the twelfth section speaks of "persons or firms" only, but the eighth section expressly mentions "telegraph companies;" and it is very clear it was the intention to include all telegraph companies, whether incorporated or not. The sections construed together plainly show that, in using the words "persons or firms" in the city ordinance, the council designed to embrace chartered companies as well as individuals. And this is sanctioned by practice and the decisions of the courts. In *Baltimore & Ohio R. R. Co. v. Gallahue's adm'r*, 12 Gratt. 655, 663, Judge Allen said: "Corporations are to be deemed and taken as persons, when the circumstances in which they are placed are identical with those of natural persons expressly included in a statute. * * *"

Another ground taken by the plaintiffs is, that the act of March 15, 1872, provides that but one license shall be required of a telegraph company, upon the issuing of which, the company's messages may be transmitted through any county or corporation of the state; and that the city of Richmond has no power, in violation of this exclusive grant, to require another license and impose another tax upon the business of the company.

21 *It is very clear, however, that the act of March 15th, 1872, refers only to

state taxation and revenue. The object of that act was, no doubt, to relieve telegraph companies from the payment of a tax for each office and place of business, and to authorize the transmission of messages throughout the state under one license, and upon the payment of a single tax. It was not intended to interfere with municipal corporations in the exercise of powers of taxation conferred by their charters, or to strip them of valuable revenues derived from companies and individuals carrying on business within the corporate limits, and under the protection of the corporate government. This subject was fully considered in the case of *Humphreys &c. v. Norfolk City*, decided by this court at the spring term 1874; and to that case reference is made. 25 Gratt. 97.

For these reasons the tax in this case must be held to be valid, so far as the constitution and laws of the state are involved.

The only question remaining for consideration is, whether the tax is in violation of any provision of the constitution of the United States, or of any rights and privileges conferred upon plaintiffs by act of congress.

It is insisted that the action of the city council in requiring the license, is repugnant to that clause of the constitution of the United States which gives to congress the power to regulate commerce among the states.

The argument of the learned counsel upon this point briefly stated is, that commerce is not merely traffic; it is something more, it is intercourse; and intercourse includes all the means by which commerce is carried on among the several states: that telegraph communication is an important branch of commercial intercourse; and if Virginia may impose a tax upon *those companies, so may every other state penetrated by their lines; and thus the whole system of telegraph communication may be destroyed by oppressive burdens in the form of taxation.

This proposition applies as well to states as to municipalities; and if the power of taxation is denied in one case it is in the other. The question is therefore a grave one, as well by reason of the principle as the amount involved.

The power of taxation, as universally conceded, is inherent in every sovereignty, and no constitutional government can exist without it. It extends to every person, to every trade and occupation, and every species of property. It is as essential to the states as to the Federal government. If it is important that the agencies of the Federal government shall be excepted from the taxing power of the states, it is equally necessary that those of the latter shall be maintained in undiminished force and vigor. In *Osborne v. Mobile*, 16 Wall. U. S. R. 479, 481, Chief Justice Chase said: "It is as important to leave the rightful powers of taxation unimpaired in the states as to maintain the powers of the Federal government in their integrity." The difficulty of drawing the line between the commercial

power of the Union and the taxing power of the states is universally conceded. Clearly no law of the states, much less the exercise of this taxing power, ought to be declared invalid upon any mere speculative, indirect and contingent ground. The repugnancy to the constitution of the United States ought to be immediate, direct, and beyond all question.

If we assume that commerce means intercourse, as it clearly does, and that intercourse includes all the instrumentalities by which commerce is carried on

23 *between the states, there is scarce an avocation in the state engaged in foreign trade and traffic which may not be brought within the influence of the constitutional inhibition. It will be conceded that a state may tax a ship of one of its citizens engaged in the transportation of foreign merchandise, or passengers to and from the state; although it cannot tax the passengers or the merchandise. The reason is, that the ship is not commerce, but a mere instrument of commerce. *Hays v. The Pacific Mail Steamship Co.*, 17 How. U. S. R. 596.

And so it has been held, that a license tax upon persons engaged in buying and selling foreign bills of exchange is not repugnant to the constitution of the United States. *Nathan v. Louisiana*, 8 How. U. S. R. 79. Such persons are not engaged in commerce, but simply in supplying an instrument of commerce. The court say "they are less connected with it than the ship-builder, without whose labor foreign commerce cannot be carried on; and yet the business of ship building may be taxed as the exercise of any other mechanical art. No one can claim an exemption from a general tax on his business within the state on the ground that the products sold may be used in commerce." In *Paul v. Virginia*, 8 Wall. U. S. R. 168, it was decided that the issuing of a policy of insurance is not a transaction of commerce within the meaning of the constitution, though the parties be domiciled in different states. The court say these contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market, as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another, and then put up for sale.

24 *The learned counsel for the plaintiffs cites the case of *Crandall v. Nevada*, 6 Wall. U. S. R. 35, in which the Supreme court held a statute of Nevada unconstitutional which imposed a tax upon every passenger leaving the state. This, however, was not upon the ground that such a tax is "a regulation of commerce, or even repugnant to any express provision of the constitution, but upon the broad principle that the Federal government had the right to call to the capital of the Union any and all of its citizens to aid in the military or civil service of the country; and every citizen from the most remote states or territories is entitled to free access to all the great departments of

the government, executive, legislative and judicial; and this right cannot be made dependent upon the pleasure of a state over whose territory they must pass in the exercise of such right. And if the principle should be admitted at all, it might be carried to the extent of an entire prohibition." An attempt was made by the counsel, who argued the case, to show that the tax was upon the business of the carrier who transports the passengers, graduated by the amount of the business done. The court say, however, it was plainly a tax upon the passenger, and the officers and agents of the companies were mere collectors of the tax. It was this feature, and this alone, which rendered the tax inconsistent with the rights belonging to citizens of the different states, and with the objects the Union was intended to attain.

The case of "*State Freight Tax*," 15 Wall. U. S. R. 285, is much relied on by the counsel for the plaintiffs. There the Supreme court held, that a statute imposing a tax upon freight taken up within the state and carried out of it, or taken up without and brought within the state, is repugnant to the clause of the constitution

25 *giving to congress the power to regulate commerce. The reason assigned is, that the tax was not upon the companies nor their franchisees, property or business, but upon the freight, or upon the consignor or consignee, and was so intended, and the company required to pay a mere toll-gatherer. And inasmuch as the transportation of freight for the purpose of exchange or sale is a constituent of commerce, a tax upon freight is necessarily a regulation of commerce.

In the case of "*State Tax on Railway Gross Receipts*," reported also in 15 Wall. U. S. R. 284, the Supreme court sustains a Pennsylvania statute imposing a tax upon the gross receipts of railroad companies, although these receipts are made up in part of freights received for transportation of merchandise to and from the state into other states. This case is plainly distinguishable from the one last cited. In the first, as has been seen, the tax was upon transportation, and the railroad company a mere agency for its collection. In the second, the tax was upon the company, measured in amount by the extent of its business, or the degree to which its franchise was exercised. It was conceded that the ultimate effect of the tax would be to increase the cost of transportation, and therefore to affect commerce itself. Nevertheless, it was not a tax upon commerce, any more than a tax upon a railroad or stage coach is a tax upon transportation, or a tax upon attorneys constitutes a tax upon clients.

The court further say, in effect, it is not everything that affects commerce that amounts to a regulation of it within the meaning of the constitution. The states have authority to tax the estate, real and personal, of all their corporations, including carrying companies, precisely as they may tax similar property when

26 belonging to natural persons. Such taxation may be *laid on valuation or may be an excise; it may be a graduated contribution, proportioned to the value of the privileges granted, or to the extent of their exercise, or to the results of such exercise. Such a power is essential to the healthy exercise of the state governments; and the Federal constitution ought not to be so construed as to impair, much less to destroy, anything that is necessary to their efficient exercise.

These cases show the great difficulty encountered by the Supreme court of the United States in dealing with this perplexing subject. They further show, I think, the anxiety of that court to preserve unimpaired the taxing powers of the states, so far as it can be done consistently with the paramount obligations of the Federal constitution. And although these decisions cannot perhaps be always harmonized, and the learned judges have been unanimous in but few of them, yet they certainly affirm the proposition that it is competent for a state to impose a tax upon individuals or corporations within its territory; and such tax, if it does not discriminate against non-residents or the products of other states, may be upon the property, or the franchises, or the business, of the individual or corporation; and its validity is not at all affected by the consideration that the party is engaged in foreign as well as domestic trade and traffic. *Society for Savings v. Coile*, 6 U. S. R. 594; *Woodruff v. Parham*, 8 Wall. U. S. R. 123; *Hinson v. Lott*, *Ibid.* 148.

In *Hinson v. Lott*, 8 Wall. U. S. R. 148, the Supreme court sustained a law of Alabama requiring every dealer in spirituous liquors introducing liquors into the state for sale to pay a tax per gallon before offering the same for sale within the limits of the state. Mr. Justice Miller in delivering the opinion of the 27 court *said: "If this was only tax it would constitute an unjust discrimination against the products of other states in favor of those of Alabama, and might be so laid as to amount to an absolute prohibition; but it appeared there was another tax of like amount upon all spirits manufactured in the state. Inasmuch, therefore, as the law merely subjected foreign articles to the same rate of taxation as applied to domestic, it was not an attempt to regulate commerce, but an appropriate and legitimate exercise of the taxing power of the states."

These decisions of the Supreme court have a direct application to the case under consideration. In the first place, it will be observed that the ordinance of the City of Richmond makes no discrimination in favor of or against any express company. The tax is alike upon all, graduated by the extent of the business. In the next place, the tax is not upon the telegraph message or communication, but upon the company, measured by the business in the corporate limits. The effect of the tax may be to increase to some extent the expense of telegraph communication. It is very probable

that the rates of telegraphing are established by general arrangement among all the companies, whether incorporated here or abroad, and it may be that these rates are fixed with reference to state and municipal taxation as to other necessary expenses. But the same thing is true as respects railroad companies engaged in the transportation of passengers and freight and domestic goods. A tax upon them is indirectly a tax upon such transportation. But no one ever questioned the constitutional power of a state to lay a tax upon its railroad companies.

The same principle applies to express companies incorporated under the laws 28 of one state, establishing *its offices in other states, and engaged in the transmission of matter internal and external.

In *Osborne v. Mobile*, 16 Wall. U. S. R. 479, the Supreme court say, although the ultimate effect of the tax may be to increase the cost of transportation, it is within the general authority of the state to tax persons, property, business or occupations within the state.

The mistake made in all this class of cases is in failing to distinguish between commerce itself and what may be termed a mere instrument of commerce. Telegraphic communication is not commerce; "it is not a subject of trade and barter offered in market as something having an existence and value independent of the parties to them." It is not an intercourse—though it may be, and doubtless is, an important and valuable instrument or agency by which intercourse is carried on between the different parts of the country. It cannot be said, however, that this intercourse is purely of a national character, affecting the commercial interests of all the states, and therefore requiring exclusive legislation by Congress. Conceding that Congress may regulate the telegraphic business of the country, it has not done so; and in the absence of any such legislation on the subject, there is no valid objection to a system of state taxation upon these companies in return for the protection they receive. They are incorporated under state laws, controlled by state regulations, and protected by state authority. It is true they are engaged in transmitting government messages at rates fixed by the postmaster general; but the railroads perform duties of a similar character in carrying the mail; so also the stage coaches. They are all subjects of state regulation, and are therefore necessarily liable to state taxation. The contract with the government for the transmis-

29 sion of its messages *is in no just sense a regulation of commerce. These terms, "to regulate commerce," are well understood to mean the power to prescribe the rules by which commerce is to be governed. *Hay on Com.* § 1061. The very fact that Congress has undertaken neither to exclude state taxation, or to prescribe any regulations for the various telegraph companies, indicates very clearly, that the whole subject was intended to be left to the

states under whose laws they are incorporated.

Another ground taken by the plaintiff is, that the company is an important agency of the Federal government in the management of public affairs, and as such no state or municipal corporation is authorized to impose a license tax upon its business, whereby the operations of the government may be impaired or obstructed. This view is based mainly upon the provisions of the act of congress of the 24th July, 1866. This act authorizes any telegraph company, organized under the laws of any state, to construct lines of telegraph over any portion of the public domain, along any of the military or post roads, and across any of the navigable waters of the United States.

Authority is also given them to take from the public lands any material needful in the construction and operation of their lines of telegraph, and also to appropriate any portion of the public lands for their stations, not exceeding forty acres for each station. The act further provides, that communications of the government, its officers and agents, shall have priority over all others in their transmission over the lines, at rates fixed by the postmaster general. The provisions of this act were accepted by the plaintiffs, and the terms of government communication fixed accordingly by the postmaster general, and agreed to by

30 the company. *It is argued, that if the state or any of its municipalities may impose a tax upon, or require a license of this company, they may impose it to any extent, and the effect may be to deprive the company altogether of the power to serve the government, or, at any rate, to impair its efficiency.

It is very clear that the states are prohibited from taxing either the property of the Federal government or the instrumentalities by which its powers are carried into execution. This doctrine is well settled, and no one doubts its application to public corporations or other agencies created by the Federal government for carrying into execution national objects and purposes. But none of the cases have gone so far as to affirm, that because the Federal government enters into a contract with a corporation or a natural person to perform certain services this operates as an exemption from all state taxation. Can it be that a railroad company by entering into an arrangement with the postmaster general to carry the mails can escape the payment of its just public dues upon the pretext that its capacity to serve the Federal government may be thereby impaired. Chief Justice Marshall, in *Osborne v. United States Bank*, 9 Wheat. R. 738-860, has given a complete answer to that question. In that case it was argued, that the tax imposed upon the Bank of the United States by the legislature was constitutional, because the bank was established for private benefit, and was founded upon contract between individuals having private trade and private interest for its great and principal object. The chief justice said if

these premises were true, the conclusion would then be inevitable. A private corporation engaged in its own business with its own views would certainly be subject to the taxing power of the state, as any individual *would be, and the casual circumstances of its being employed by the government in the transaction of its fiscal affairs would no more exempt its private business from the operation of that power that it would exempt the private business of any individual employed in the same manner. But the premises are not true. The bank is a public corporation, created for public and national purposes. It is not an instrument which the government found ready made, and has supposed to be adapted to its purposes, but one which was created in the form in which it now appears, for national purposes only.

The very reverse of all this is the status of this company. It was not created by the Federal government. It was not organized under any act of Congress, but under the laws of the state of New York. It is a private corporation, created for individual benefit and for the benefit of the private stockholders, carrying on business here under the authority of Virginia statutes, and protected in its franchises and the enjoyment of its property by state laws and the police power of the city government. The Federal government has granted it certain privileges in consideration of the performance of certain services at certain specified rates of compensation. But the government has no interest in it and no concern with it, any further that the performance of these services. So long as these are not interfered with by the regulations of the states, it is no concern of the Federal government whether a tax is imposed at all, or whether it is upon the property or the franchise, or the business of the company. It is not pretended, there is not even a suggestion, that the tax prevents the transmission of the government messages, or that it impairs in the slightest degree, the capacity of the company 32 for the *fulfillment of its obligations.

Exemption from all state or municipal taxation might with the same propriety be claimed by all railroad companies, express companies, and others engaged in the transportation of mail matter, upon the ground that such taxation may tend to prevent the performance of the contract, or at least to impair the efficiency of those agencies in the discharge of their duties.

The decisions of the Supreme court of the United States do not give the least countenance to any such pretension. They establish the contrary doctrine. One of these, the case of *National Bank v. Commonwealth*, 9 Wall. U. S. R. 353, will show the manifest disinclination of the court to extend this doctrine of exemption from state taxation.

In that case it was conceded that the Legislature of Kentucky might tax the stockholders upon the shares held by them in the national banks; but it was insisted that

so much of the act as required the banks to pay such tax was invalid, because the banks, being instrumentalities of the Federal government, are beyond the reach of state legislation. This view, however, did not prevail. The Supreme court declared that the doctrine of exemption of Federal agencies from state taxation had its just limitation, a limitation growing out of the necessity in which it is founded. This limitation is, that these agencies are only exempted from state legislation, so far as that legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve the Federal government. Any other rule would convert a principle founded alone in the necessity of securing to the government the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the states. The banks

33 are subject to *the laws of the states, and are governed in their daily course of business far more by the laws of the state than of the nation. Their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts are all based on state laws. It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional. We do not perceive the remotest probability of this in their being required to pay the tax which their stockholders owe to the state for the shares of the capital stock when the laws of the Federal government authorize the same.

In *Thomson v. Pacific Railroad*, 9 Wall. U. S. R. 579, the same doctrines are still more strongly stated. In that case the question was as to the validity of a tax imposed by the legislature of Kansas upon the railroad and telegraph property of the Union Pacific Railway Company. Exemption from this taxation was claimed upon the ground, that although the company was incorporated under the laws of Kansas, congress had granted it lands and subsidies to a large amount, in consideration of which the company had executed a mortgage upon its property for the payment of five per cent. of its net gains, and had agreed to render services also in the transmission of messages, in the transportation of mails, troops, munitions, and other property at reasonable rates of compensation: and it was insisted that the effect of the tax would be to impede and embarrass the company in the performance of these services as an agency of the government. Chief Justice Chase, in delivering the opinion of the court, dwelt at some length upon the distinction between a corporation created by the Federal government for national purposes, and corpora-

34 tions deriving their existence *and exercising their franchises under authority of state laws, but employed by the national government for certain duties and services. As to the latter, while congress may exempt them from any state taxation, which will really prevent or impede such services,

yet in the absence of legislation by congress to indicate that exemption is deemed essential to the performance of the governmental services, it cannot be claimed upon the mere ground that the corporation is employed as an agency of the government. It is true that the tax in this case was upon the property of the railroad company; and the learned counsel seems to suppose there is a material distinction between such a tax and a tax upon the business of a corporation. But the reasoning of the court does not justify any such distinction. It applies equally to both forms of taxation. Indeed, Chief Justice Chase expressly says: "No one questions that the power to tax all property, business and persons within their respective limits, is original in the states, and has never been surrendered. It cannot be so used as to defeat or hinder the operations of the national government; but it will be safe to conclude in general in reference to persons and state corporations employed in government service, that where congress has not interfered to protect their property from state taxation, such taxation is not obnoxious to the objection suggested."

These observations apply as strongly to a tax upon business as a tax upon property. Indeed there is no valid distinction between the two, so far as the principles of this case are concerned. The cases do recognize a distinction between taxation of the property belonging to a private corporation employed by the general government and taxation of the instrumentalities or means 35 of the government in the possession *of such corporation. The state may tax a banking institution, but it cannot tax the currency or the government bonds belonging to such bank. It may tax the railroad, but not the mail or the munitions or other property of the government. It may tax the contractor with the government, though not the contract. Such tax may be upon the property of the corporation, or it may be graduated by the amount of its business. It is no concern of the Federal government, provided the tax is not prohibitory, or, at least, does not impair the efficiency of the corporation in the fulfillment of its contract with the government. Indeed a tax upon business in many instances is the only just and practicable mode of assessment. Chartered companies and individuals may carry on business to the amount of thousands of dollars without owning property, real or personal, of any conceivable value. If, whenever they happen to be employed in the service of the government, they are to be exempt from all those burdens which attach to all other persons, it is obvious that both states and cities will be deprived of most valuable subjects and sources of taxation. It is impossible to foresee the mischiefs that will arise from such a limitation upon the powers of the states. We see nothing in the constitution of the United States, or in the decisions of the Supreme Court, warranting such a conclusion.

Judgment affirmed.

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***Bolling v. Lersner.**

March Term, 1875, Richmond.

1. Appeals—Statutory Limitations—Construction.

The § 8 of the act March 15, 1867, which amended § 8 of ch. 182 of the Code of 1860, changing the limitation of time for presenting a petition for an appeal from, or writ of error or *superedeas* to, any final decree or judgment, from five to two years after it was made or rendered, did not amend § 26 of that chapter, which allows five years for perfecting the appeal, by giving bond &c. And therefore, where a petition for an appeal was presented within two years from the date of the decree it might be perfected in any time within five years from that date. But see now, Code of 1873, ch. 178, § 17.

2. Same—Same—Time to Object.—If an appeal has been allowed, and the cause decided by the appellate court, without objection by the appellee that the appeal was not perfected in time, the objection cannot afterwards be made in the court below, or in the appellate court when the cause is brought up a second time.**3. Same—Judge Acting under Military Authority.***—An appeal allowed by a judge acting under military authority in 1869, was a valid appeal, and was confirmed by the act of March 5, 1870, styled the enabling act.**4. Special Court of Appeals—Validity of Act Creating.**—The act of February 28, 1872, to provide a special Court of Appeals, Acts of 1881-'72, ch. 124, p. 98, which creates a special Court of Appeals to consist of three judges of the Circuit courts, is constitutional, and the decisions of the court are valid and binding on the parties in the causes decided.**5. Same—Proper Cases for.**—All cases pending on the docket of the Supreme Court of Appeals, not involving a constitutional question and not decided in the court below by one of the judges of the special Court of Appeals, are proper cases to be sent to said special Court of Appeals for decision; and it is for the judges of the Supreme Court of Appeals under the constitution and the statute, to select the cases to be sent to said special court.**6. Same—Reversal by This Court—Effect.**—The special Court of Appeals having decided a case regularly sent to that court, and having reversed the decree of the court below, and *sent the cause back for further proceedings, there can afterwards be no complaint of error in the decree of the special court or in the proceedings before that decree.**7. Vendor Refusing to Deliver Possession—Specific Performance—Accounting for Rents and Profits.†—A**

***De Facto Officers—Validity of Their Acts.**—In *McCraw v. Williams*, 33 Gratt. 510, the facts were that one E. W. Armistead was elected judge of the county court of Halifax, and commissioned by the governor. Believing that his term commenced immediately, he proceeded to hold the court and transact business. It was held, citing the principal case and *Griffin v. Cunningham*, 20 Gratt. 81; *Quinn v. Com.*, 20 Gratt. 188, that he was a judge *de facto* and his acts, judgments, decrees, etc., while so acting were as valid as if he had been a judge *de jure*.

†Specific Performance—Accounting for Rents and Profits—Interest.—The principal case is cited and approved in *Stearns v. Beckham*, 81 Gratt. 432; *Cullop v. Leonard*, 97 Va. 260; *Moreland v. Metz*, 24 W. Va. 141; *Rust v. Rust*, 17 W. Va. 901; *Vance v. Evans*, 11 W. Va. 381.

vendor of land refuses to deliver possession according to the contract, and the vendee who has paid the purchase money, immediately sues for a specific performance, and the vendee resists it, and asks for a rescission of the contract; but there is a decree for specific performance and for an account of rents and profits. In estimating the rents and profits of the land thus held by the vendor, the annual value of the land in the hands of a prudent and discreet tenant upon a judicious system of husbandry is the proper rule in the case; to be influenced in some measure by the mode of treatment of the land by the occupant.

8. Same—Same—Same—Interest.*—Though in such case the rents are estimated, it is proper to charge interest upon them.

By an agreement under seal, bearing date the 19th of January 1863, R. B. Bolling, in consideration of the sum of seventy-seven thousand dollars, sold to Gustavus Lersner his estate in the county of Fauquier, called Bollingbrook, containing seven hundred and sixty-nine acres, and bound himself, upon payment of the purchase money, to convey the same to Lersner by deed with general warranty. And he also agreed to sell to said Lersner another tract adjoining Bollingbrook, known as Ben Lomond, containing three hundred and forty-one acres, being the same purchased by Bolling at a sale by the commissioner acting under a decree in the case of *Armistead v. Armistead*, in which a final decree was yet to be rendered; and the said Lersner was to be substituted for the said Bolling, as the purchaser; also all the live stock then on the farm, farming utensils, household and kitchen furniture, silver plate, pictures, &c., the crops, &c. And Lersner agreed to pay to the said Bolling the sum of \$17,000 on the 1st of February, a further sum of \$30,000 on the 1st of March, and a like sum of \$30,000 on the 10th of March, 1863. And it was further agreed

38 that *Bolling might use and occupy the above farms without rent or charge. One month after the termination of the war, Bolling was to deliver possession of the premises to Lersner.

Lersner seems to have paid the first two instalments of the purchase money in February and March 1863. The last, of \$30,000, was none of it paid before April; and to enable him to pay it, Bolling endorsed Lersner's three bills of exchange on London for £1,200 sterling, two of which, amounting to £700 sterling, came back protested; and

***Damages—Profits or Expected Gains.**—In *Burruss v. Hines*, 24 Va. 416, the principal case was cited for the following statement of the law. A plaintiff will not ordinarily be allowed to give evidence or to recover profits or expected gains, for it is generally conjectural whether there will be any profits or gains. The prohibition against the recovery of profits or gains, when not excluded as unnatural or remote, is due mainly to the inability to prove with reasonable certainty that the injury prevented the receipt of profits or gains and their amount. But if it be shown that the loss of profits or gains was the natural and proximate result of the wrongful act, and their extent is also satisfactorily proved, they may be recovered.

Bolling was sued upon them, and compelled to pay them.

In November 1865 Lersner filed his bill in the Circuit court of Fauquier against Bolling, for a specific performance of the said contract; and Bolling having answered, resisting the demand, and asking for a rescission of the contract, and a great mass of testimony having been taken, the cause came on to be finally heard on the 13th of September 1867, when the court made a decree that the said contract be annulled and declared void, that Bolling should pay to Lersner \$19,780.90, with interest, and his costs.

On the 17th of May 1869, on the petition of Lersner, an appeal from this decree was allowed by W. Willoughby, a judge of the Court of Appeals under military appointment, bond with surety to be given in the penalty of \$1,500, conditioned as the law directs. The case was sent to the clerk of the district Court of Appeals at Fredericksburg. The writ of supersedeas to the decree is dated the 13th of September 1869; and the appeal bond is dated the 11th of November 1869.

After the present constitution of the state went into operation and the present Court of Appeals was organized, the cause was sent to this court; and was pending

39 *in this court when a special Court of Appeals, consisting of three judges of the circuit courts, was organized; and the judges of the Supreme Court of Appeals sent it, with forty-nine other cases, to be heard and decided by that court.

On the 17th of April 1873, the special Court of Appeals, one judge dissenting, reversed the decision of the Circuit court of Fauquier, for error in rescinding the contract of the 19th of January 1863, and in not decreeing a specific execution thereof. And the cause was remanded to the Circuit court of Fauquier county, with instructions to refer the cause to a master commissioner, to have an account taken crediting Bolling with the amount paid by him on the two bills of exchange, and charging him with the rents and profits of Bollingbrook and Ben Lomond from the 2d of May 1866, when possession should have been delivered under the terms of the contract. And if upon the coming in of this report it should appear that there is a balance due the appellee, the said Circuit court will require the appellee to convey Bollingbrook, and cause a decree to be entered conveying Ben Lomond to the appellant upon his paying such balance, after deducting the costs of the suit below; but if it should appear there was a balance due the appellant upon taking said accounts, then the court will require such conveyance and decree as before stated, and render a personal decree against the appellee for such balance, and for the costs of said suit.

When the decree of the special Court of Appeals was sent down to the Circuit court, Bolling appeared by counsel, and objected to its being entered as the decree of that court, on several grounds; the most material of which are, 1st. That W. Willoughby, who

40 commission or *appointment as judge: that the reconstruction acts under which he was appointed were unconstitutional, and the authority exercised under the United States by force of said acts was invalid. 2d. That said appeal was not heard by the Supreme Court of Appeals, but by judges sitting as a special Court of Appeals, under color of an act of assembly of Virginia passed on the 28th of February 1872; and that this act was in violation of the present constitution of the state, which it was insisted, required that every special Court of Appeals should be constituted of five judges, of whom not less than three should sit to do business. The other grounds are noticed in the opinion of Judge Moncure.

The Circuit court overruled the objection, and entered the decree, and ordered the accounts as directed by said decree.

In November 1873 the commissioner returned his report, in which he fixed the rent of the land at \$1,925 a year, and after giving to Bolling credit for the amount he had paid on the two bills of exchange which had been returned, and for his permanent improvements on the land, he reported a balance against him of \$10,954.17, of which \$9,160.83 was principal.

To this report Bolling filed eight exceptions; and when the cause came on to be heard upon the report, the court reduced the rents to \$1,500 per annum; and recommitted the report to be reformed accordingly. The second report of the commissioner was filed on the 22d of December 1873, reporting a balance against Bolling of \$5,262.43, of which \$4,684.19 was principal. To this report Bolling filed six exceptions. These reports, and the exceptions thereto, are sufficiently stated in the opinion of the court by Moncure, P. The cause came on to

41 be finally heard on the 23d of *December 1873, when the court overruled all the exceptions, confirmed the last report, and decreed that the defendant, Robert B. Bolling, do execute and deliver to the plaintiff a good and sufficient deed in fee simple, with general warranty, conveying to the plaintiff the tract of land known as Bollingbrook; and that the plaintiff recover against him the sum of \$5,262.43, with interest on \$4,684.19, part thereof, from the 26th of December 1873, and his costs. And liberty was reserved to the plaintiff to apply for further relief upon the footing of this decree. Bolling thereupon applied to this court for an appeal from the decree; which was allowed.

The cause was argued by Conway Robinson, Jones & Bouldin, and Wm. J. Robertson, for the appellant, and by Jno. R. Tucker and Brooke, for the appellee.

Moncure, P., delivered the opinion of the court.

The first question which this case presents for our decision is, whether the decree of the Circuit court of Fauquier county, made on the 13th day of September 1867, has ever been reversed or annulled by any valid proceeding, and does not therefore still remain in full force?

"In the first place, it is contended that after the date of the said final decree, and after the act of March 15th, 1867, reducing the period of limitation of appeals to two years, there elapsed two years before the record was delivered to the clerk of the appellate court, and before process issued upon the appeal, and before such bond was given as was required to be given before the appeal could take effect. The date of the order

made by W. Willoughby, as a judge of 42 the *late district Court of Appeals, held at Fredericksburg, allowing an appeal from the said decree to the said district court, was May 17th, 1869, much less than two years after the date of said decree. Process was issued upon the appeal on the 13th day of September 1869, exactly two years after the date of said decree. The appeal bond, however, was not given until the 11th day of November 1869, more than two years after the date of said decree.

To this objection the answer made by the counsel of the appellee is sufficient; that the act of March 15th, 1867, which amended the third section of chapter 182 of the Code of 1680, changing the limitation of time for presenting a petition for an appeal from, or writ of error or supersedeas to any final judgment decree or order, from five years to two years after it was rendered or made, did not amend the twenty-sixth section of that chapter, which allowed five years within which to perfect the appeal by giving bond, &c.; and this stood unaltered until it was amended by act of June 23, 1870 (Acts of 1869-'70, p. 224, § 17); so that the petition was presented, and all other acts performed within the time allowed by law. But see *Callaway v. Harding*, 23 Gratt. 542, which will suffice.

If, however, the appeal had not been perfected within the period limited by law; still, as no objection was made on that ground until after the judgment was affirmed by the appellate court, it was certainly too late to make the objection then for the first time.

In the next place, it is contended that even supposing the appeal which was allowed, to have been perfected in due time, yet the appeal was invalid; and therefore the decree of the appellate court founded thereon, is also invalid, and the said decree of the Circuit court still remains in

43 full force. *It is contended that the appeal was invalid, because W. Willoughby, by whom the same was allowed, as a judge of the late district Court of Appeals, held at Fredericksburg, was not in law or in fact such judge, and therefore had no authority to allow an appeal in the case.

If it be conceded that this would have been a good objection if made in due time, it might well be argued, as indeed was argued by the counsel for the appellee, that the objection came too late. It was not made in the district Court of Appeals, while the case was pending there, nor in this court, while the case was pending here, nor in the special Court of Appeals, while the case was pending there, until after that

court had reversed the judgment of the Circuit court, and then it was made for the first time.

But without deciding that question (because unnecessary to do so), we are of opinion that the said appeal was a valid appeal, according to the law of this state, as it has been settled by this court in the cases of *Griffin's ex'or v. Cunningham*, 20 Gratt. 31, and *Quinn &c. v. The Commonwealth*, Id. 138. To that extent the judges were unanimous, although they differed upon an important question arising in the first named case. All of the five judges were present when that case was argued and decided, and it was argued with great ability, and very deliberately considered and decided. We all still think that decision was right, to the extent to which the whole court was then agreed, and we are of opinion that it ought not now to be disturbed. We therefore confirm it. In *Teel &c. v. Yancey &c.*, 23 Gratt. 691, it was held that the act of March 5th, 1870, commonly called the enabling act, is a valid act, except the proviso, which authorizes the Court of

44 Appeals to review the decisions of the Court of Appeals *organized under the reconstruction acts; and the district courts of appeal, sitting in December 1869, had jurisdiction to hear and decide the causes then pending therein. Judge Christian in his opinion in that case, after referring to the decision of this court in *Griffin's ex'or v. Cunningham*, supra, said: "The question raised is therefore *res adjudicata*, and no longer open for discussion." Two of the other judges, Moncure and Staples, concurred in that opinion; and though the other two, Anderson and Bouldin, dissented, it does not appear that their dissent was to that part of the opinion.

In the next place, it is contended that even if there was a valid appeal from the said decree of the Circuit court of Fauquier county, that appeal has never been lawfully disposed of, but is yet pending in this court.

If it has been lawfully disposed of at all, it has been so disposed of by the late special Court of Appeals in reviewing the said decree of the Circuit court.

But it is contended that the decree of reversal of the Circuit court is invalid: 1st, because the special court was not organized according to the constitution of the state; and if it was, 2dly, because the case was not legally transferred from this court to the special court, to be disposed of by the latter. And,

1st. Was the special court organized according to the constitution?

It is said that it was not, because it was made by law to consist of not more than three judges; whereas, by the constitution, it is required to consist of not less than three nor more than five judges.

Certainly, if the constitution requires it to consist of not less than three nor more than five judges, the law which made it consist of not more than three was unconstitutional. And certainly also we may say it was

competent for the convention in framing the constitution *to authorize the legislature to create a special Court of Appeals, to consist of not more than three judges. The question is, "Does the constitution confer such authority on the legislature? If it does, it is an immaterial question whether a court of five would not have been better than a court of three judges; and whether it would not have been a sounder exercise of discretion in the legislature, in carrying out the provision of the constitution on this subject, to have adopted the former instead of the latter number. We were decidedly of opinion that it would have been. But that is a question not for us but for the legislature to decide, supposing the constitutional authority to exist.

Now the constitution seems to speak a plain language on the subject. "Special courts of appeals, to consist of not less than three nor more than five judges, may be formed of the judges of the Supreme Court of Appeals and of the Circuit courts, or any of them, to try any cases on the docket of said court, in respect to which a majority of the judges thereof may be so situated as to make it improper for them to sit on the hearing of the same; and also to try any cases on the said docket which cannot be otherwise disposed of with convenient dispatch." A choice of the number of the judges of a special Court of Appeals was here plainly given by the constitution to the legislature, so that such number should be between the extreme limits of three and five inclusive. If there were any doubt about this upon section 3 of article vi. of the constitution just quoted, taken by itself, there can surely be none when we take it in connection with section two of the same article. "The Supreme Court of Appeals shall consist of five judges, any three of whom may hold a court." If the

convention had intended *that special courts of appeals should consist necessarily of the same number of judges, required by section two to constitute the Supreme Court of Appeals, it would, in the immediately succeeding section three have used similar language to that which was used in section two, and have said: "Special courts of appeals, to consist of five judges, any three of whom may hold a court, may be formed," &c. But the convention thought proper to give the legislature a discretion in regard to the number of the judges of which a special court may consist between the limits of five and three, believing no doubt that while five might be a preferable number in some cases, three might be in others. The Supreme Court of Appeals of the state has sometimes consisted of but three judges. It so consisted at one time before the state was divided as it now is. And it so consisted for several years under the Alexandria constitution, after the state was divided. The first term of the court under that constitution was held by only two judges, during the sickness and after the death of Judge Thompson, and before the appointment and qualification of his successor, Judge Rives.

That court of two judges went on to hear and decide the cases as they stood upon the docket, without any objection so far as heard of from any quarter. It decided some very important cases. Among them was that of Brockenbrough's ex'ors v. Spindle's adm'ors, 17 Gratt. 21, which was argued for the appellants by two of the same counsel, who argued this cause for the appellant, and, as the reporter truly says, they argued it "most ably." They gained that cause, the decree of the court below having been reversed. With this example immediately before the eyes of the convention, when it framed the constitution, it may well have been led to suppose that three judges might be a sufficient number

*to compose a special Court of Appeals, which would be required only occasionally, and perhaps for short periods. And economy, which was then a very important consideration, strongly recommended that the court should consist of three rather than five judges. At all events, it no doubt seemed to the convention to be reasonable to give to the legislature an election between the numbers three and five in the constitution of the court.

The legislature so construed the constitution, and accordingly passed the act approved February 28th, 1872, entitled "an act to provide a special Court of Appeals." Acts of 1871-'72, p. 98, chap. 124. That act unmistakably creates a court to consist of three judges, and not more, and no person ever doubted, so far as we know, that the act was constitutional, until it was recently doubted by counsel in this case. Nothing is better settled than that, *prima facie*, every act of the legislature is constitutional, and the burden of clearly showing the contrary devolves on him who asserts it. If the question be doubtful, it will be solved in favor of the validity of the act. If this act be not plainly in accordance with the constitution, it certainly cannot be said that the contrary plainly appears.

We do not see the force of the objection to the constitutionality of the act, arising from the provision in section 2 of article vi. of the constitution, concerning the Supreme Court of Appeals, which declares "that the assent of the majority of the judges elected to the court shall be required in order to declare any law null and void by reason of its repugnance to the Federal constitution or to the "constitution of this state." It was not contemplated nor intended that cases involving a question of constitutionality of a law should be referred for decision to a special Court of Appeals,

*which must consist in part at least, and may consist entirely, as in the instance of the special court in question, of Circuit court judges. In certifying cases to the special court for decision, of course the Supreme court would certify none which was known to involve a constitutional question: and if a mistake should happen to be made in that respect, it could easily be corrected by returning the case to the Supreme court, or leaving it for decision by that

court. A similar course, it is believed, was pursued whenever it was deemed proper, even before the passage of the act approved January 17, 1873. Acts of 1872-'73, p. 26, chap. 39.

Nor do we see the force of the objection made to the constitutionality of the act, upon the ground that it authorized the Court of Appeals to designate annually three judges of the Circuit courts, to constitute a special Court of Appeals. We do not consider this as a legislative power, which the Court of Appeals had no constitutional power to perform. This was, no doubt, deemed by the legislature to be the best and most convenient mode of mere designation of three of the circuit judges to hold the special Court of Appeals. A similar mode has been authorized by law to be pursued in other like cases, without objection. In the act providing for special Courts of Appeals, passed March 15th, 1832, Sup. to R. C. p. 123, chap. 95, the duty of designating the judges to constitute a special Court of Appeals was devolved on the General court. Certainly the General court had no more capacity to perform such a function than had the Court of Appeals. In the act passed February 25, 1854, Acts of 1853-'4, p. 18, ch. 17, sec. 5, power was given to the Court of Appeals to designate judges of the Circuit courts to hold a special Court of Appeals; precisely such a power as was conferred

49 by the act of 1872. *Then the special Court of Appeals, created by that act, was organized according to the constitution; and we proceed now to enquire,

2ndly. Was this case legally transferred from this court to the said special court, to be disposed of by that court?

Under this head we understand two objections to be made: first, that this is not such a case as ought to have been transferred to the special court; and, secondly, that no opportunity was afforded the appellant to object to such transfer, or show cause against it. We now proceed to consider these two objections; and,

First, that this is not such a case as ought to have been transferred to the special court.

To determine this question, we must look at the words of the first section of the act, and of the third section of the sixth article of the constitution; and we need only look to a few of those words. By the first section of the act, the special court is constituted for the trial of such causes "as the Court of Appeals cannot dispose of with convenient dispatch, and shall certify to it, as provided in article sixth, section three, of the constitution of the state, not exceeding fifty at a time." And by the third section of the sixth article of the constitution, special courts are authorized to be formed "to try any cases on the docket of the Supreme Court of Appeals, which cannot be otherwise disposed of with convenient dispatch." This is all that is said, either in the constitution or the act, in regard to the nature of the cases to be tried by the special court, in the exercise of the branch of its jurisdiction we are now considering.

The only limitation, if limitation that can be called, upon the cases on the docket 50 which the special court *is authorized to try, is contained in the words, "which cannot be otherwise disposed of with convenient dispatch." Now what cases are they? Are they the first cases, or the last cases on the docket? Or those in the middle? The first have been longest pending, and in reason, it would seem, ought first to be tried. The last will not be tried for the longest time, and for that reason may seem to be those for the more speedy trial of which provision should be made. The cases in the middle of the docket, having been longer pending than the last, and not so long as the first, may, on that account, be considered as entitled to preference in the transfers to be made to the special court. These words, "convenient dispatch," are very indefinite words, and they are relative words. What would be convenient dispatch in regard to one case would not be convenient dispatch in regard to another, although both might be disposed of in the same time. Take a case, for example, that has been pending two years, and another that has been pending two months. To dispose of the latter in one year, might be convenient dispatch; whereas, to dispose of the former in one year, certainly would not be. Who is to decide these questions? To whom did the legislature and the framers of the constitution refer them? To whom else than this court, which was reasonably supposed to have more information on the subject, and to be better able to judge correctly in the matter than any other person? This court did exercise its best judgment in the matter under all the circumstances.

The act provided that it should continue in force for two years, unless this court should enter an order of record that the existence of said special court was no longer necessary. Thus showing that during that 51 period of two years it was expected that all the cases on *the docket which were necessary to be tried by a special court could be tried, and there would then be no longer occasion for such a court. If, however, there should be such occasion, the members of this court, and all other persons concerned, confidently expected that the special court would be continued until all occasion for it ceased. Thus it was confidently expected that this constitutional plan of reducing the overloaded docket of this court, by the assistance of a special court, would be actively and continuously pursued until the end in view was accomplished, which it was expected would be the case in two or three years, when it was hoped that this court would be able to keep down its docket for the future. Under these circumstances, it became our duty to execute the power conferred on us by the first section of the act of February 28th, 1872, aforesaid, to certify for trial by the special court, such causes on the docket of this court as could not be disposed of by this court with convenient dispatch. We had much difficulty in regard to the

cases proper to be certified to the special court. We at length concluded that the fairest and best mode was to certify to it, the first fifty unargued causes standing on the docket at the time of our adjournment in Richmond in the spring of 1872. The special court was to sit on or about the first of July thereafter. We were not again to sit in Richmond until some time in November, and would then be for some time occupied in the trial of criminal and other privileged causes, so that it might be some time in January before we could resume the trial of causes on the regular docket. During all this time the fifty oldest causes on the docket, which had already been delayed more than two years, would have been delayed many months longer but for our transferring them for trial to the special

52 court. *Whereas by so transferring them, and by pursuing the same course thereafter, it was reasonably hoped that if the special court should be continued so long as might be necessary, as was then expected, all the causes on the docket would be disposed of with as convenient dispatch as would be consistent with the rights of all parties concerned. We may have come to a wrong conclusion, but we acted according to the best of our judgment, and even if we made a mistake, it certainly cannot be such an error as invalidates the judgment of the special court. And now let us consider the objection. Secondly, that no opportunity was afforded the appellant to object to such transfer, or show cause against it.

The act of assembly made no provision for affording such an opportunity. It only provided for the transfer to the special court, of such causes as this court could not dispose of with convenient dispatch, not exceeding fifty at a time. There could be no occasion for such an opportunity in regard to the question of convenient dispatch with which a cause might be disposed of. That was a question which the court could decide without the aid of parties or their counsel. It could not have been contemplated by the framers, either of the constitution or the law, that all or any of the suitors in the court might raise an issue on that question. There might be peculiar reasons for not certifying a particular case to the special court; such as the fact, that a constitutional question existed in the case, or the fact that one of the judges of the special court decided the case as a circuit judge. But such facts, which would be cases of rare exception, might be brought to the notice of either court at any time, and the case, whenever proper, would be restored to the docket of this court. If there was any advantage

53 to be derived from *a trial of a case in one of the two courts, rather than the other, the suitors in this court were all equally entitled to the benefit of that advantage. The importance of a cause afforded no sufficient reason for excluding it from the special court. That court was not instituted for the trial of inferior causes, but all causes on the docket, important or

unimportant, which could not otherwise be disposed of with convenient dispatch. To be sure the special court consisted of but three members, while this court consists of five, which may be supposed to give to those, whose causes are tried in this court, an advantage over those whose causes were tried in the special court; but that was an accidental advantage, if any, which all had an equal chance to obtain. In consequence of that supposed advantage, we would have preferred that the special court should also have consisted of five judges; but the legislature, to whom alone the decision of the question belonged, ordained otherwise. But this court is often held by only three judges, two of whom may decide the most important cause; and thus it may happen that the judgment therein may be reversed by two judges against two. That the appeal was taken to a court consisting of five judges, is no sufficient reason for the case not being tried by a court which happens to be held by only three of the five judges. These are accidents to which all suitors are subject. We have seen that by changes in the constitution and laws of the state the number of the judges of this court has been sometimes five and sometimes three. And of whatever number the court happens to consist, it goes on to try the causes as they are called, without regard to the state of the court when the appeal was taken. Thus it has sometimes happened that an appeal

54 taken to a court of three judges has been tried by a court of *five; and so vice versa. After the close of the war, it happened that there was an overwhelming accumulation of business in this court. The evil was so great, that all concerned were anxious to devise an adequate remedy for its removal. And the act of February 28, 1872, to provide a special Court of Appeals, was passed for that purpose. The preamble of that act gives us some idea of the nature and extent of the evil. "Whereas it appears," says the preamble, "that the business of the Court of Appeals has increased so much by reason of the numerous questions to which the war has given rise, that the causes upon its docket cannot be conveniently tried within a reasonable time," &c. This act is very different from the act of March 31, 1848 (Acts of 1847-'8, p. 51, chap. 68), to which the learned counsel of the appellant seems to suppose it to be analogous. And we therefore think there was no occasion for using the same precautions in the act of 1872, as were used in the act of 1848. That act was passed under a constitution which made no provision for a special Court of Appeals, but which, on the contrary, declared that "the judicial power shall be vested in a Supreme Court of Appeals, in such superior courts as the legislature may from time to time ordain and establish, and the judges thereof, in the County courts, and in justices of the peace." It was argued that under that constitution there could not be two Courts of Appeals. And in the preparation by the learned revisors of the Code, of the act of

1848, they had to use their skill to avoid leaving any room for reasonable objection to the act. And, notwithstanding that, a great controversy arose in regard to the act, which was settled in this court in the case of Sharpe v. Robertson, 5 Gratt. 518-644. In the constitution adopted since that decision was made, the precaution has been

55 *used of avoiding a like difficulty, by expressly providing for the creation of a special Court of Appeals: as in the constitution of 1851, the Alexandria constitution, and the present constitution. In the constitution of 1851, provision was made for the trial of all the causes on the docket of this court when that constitution took effect. So that it was plain what causes were to be tried by a special court under that constitution, and easy provision was made therefor by the act passed February 25th, 1854 (Acts of 1853-4, p. 18, chap. 17), leaving this court to try the new causes afterwards brought to it. In the Alexandria constitution provision was made similar to, but not the same with that contained in the present constitution. We have seen what that is. The act which was passed to carry that provision into effect was not like the act of 1848, because the constitution under which it was enacted was very unlike the constitution under which the act of 1848 was passed. And if the act of 1872 was constitutional, as we think it was, of course the legislature had a right to pass it, and it is valid, although it does not contain the provisions of the act of 1848, however wise those provisions may be.

It follows, from what we have said, that the decree of the 27th of January 1873 is a valid and conclusive decree; that there can be no complaint of any error either in it or behind it; and that if there be any error in this case, for which relief can be afforded, it must be in the proceedings which occurred in the case after it was remanded by the special Court of Appeals to the Circuit court. The appellant complains of such errors, and we now proceed to consider that complaint.

Among the errors complained of in these subsequent proceedings, are several which involve the same questions we have already considered and decided, and it

56 *will therefore be unnecessary to do more than to state them. That the decree of the special Court of Appeals is a valid and conclusive decree, as far as it goes in the case, is an answer to them all. The first of them is, that the Circuit court on the 17th day of April 1873 ordered the decree of the special Court of Appeals of the 27th day of January 1873 in the case, to be entered as the decree of the said Circuit court, notwithstanding the resistance of such entry by appellant, who insisted that the said decree of the special court was null and void for the reasons and upon the grounds set forth in his written objections filed, and ordered to be made a part of the record in the cause. The second of them is, that the circuit court on the 17th day of December 1873 rejected the prayer of the appellant's

petition for a rehearing of the decree of said court of the 17th of April 1873, directing the decree of the special Court of Appeals of the 27th of January 1873 to be entered as the decree of the said Circuit court as aforesaid.

When the decree of the special court was entered as the decree of the Circuit court as aforesaid, to wit: on the 17th of April 1873 the latter court, in conformity with the requirements of the said decree of the former court, decreed that one of the master commissioners of the court should take an account, crediting the said Robert B. Bolling with the amount paid by him on the bills held by Caldwell, Shannon & Co., and charging him with the rents and profits of Bollingbrook, and Ben Lomond from the 2d day of May 1866, when possession thereof ought to have been delivered under the terms of the contract of sale in the bill and proceedings mentioned; and also with the value of the personal property which then ought to have been delivered under the terms of the

57 said contract; in *taking which said account, said commissioner was directed to make all necessary enquiries, and to report his proceedings to the court. On the 28th of November 1873, the report of the commissioner and papers accompanying the same were filed in the cause. It contained a statement of the account between Bolling and Lersner, as directed in said decree. "The only fact in the account," said the commissioner, "about which there was any difficulty was the question of the proper rent to be charged for said two tracts of land. There were seven depositions taken by each of the parties relative to this question; of course these fourteen witnesses differ as to the proper amount that should be charged, or as to what said farms should have rented for; the difference between the estimates of the highest and lowest being as much as that of \$1,300. With this conflicting evidence, your commissioner took the mean rent of all these estimates, to-wit, \$1,925 per annum for both farms; and what is a little remarkable, the average rent of the two lowest and the two highest is within a few dollars of this sum fixed upon by your commissioner. The said Bolling was credited with all sums paid for taxes, and for ditching and stone fencing; these items were given in the exhibit filed with Townshend S. Bolling's deposition." Then follows the account, showing the total amount due by Bolling to Lersner, on rent account, up to 2d May 1873, with interest to 2d December 1873, to be \$10,954.17, of which the sum of \$9,160.83 is principal.

To this report eight exceptions were taken by Bolling and none by Lersner; and on the 20th of December 1873 the cause came on again to be heard on the papers formerly read, the said report of the commissioner, and exhibits returned therewith, and 58 exceptions *taken thereto, and was argued by counsel; on consideration whereof the court overruled the first, third, sixth and seventh of said exceptions; and being of opinion, upon the matters contained

in the fourth and fifth of said exceptions, that there is no error in said report, in failing to give the defendant credit directly for any increase in the intrinsic value of the lands, and that the true standard by which the rents and profits of the land should be determined is the annual value of said lands in the hands of a prudent and discreet tenant, upon a judicious system of husbandry; but being further of opinion that the mode of treatment by the occupant should have some influence in determining this value, and that the amount allowed by said commissioner is more than a fair rent under the circumstances, which the court ascertains, upon a fair view of the testimony, to be the sum of fifteen hundred dollars per annum, did overrule said fourth and fifth exceptions, in so far as they are inconsistent with the principles above declared, and did not sustain them, in so far as they are consistent therewith. And the court sustained the eighth exception, and recommended the report to the commissioner with instructions to reform the same according to the principles of the said decree, and report the same forthwith to the court.

On the 23d of December 1873, a report of the commissioner, made in pursuance of the said decree, was filed in the cause, showing the balance due by Bolling to Lersner, as of the 20th of December, 1873, to be \$5,262.43, of which the sum of \$4,684.19 is principal.

To this report six exceptions were taken by Bolling and none by Lersner. The said exceptions are as follows:

1. Because the commissioner charges the defendant with estimated and conjectural rent, &c., instead of the actual profits realized by defendant.

59 *2. Because the commissioner has failed to give Bolling credit for the increased value of the land, arising from the mode in which he managed it.

3. Because the rent fixed is in excess of any fair estimate of value of the estate, based upon a proper management of it.

4. Because interest has been allowed upon estimated rents.

5 (called 7). Because the commissioner has not reduced the charge for the rent of 1866-'7 below that of other years, although that was the year when the fencing had to be repaired, and there was no capital to buy stock, and the tenancy began and ended at an unseasonable period for farming operations, to wit, the 2d of May 1866 to 2d May 1867.

6 (called 8). Because the commissioner failed to allow Bolling sufficient credit for his improvements and repairs, over and above the general improvement of the land. See exception 8, of 17th December 1873.

And on the same day, to wit, the 23d day of December 1873, the cause coming on to be further heard on the papers formerly read, the commissioner's report last mentioned, and the defendant's exceptions thereto, was argued by counsel. On consideration whereof, the court, overruling the said exceptions and confirming the said report, de-

creed that the defendant, Bolling, should execute and deliver to the plaintiff, Lersner, a good and sufficient deed in fee simple, with general warranty, conveying to said plaintiff that tract or parcel of land known as Bollingbrook, in the bill and proceedings mentioned; and further decreed that the plaintiff should recover against the defendant the sum of \$5,262.43, with interest on \$4,684.19, part thereof, from the 20th of December 1873, and the costs by
60 *him expended in the prosecution of this suit. And leave was reserved to the plaintiff to apply for further relief on the footing of the said decree.

From that decree an appeal to this court was applied for; which was accordingly allowed.

We have disposed of all the questions arising on this appeal except those which relate to the account taken of rents and profits, and they are presented by the six exceptions of the appellant to the last report of the commissioner, all of which were overruled by the decree appealed from. We will now proceed to consider them, though not, perhaps, in the precise order of the exceptions.

It is well settled, and not denied in this case, that when a contract is made for the sale of real estate, which a court of equity will specifically execute, from the moment of the contract the estate is to be considered as the property of the purchaser, and the purchase money as the property of the vendor; possession of the former to be delivered, and payment of the latter to be made, according to the terms of the contract. If, wrongfully, such possession be retained by the vendor, or such payment be withheld by the vendee, contrary to the terms of the contract, the obligation hence arises to pay rents and profits in the one case, or interest in the other, as the case may be. In this case no question arises in regard to the obligation to pay interest, the purchase money and interest having been all paid. But there is a question, which is the main, and, in substance and effect, almost the only remaining question in the case, in regard to the obligation to pay rents and profits. The vendor has continually retained possession of the estate, "from the 2d May 1866, when possession thereof ought to have been delivered under the terms of the con-

61 tract," *as adjudged by the decree of the special Court of Appeals, and yet retains such possession. His obligation to account for and pay rents and profits to some extent, supposing the contract to be valid and binding, as it has been adjudged to be, is not denied. The only question is as to the extent of such liability and the rule by which it is to be ascertained. The appellant contends that he is bound to account for and pay only the amount of actual profits realized by him; while the appellee contends that the obligation is to pay "the annual value of said lands in the hands of a prudent and discreet tenant, upon a judicious system of husbandry," "the mode of treatment by the occupant" having "some influence in determining this value," ac-

cording to the decree of the Circuit court of the 20th of December 1873.

We are of opinion that the latter is the just and true measure of the appellant's liability and the mode of ascertaining it, and therefore that the Circuit court did not err in applying such measure and mode to this case, and in decreeing "that the amount allowed by said commissioner (to wit: nineteen hundred and twenty-five dollars per annum) is more than a fair rent under the circumstances, "and in ascertaining such rent, upon a fair view of the testimony, to be the sum of fifteen hundred dollars per annum." At all events, we think the appellant has no just cause to complain of the amount of this assessment. There may be, and no doubt are, cases in which the amount of profits actually received, without regard to the actual yearly value of the property, is the just and true measure of liability. If a person were in possession of land which he bona fide believed to be his, and did not know was claimed by another, who might be adjudged to be entitled to it, there would seem to be reason in

62 charging *such person only with such profits as he actually received. But here the case is altogether different. A controversy arose between the parties very soon after the war about their contract, and as early as October 1865 this suit was brought by Lersner for its specific execution. He claimed in his bill to have fully paid the purchase money, and to be entitled to the possession of the land, which he said was wrongfully withheld from him. Bolling in his answer denied that Lersner was entitled to a specific execution of the contract, and claimed a rescission thereof for reasons set forth by him. The litigation between the parties thus commenced in 1865, was actually prosecuted by them until the 13th of September 1867, when a decree was rendered by the Circuit court annulling the contract, and for the payment by Bolling to Lersner of the sum of \$19,708.90, with interest as therein mentioned, subject, however, to the provisions of the act of assembly staying the collection of debts, and also for the payment of the costs of suit by Lersner to Bolling. From the said decree an appeal was applied for on the 16th of April 1869, allowed May 17th 1869, and perfected by the execution of an appeal bond on the 11th of November 1869. This appeal was prosecuted without intermission until the 27th of January 1873, when the special Court of Appeals being of opinion that there was error in the said decree of the Circuit court in rescinding the contract of the 19th of January 1863, and in not decreeing the specific execution thereof, therefore reversed the said decree with costs, and remanded the cause to the Circuit court, with instructions to refer it to a commissioner to take certain accounts, and among them an account charging Bolling "with the rents and profits of Bollingbrook, and Ben Lomond

63 possession thereof *ought to have been delivered under the terms of the contract."

Now how can it be said, under all these circumstances, that Bolling is not chargeable with a fair and reasonable rent for the property from and after the 2d day of May 1866, when, according to the decree of the special Court of Appeals, he ought to have delivered possession to Lersner under the terms of the contract? The fact is, that when we say that the decree of the special Court of Appeals is valid and conclusive, we decide every question of controversy in this case, even that which relates to rents and profits. In that view of the case it stands thus: On the 2d day of May 1866 Bolling was in possession of the land in controversy, and was bound by his contract to deliver it to Lersner, who had paid the whole amount of the purchase money, and was then demanding such possession, and actively prosecuting this suit for its recovery. Bolling has ever since remained, and yet remains, in the full possession and enjoyment of the land, while Lersner has ever since been demanding, and actively prosecuting this suit to recover such possession, with the exception only of about two years, during which his application for an appeal from the decree of the Circuit court of the 13th day of September 1867 was suspended; and even during that period it must have been confidently expected by Bolling that Lersner intended to apply for an appeal, and that if he so applied he would obtain it.

Under these circumstances ought not Bolling to have expected and prepared to pay a reasonable rent for the land in case of its recovery from him? And now that a decree has been rendered against him for it by the court of last resort, is there any principle of law or equity which can exempt

64 him from liability for *such a rent? We think not. And then the question is, what is a reasonable rent in such a case?

The commissioner ascertained that an average of the estimates of all the witnesses on both sides, of which there was an equal number, made the sum of nineteen hundred and twenty-five dollars, and reported that as a reasonable annual rent. But Bolling excepted, and the Circuit court sustained his exception, and reduced the sum to fifteen hundred dollars per annum, which it considered to be a reasonable rent under all the circumstances of the case, and especially looking to the care which had been taken of the land, and of the prudent manner in which it had been managed and cultivated. And from that amount of fifteen hundred dollars was deducted every cent which had been paid by Bolling for taxes on the land, for ditching, fencing, and other improvements, with the single exception of clover seed and plaster used upon the land, which was considered to be properly chargeable to the tenant, and not to the owner of the land. Is this more than a reasonable rent? and has Bolling any just cause to complain of it? We think not.

And this disposes of all the questions arising upon the exceptions to the commissioner's last report, except the fourth, "because interest has been allowed upon

estimated rents," which presents the only remaining question to be decided in the case.

In actions for the recovery of rent in arrear, it was a general rule formerly, that interest was not recoverable on the sum due, because the landlord had a summary remedy by distress. 1 Rob. Pr., old ed. 362-3, and cases cited. But although interest was not given, of course it might, nevertheless, be given under circumstances to be judged of by the jury; and in case of a general verdict allowing interest, it was intended

65 *that sufficient circumstances existed to justify an allowance thereof. Id. But this rule has been changed by an act passed March 2d, 1827, which provides "that interest shall hereafter be allowed on rent in arrear from the period or periods at which the whole or any portion thereof shall become due." Id. Acts of 1826-'7, p. 26, ch. 27, § 3. Since the passage of this act, there seems to be no difference between debts due for rent, and debts due for any other valuable consideration as there certainly should not be. In the Code, p. 969, ch. 134, § 7, the words of the law are: "In any action for rent, or for such use and occupation, interest shall be allowed as on other contracts." We know that in the United States the law favors the recovery of interest more than in England; and as a general rule here, where a debt is due, it will bear interest, which is an incident of the debt, and follows it as shadow does the substance. That rent is what is called "estimated," can make no reasonable difference. Rent must be estimated where the precise amount has not been fixed by agreement. But why may it not be estimated as the value of any other consideration may? See *Eppe's ex'or v. Cole & wife*, 4 Hen. and Mun. 161, and *Sutton v. Mandeville*, 1 Munf. 407. The statute expressly provides, that a landlord may by action recover "a reasonable satisfaction for the use and occupation of lands;" and the same section of the statute provides, as above mentioned, that in any such action "interest shall be allowed as on other contracts." In this case, a large portion of the rents was applied as they accrued to the payment of what was due to Bolling on account of the bills endorsed by him, and thus stopped interest. Of course there can be no objection to that, nor can there be any ob-

66 jection, in reason or *justice, to an allowance of interest on the rents which afterwards accrued and remained in arrear.

Upon the whole, we are of opinion that there is no error in the decree appealed from, and that it ought to be affirmed.

Decree affirmed.

67 *Wallace v. Richmond, Assignee.

March Term, 1875, Richmond.

Judgment by Default—Negligence of Defendant—Relief in Equity.—W is sued by R in debt on the note of

*Equitable Relief—Negligence.—In *Ayers v. Morehead*, 77 Va. 586, the rule is laid down in accordance

B & Co. He employs counsel to defend the suit, and states to him that he never was a partner of B & Co., or in any way liable for the debt. He lives in the county, but pays no further attention to the case. At the next term of the court the counsel examines the docket, and though he sees a case of R against B & Co., he does not suspect that that is the case against W, and therefore does not examine the papers; and no plea being entered, the office judgment is confirmed. Equity will not relieve W.

This was a bill filed in the Circuit court of Norfolk county by George T. Wallace, to join a judgment which had been recovered against him by L. V. Richmond, as assigned of E. Richmond. It appears that in September 1868 L. V. Richmond, assignee of E. Richmond, instituted an action of debt in the County court of Norfolk county against George T. Wallace, John Black and William Shannon, as late partners under the name and style of Black & Co., upon a note for \$2,133.22, bearing date April 12th, 1865, and signed Black & Co. The process was served on Wallace, but Black and Shannon living in North Carolina, the process was returned as to them "not found." No appearance or plea having been entered or filed for Wallace at the December term of the court, the office judgment against him was confirmed.

The ground of equity relied on by Wallace is, that he was never a member of 68 the firm of Black & Co., *and was not on any ground liable either on the note or for the debt for which the note was given. That when served with the process he spoke to James Murdaugh, a lawyer practicing in the court, and who had been for years, and was then, his standing counsel, telling him of the suit, and the ground of his defense, and directing him to defend the suit. That at the December term of the court Murdaugh examined the docket of the court, and though he saw a case on the docket in the name of Richmond, assignee v. Black & Co., it did not occur to him that this was the case against Wallace, and therefore did not examine the papers; and thus the case was not defended, and the office judgment was confirmed. Wallace states in his evidence that he showed the process to Murdaugh when he spoke to him to defend the case; but this Murdaugh did not remember. It does not appear that Wallace paid any attention to the case after

with the decision in the principal case that where a party, through his own or his agent's or attorney's negligence fails to avail himself of a defence which he might have made at law, he will not be relieved in equity, citing the principal case and *Haseltine v. Walton & Buckey*, 16 Gratt. 120; *Green & Suttle v. Massie*, 21 Gratt. 356; *The Marine Insurance Co. v. Hodgson*, 7 Cranch 338; *Richmond Enquires Co. v. Robinson*, 24 Gratt. 552; *Slack v. Wood*, 9 Gratt. 408. See also, *Dey v. Martin*, 78 Va. 1; *Wray v. Davenport*, 79 Va. 26; *Holland v. Trotter*, 22 Gratt. 141; *Canada v. Barksdale*, 84 Va. 746; 4 Min. Inst. (3rd Ed.) 14, 28. See *Black v. Smith*, 18 W. Va. 780, citing the principal case and *Meem v. Rucker*, 10 Gratt. 506; *Shields v. McClung*, 6 W. Va. 79.

he spoke to Murdaugh, but he lived in the county, and might have been reached in time to make the defense by plea, if Mr. Murdaugh had found the case on the docket.

The cause came to be heard on the 4th of April 1872, when the court dissolved the injunction and dismissed the bill, with costs. And thereupon Wallace applied to a judge of this court for an appeal; which was allowed.

Scarburgh & Duffield, for the appellant.
Goodwin & Crocker, for the appellee.

Anderson, J., delivered the opinion of the court.

This is a bill in chancery to injoin a judgment at law. In general, any facts which prove it to be against *conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or agents, will authorize a court of equity to interfere by injunction to restrain the adverse party from availing himself of such judgment. (2 Stor. Eq. Jur., § 887, and cases cited.) The author here declares the rule affirmatively, that the injured party may be relieved in equity in the cases described.

In *Tapps' adm'r v. Rankin*, 9 Leigh 478, the rule is negatively declared, setting forth under what circumstances the party injured will not be entitled to relief in equity by Parker, J., who delivered the opinion in which a majority of the court concurred. The rule, he says, is well settled, "that after a trial at law, if there appear to be no fraud or surprise on the part of the plaintiff, equity cannot relieve the defendant from the consequences of mere negligence, notwithstanding it may be manifest that great injustice has been done him at law. If it appears that by proper diligence he could have defended himself successfully, however hard his case, equity must not interfere; and this upon sound principles of policy, which no court is at liberty to disregard.

In the recent case of *Holland & wife v. Trotter*, 22 Gratt. 136, relief was given upon the ground of surprise, but upon principles, which are stated by Judge Christian who delivered the opinion of the court, entirely consistent with *Tapp's adm'r v. Rankin*, supra.

In this case the court is of opinion that the facts upon which the plaintiff relies to show that it would be against conscience to execute the judgment at law, might have been relied on in his defense at law;

70 and *that he does not show that he was prevented by fraud or accident, unmixed with fault or negligence in himself or his agent, from availing himself of them in his defense at law. It is true, that after the writ was served on him he retained counsel to defend the suit, and informed him of the grounds of his defense, to wit: that he was sued as a partner of Black & Co., and was not, and never was,

a partner or member of said firm, or in any way liable for said debt. But he gave no further attention to the suit. It does not appear that he ever spoke to his counsel again on the subject, or made any preparation for his defense, though he was probably at the place where the court was held during the term. His counsel entered no plea to set aside the office judgment, and made no defense whatever, and judgment went against him by default.

His counsel says he examined the docket, and saw no case upon it of *Richmond, assignee v. Wallace*. He saw the case of *Richmond, assignee against Black & Co.*, but it never occurred to him that the appellant was sued in that case, and he did not look into the papers to see. Yet he had been informed by the appellant that he was sued as a member of that firm, and that his ground of defense was, that he was not, and never had been, a member of it; and he thinks he showed him a copy of the summons which had been served on him. His counsel says he did not remember to have been shown a copy of the summons, and was not aware that the appellee was interested in that suit, else he would have looked into the papers and entered a plea. But a plea denying the partnership could not have availed for his defense unless verified by affidavit; and the defendant was not there to make affidavit.

But being informed as to the character of the appellant's defense, and knowing 71 from the date of the summons *and its service, that in the regular course of procedure the case would be on the office judgment docket at that term of the court, it does appear extraordinary that he made no inquiry about the case. If he had inquired of the clerk, he, doubtless, would have been informed. It seems to the court a plain case of negligence on the part of the appellant's attorney, not unmixed with fault or negligence on his part. And without deciding that mere inadvertence or forgetfulness on the part of the attorney would deprive a party of his right to relief in equity, where the defendant himself had used proper diligence, and was chargeable with no laches, the court is of opinion that a court of equity could not interfere by injunction in this case to restrain the execution of the judgment, and to give the appellant another trial, who has already had his day in court, without overturning the well established rule in such cases. The decree of the court below must therefore be affirmed.

Decree affirmed.

72 *Hill & als. v. Rixey & Starke & als.

March Term, 1875, Richmond.

I. Statute—Construction.—The act of March 2, 1866, Sess. Acts 1865-'66, p. 191, ch. 77, § 1, "to preserve and extend the time for the exercise of certain civil rights and remedies," is retrospective in its operation, and applies in favor of a judgment creditor as to the docketing of his judgment.

II. Stay Law—Application.—The act of March 2, 1866, Sess. Acts 1865-'66, ch. 69, p. 180, called the stay law, does not apply to a judgment creditor to relieve him from the necessity of docketing his judgment.

III. R recovers a judgment against G in 1860, but it is not docketed until December 1868. W and others recover judgments against G in 1861 and 1865, which were docketed in November and December 1865 and in 1866. In November 1865 G conveys land in trust to secure other creditors, and in the same month it is left with the clerk to be recorded, but not being stamped, and the tax on the deed and fee for recording not being paid until November 1867, it is not admitted to record until that time—*Held*:

1. Registry Laws—Failure to Docket Judgments—Priorities.—

The deed having been recorded before the judgment of R was docketed, the lien of the deed has priority over the judgment of R.

2. Same—Same—Same.—The deed was not of record until November 1867, though left with the clerk in November 1865; and the judgments of W and others having been docketed before the deed was recorded, they have priority over the deed.

This was a suit in equity in the Circuit court of Culpeper county, instituted in October 1869 by Rixey & Starke, merchants and partners, and as such judgment creditors of Williamson C. George, to subject certain real estate of George to satisfy their judgments. The defendants, beside George, were creditors claiming under a deed of trust from

73 him to secure their *debts, and other judgment creditors of said George; and as the property was not sufficient to pay all the debts, the question in the cause was as to the respective priorities of the creditors.

It appears that Rixey & Starke recovered their judgments against George in November 1860, and that they were docketed on the 11th of December 1868. Wm. B. Wayland and three others recovered judgments in March 1861; and they were docketed on the 11th of December 1865. A number of judgments were recovered by other parties in May, June and November of the same year, and they were docketed on the 3d and 9th of

November 1865. And still other judgments were recovered subsequent to these last, and were docketed in December 1865 and in 1866.

The deed of trust from George to John C. Turner bears date the 21st of November 1865, and was acknowledged before a justice of the peace of Albemarle county, where the trustee lived, on the 23d of the same month; and it was delivered to the clerk of Culpeper to be recorded, but not being stamped, and the tax upon it and the fees for recording not having been paid, the clerk did not consider it as an office paper on record until the 6th of November 1867, when being made perfect in these respects it was recorded.

When the cause came on to be heard, the court held that the creditors by judgments were to be paid in the order of the date of their judgments, and that the creditors claiming under the deed of trust were to be postponed to all the judgment creditors. And at a subsequent day a decree was made appointing commissioners to sell the land. And thereupon E. B. Hill, one of the creditors claiming under the deed, applied to this court for an appeal; which was allowed.

74 *Royall, for the appellant.
Field & Gray, for the appellees.

Staples, J. The appellees, Rixey & Starke, recovered judgments to a considerable amount against Williamson C. George, at the November term 1860, of the County court of Culpeper. These judgments were docketed on the 11th December 1868. Other creditors obtained judgments against the same debtor, some of which were recovered during the war, and others after its termination. These latter were, however, not docketed until 1865 and 1866.

On the 21st November 1865 the same Williamson C. George executed a deed of trust upon his real estate to secure the payment of certain debts therein enumerated. This deed was delivered to the clerk of the county on the 8th December 1865, but the stamp tax and registration fees not being paid, it was not recorded until the 6th November 1867.

The controversy in this case is between these judgment creditors on the one hand, and the trust creditors on the other, the latter claiming as purchasers under the deed of trust just referred to. The question is one of priority of lien, to be decided almost exclusively by the provisions of our own statutes.

It is conceded that as against a purchaser for valuable consideration without notice, no judgment operates as a lien upon real estate unless it is docketed within a year from its date, or ninety days before a conveyance to such purchaser. Code of 1860, § 8, chap. 186.

It is insisted, however, that the acts of March 2d, 1866, and the several acts amendatory thereof, save to creditors the benefit of their liens during the period

75 *these acts were in force, although the judgments were not docketed in

*Registry Laws—Failure to Docket Judgments—Priorities.—In *Rhea v. Preston*, 75 Va. 758, the court, citing the principal case, states the law as follows: "Judgments for money, whether docketed or not, bind the unallened lands of the debtors, certainly those owned by him at the date of the judgments, and, it may be those subsequently acquired, in the order in which the judgments are recovered, and the same is true of decrees for money; and so though not docketed, they bind the debtor's land subsequently aliened to a purchaser with notice, even though he be a purchaser for value, but unless docketed, they are not liens on lands subsequently aliened to bona fide purchasers for value without notice—and a trustee in a deed of trust given to secure a debt and the creditors secured are purchasers for value within the meaning of our registry laws." See also, *Borst v. Nalle*, 28 Gratt. 427, citing the principal case. The principal case is distinguished in *Eldson v. Huff*, 29 Gratt. 338, and *Lucas v. Claffin*, 76 Va. 282.

conformity with the provisions of the statute. One of these acts is entitled "an act to preserve and extend the time for the exercise of certain civil rights and remedies." Acts of 1865-'66, page 191. The first section of this act is very comprehensive in its terms. It declares that the period between the 17th April 1861, and the 2d March 1866, shall be excluded from the computation of the time within which by the terms of any statute or rule of law it may be necessary to commence any action or other proceeding, or to do any other act to preserve or prevent the loss of any civil right or remedy, or to avoid any fine, penalty or forfeiture."

Now it is very clear that "docketing a judgment" is "an act to be done." By the provisions of the 8th section, chapter 186, Code of 1860, already cited, it is to be done within twelve months from the date of the judgment, or ninety days before a conveyance. That it is directly within the saving of the first section of the act of March 2d, 1866, above quoted, does not, I think, admit of a question. The proposition is too plain for argument. My opinion therefore is, that the period between the 17th April 1861, and the 2d March 1866, is to be excluded wholly from the computation in determining whether the judgment was docketed in sufficient time to preserve the lien. It was so decided by the special Court of Appeals in the case of Hart et als. v. Haynes.

The learned counsel for the appellees, as I understand, does not deny that this is the effect of the first section of the act of March 2d, 1866; but he insists that as the judgment liens were lost under existing laws by the failure of the creditors to docket their judgments, the liens could not
76 be restored by subsequent *legislation as against bona fide purchasers. In other words, the legislature could not by a retrospective statute divest rights acquired under previous laws.

The act of March 2d, 1866, is, however, a mere repetition or re-enactment of the provisions contained in the acts of March 14th, 1862, and of February 23d, 1864. All these acts embrace a period either of actual war, or the subsequent disorganization of the courts consequent thereon. That it is competent for the legislature to pass remedial statutes of a retrospective character, applicable to such a state of society, can be maintained both upon reason and upon authority. The necessity and validity of such legislation have been recognized by all governments and in all countries which have been the theatre of great civil conflicts. Statutes of this sort merely afford remedies for evils originating in the disorganization of society, when the laws are supposed to be silent, and the courts are closed against the assertion of civil rights.

It is however unnecessary now to discuss the constitutionality of the act of March 2d, 1866, and other acts of a kindred character. Their validity has been fully sustained by this court in Strother et als. v. Hull, 23 Gratt. 652; Sexton v. Crockett & als., Id.

857. The question must be considered as settled in this state.

As already stated, the judgments recovered by Rixey & Starke were not docketed until the 11th December 1868. It is very clear that the act just adverted to is not sufficient to preserve the lien of these judgments. That act was wholly retrospective in its operation, and did not extend beyond the 2d March 1866. The question is, whether the lien is preserved by any other statute. It is insisted that they are within the spirit, if not the letter, of the act of March 2d, 1866, known as the stay law. This act is entitled "an act to

77 stay the *collection of debts for a limited period." Although the title cannot be relied on to restrain or control the positive provisions of a statute, yet when the meaning is at all doubtful the title may be looked to aid in the interpretation. Here the title plainly indicates that the object of the statute was merely to restrain the collection of debts during the period of its operation. The preamble plainly indicates the same restricted purpose. It states with some minuteness of detail, the great pecuniary distress inflicted upon the state by the disastrous results of the war, in the destruction of property and currency, in the want of means, efficient labor, and implements for agricultural purposes, and the strong appeal made by this condition of things to the legislature to interpose and prevent the ruinous results that would inevitably follow from forced sales of property. It was therefore enacted that no executions should issue, and no sales be made under judgments, deeds of trust or mortgages, whilst the act was in operation. This language plainly shows, what indeed is manifest throughout the act, that the intention was a mere suspension of the legal rights and remedies of creditors for a limited period. The legislation was not curative, but preventive in its character. Inasmuch, however, as the creditor was thus deprived of the ordinary legal remedies for the collection of his debt, it was but just and reasonable that he should be also relieved of the duty of instituting any proceeding to prevent the operation of the statute of limitation. As he could issue no execution, he ought not to be required to bring any suit. The seventh section was therefore inserted, which declares: "The period during which this act shall remain in force shall be excluded from the computation of the time within which, by the operation of any statute or rule of law, it may be necessary to commence any
78 proceeding *to preserve or prevent the loss of any right or remedy."

It will be borne in mind that the other act of March 2d, 1866, first mentioned, known as "the act to extend the time for the exercise of certain civil rights and remedies," excludes from the computation the time "for doing any act" required by any statute or rule of law. Those words, "the doing any act," it will be observed, are omitted in the seventh section of the

stay law, just cited, and the words "to commence any proceeding" are alone retained. This change or difference of phraseology in the two acts passed on the same day, and relating somewhat to the same subject matter, very plainly indicates a difference of legislature purpose, a clear design that the one statute should not be as broad and comprehensive as the other.

The docketing a judgment is in no just sense of the term "the commencement of a proceeding." The recordation of a deed might, with equal propriety, be so considered. If the creditor was to be excused from docketing his judgment, merely because he could take no steps to enforce it, the same indulgence was due to the mortgagee or trust creditor, who was similarly situated. Every reason or consideration of public policy which applies to one equally applies to the other.

A few moments reflection will satisfy us that the legislature could not have committed so grave an error as to dispense with the docketing of judgments during the long period the stay law might continue in force. The existence of that law was of uncertain duration. It was impossible to say how long the necessities or the temper of the people might require its continuance. While indulgence was necessary to the debtor, it was equally important to him to provide for the

79 discharge of his constantly accruing liabilities. The personal *property being to a great extent destroyed, this could only be done by an advantageous sale of his real estate. But who would buy property encumbered with secret liens of unknown amount and number, which might be enforced after the lapse of years to the utter ruin of the purchaser.

The law requiring judgments to be docketed is an enactment of great public utility, founded upon the same considerations of public policy as the laws requiring the recordation of deeds, title bonds and marriage contracts. By discountenancing secret trusts and liens they encourage the sale of property, and protect the rights of innocent purchasers. The very fact that the judgment could not be enforced was an additional reason for requiring it to be docketed. The creditor might justly claim that the indulgence granted the debtor should not impair his legal rights and remedies; but he could not justly claim that this indulgence should also release him (the creditor) from a compliance with the laws intended for the protection of third persons. The object of the seventh section was to prevent the bar of the statute in favor of the debtor, but not to relieve the creditor of the duty he owed to innocent purchasers. In this view I am sustained by the opinion of Judge Bouldin in *Sexton v. Crockett*, 23 Gratt. 862.

In reference to the stay law he says: "Its purpose was to prevent the sacrifice of property of the citizen by sales under execution in the impoverished condition of our people, and to save them from the expense of law suits as far as practicable by discouraging

litigation. But as indulgence to the debtor might become hazardous to the interests of the creditor by exposing his claim to the bar of limitation, it became necessary to make

80 some provision by which indulgence might be *extended with safety to the creditor, and, to effect this, the seventh section was enacted." Judge Anderson concurred in Judge Bouldin's opinion throughout. Judges Moncure and Christian dissented from so much of it as held that the seventh section of the stay law applied to appeals; but they did not dissent from the observations which I have quoted. They may therefore be regarded as the views of the four judges who sat in that case.

For these reasons I think the judgments recovered by Rixey & Starke do not constitute valid liens as against the creditors claiming under the deed of trust. Under the decisions of this court these creditors must be held to be purchasers, entitled to all the rights and remedies accorded to persons of that class. *Exchange Bank v. Knox*, 19 Gratt. 739.

It is true that the deed of trust was not recorded until 6th November 1867; but in the interval between its date and recordation no new rights attached, no additional liens were created upon the property in controversy. It was certainly a valid deed, from the date of its registration. The lien acquired under it must have precedence of the judgments of Rixey & Starke, which were not docketed until more than a year thereafter.

The other judgments were rendered and docketed before the deed of trust was admitted to record on the 6th November 1867. It is said, however, that the deed must be considered as recorded from the day of its delivery to the clerk. This was the 8th December 1865. But as the proper revenue stamps were not then affixed, nor the tax and registration fees then paid, the clerk was under no obligation to record the deed. All the cases which hold that the instrument is

81 to be regarded as actually recorded from the time of delivery to the *clerk, proceed upon the idea, that the party has done all that is incumbent upon him to do, and nothing remains to be done as a prerequisite to the recordation. This, of course, cannot be predicated of a conveyance which is deposited in the office without pre-payment of the necessary fees and charges imposed by authority of the government.

It is further insisted that the recordation of the trust deed was entirely unnecessary, because the judgment creditors do not occupy the position of purchasers for valuable consideration without notice. The language of the statute is however very emphatic, that a deed of trust or mortgage is utterly void as to creditors unless recorded, whether they have or have not notice. The purchaser, or rather the creditor, claiming as a purchaser, under the trust deed, can only acquire title against the lien of the judgment by the recordation of the conveyance. According to this view, all the judgments, except those of Rixey & Starke, have priority over the

deed of trust. They were either docketed within the twelve months after their rendition, or they are within the influence of the act of March 2d, 1866, first mentioned, "to preserve and extend the time for the exercise of certain civil rights and remedies."

It is objected to this view, that it in effect gives to subsequent judgments precedence of those prior in date; whereas as between creditors the judgments take effect in the order of time, whether docketed or not. This is true, but it is because the registration laws so provided. A judgment creditor may lose his lien as against a purchaser by a failure to docket, and a subsequent creditor to him may preserve his judgment lien against the same purchaser by a prompt compliance with the statute. In such case the purchaser takes precedence of the prior though not of the subsequent

82 *judgment. This is the necessary result of the preference given to him who is most vigilant in the exercise of his rights. The books are full of familiar illustrations of the rule.

For these reasons I am of opinion the decree of the Circuit court should be reversed, and the cause remanded to be proceeded with in conformity with the views herein expressed.

The other judges concurred in the opinion of Staples, J.

Decree reversed.

83 **Richmond, Fred'g & Pot. R. R. Co. v. City of Richmond.*

March Term, 1875, Richmond.

Absent, MONCURE, P.

1. Railroad Co. Charter—Right to Use Steam in City Streets.—The charter of the Richmond, Fredericksburg and Potomac Railroad Company does not in express terms, or by necessary implication, vest in the company the right to propel her engines by steam through the streets of a city without the consent of the corporate authorities of the city; and the charter of the city of Richmond giving to the counsel of the city the authority to prevent the propelling of the cars of a railroad company by steam through the streets of the city, provided no contract is thereby violated, the counsel may prohibit said railroad company from the use of steam in propelling their cars in the streets of the city.

2. Corporations—Municipal Control—Police Power.—A corporation, except where it is otherwise provided in its charter, expressly or by clear implication, in the use of its property, the exercise of its powers and the transaction of its business, stands upon the same footing as individuals, and is subject to the same control under the police powers of the state or a municipal corporation.

By an ordinance of the council of the city of Richmond, it was ordained that on and after the first day of January 1874, no car, engine, carriage, or other vehicle of any kind, belonging to or used by

the Richmond, Fredericksburg and Potomac Railroad Company, shall be drawn or propelled by steam upon that part of their railroad or railway track on Broad street east of Belvidere street in said city, under a penalty of not less than one hundred nor more than five hundred dollars, to be recovered before the police justice of the city of Richmond.

84 *The railroad company being of opinion that under their charter, and the action of the council of the city in 1834, they had the right to use engines to propel their cars from their depot and warehouse, at the corner of Broad and Eighth streets along Broad street, continued their use on their road in that street; and the company was summoned before the police justice to answer the charge of violating said ordinance. The case came on to be heard on the 17th of January 1874, when the justice held that the ordinance was valid, and imposed upon the company a fine of five hundred dollars.

The company thereupon took an appeal to the Circuit court of the city of Richmond, where the judgment was affirmed; and they then applied to a judge of this court for a supersedeas; which was awarded. The case is sufficiently stated by Judge Christian in his opinion.

The case was argued by Steger, P. V. Daniel, and Ould & Carrington, for the appellants, and L. Page, Lyons and Burwell, for the appellee.

Christian, J. This case is before us upon a writ of error to a judgment of the Circuit court of the city of Richmond, affirming a judgment of the police justice of said city, imposing a fine upon the plaintiff in error for running its cars propelled by steam upon Broad street east of Belvidere street, in violation of a city ordinance passed September 8th, 1873.

This ordinance is entitled "an ordinance to amend the third section of an ordinance to regulate the use of Broad street by the Richmond, Fredericksburg and Potomac Railroad Company;" and is in the following words:

85 "Be it ordained by the council of the city of Richmond, *that section three of an ordinance passed May 13th, 1872, entitled an ordinance to regulate the use of Broad street by the Richmond, Fredericksburg and Potomac Railroad Company, be amended and reordained so as to read as follows:

"Sec. 3. That on and after the 1st day of January 1874, no car, engine, carriage, or other vehicle of any kind, belonging to or used by the Richmond, Fredericksburg and Potomac Railroad Company, shall be drawn or propelled by steam upon that part of their railroad or railway track on Broad street east of Belvidere street in said city. The penalty for failing to comply with this section shall be not less than one hundred dollars nor more than five hundred dollars for each and every offence, to be recovered before the police justice of the city of Richmond."

See Davenport & Morris v. Richmond City, 81 Va.

408.

The plaintiff in error (the railroad company) admits the violation of this ordinance, but contends that the ordinance is invalid, because it is in violation of its chartered rights.

On the other hand, the city of Richmond claims that it has the right, not only under the general police power vested in it as a municipal corporation, which antedates and overrides the charter of the railroad company, but under authority conferred upon the city council, by act of the legislature amending the city charter, to the exercise of the complete and absolute authority to regulate the use of Broad street by the said railroad company.

The legislature, by an act providing a charter for the city of Richmond, approved May 24th, 1870, vested in the council of said city the power "to prevent the cumbering of streets, avenues, walks, public squares, lanes, alleys or bridges, in any manner whatsoever," and the power "to deter-

mine and designate the route *and grade of any railroad to be laid in said city, and to restrain and regulate the rate of speed of locomotives, engines and cars upon the railroads within said city, and may wholly exclude said engines or cars if they please; provided no contract may be thereby violated."

It is insisted by the counsel for the railroad company, that this provision of the charter of the city of Richmond cannot be executed against it, because it is excluded from its operation by the proviso; inasmuch as by its charter it has the right by contract forever, and under all circumstances, to run its cars by steam through the whole length of Broad street to its depot and terminus at the corner of Eighth and Broad streets.

The question therefore we have to determine is, whether the ordinance of the city council is void and invalid because it is in violation of the chartered rights of the said railroad company and therefore violates the obligation of the contract between the state and the said railroad company, as evidenced and declared by said charter of incorporation.

We are therefore called upon to examine carefully the provisions of that act, and to determine whether the state has by an ever-continuing contract committed itself for all time to this railroad company to run its cars propelled by steam through the heart of the capital city of the commonwealth, and through the most important and populous street of that city, without regard to the safety, comfort and convenience of its citizens, and without regard to the general prosperity and welfare of the whole city.

The Richmond, Fredericksburg and Potomac Railroad Company was incorporated by an act of the legislature of the state passed February 25th, 1834.

This act provided, that under the direction of certain *persons therein named, books should be opened at Richmond, Fredericksburg and other places, "for the purpose of receiving subscriptions to the amount of seven hundred thousand

dollars, in shares of one hundred dollars each, to constitute a joint capital stock, for the purpose of making a railroad from some point within the corporation of Richmond, to be approved by the common council, to some point within the corporation of Fredericksburg; and for the purpose of extending the same, should the company hereby incorporated, at the commencement of the work or at any time afterwards, deem it advisable to do so, from its termination within the town of Fredericksburg to the Potomac river or some creek thereof, and for providing everything convenient and necessary for the purpose of transportation on the same." Sess. Acts 1834.

The only other section of the act (which comprises thirty-eight sections), necessary to be referred to, is the twenty-fourth section, which is as follows:

"Sec. 24. The president and directors, or a majority of them, shall have power to purchase with the funds of the said company, and place on the railroad constructed by them under this act, all machines, wagons, vehicles, carriages and teams of any description whatsoever, which they may deem necessary and proper for the purpose of transportation."

These are the two sections of the act upon which the railroad company relies, to show that the ordinance of the city council is void and invalid as to it, because they create a contract which is perpetual with the state, permitting them to run their engines for all time on Broad street. These two sections will be considered more particularly presently.

The record further shows, that on the 22d December 1834, at a meeting of the president and directors of the Richmond and Fredericksburg Railroad Company, the following preamble and resolutions were adopted:

"Whereas, by the act incorporating this company, it is requisite that the point at which the railroad terminates, within the corporation of Richmond, should be approved by the common council, and it appears to the board most expedient to conduct the same from the Richmond turnpike along H street (now Broad street) to a point at or near the intersection of the said street and Eighth street, and for the present to terminate the same by suitable connections with the contemplated warehouses and workshops of the company on lots Nos. 477, 478, purchased by them from John Heth: Therefore,

"Be it Resolved, That the approbation of the city council be requested to the above plan.

"Resolved, That the president cause a copy of the foregoing resolutions to be transmitted to the city council," &c.

In response to these resolutions of the president and directors of the Richmond, Fredericksburg and Potomac Railroad Company, the city council on the 23d December 1834 adopted the following preamble and resolutions:

"Whereas, by a resolution of the president

and directors of the Richmond, Fredericksburg and Potomac Railroad Company, submitted to the common council, it appears that it is deemed most expedient by the president and directors to conduct the said railroad from the Richmond turnpike along H street, to a point at or near the intersection of said street and Eighth street, and for the present to terminate the same by suitable connections with the contemplated warehouses and workshops of the company on lots Nos. 477, 478, purchased by them from John Heth:

89 **Resolved*, That the common council do approve the proposed location of the said railroad, and the present termination of the same as described in the foregoing resolution, and authorize the prosecution of the said work within the limits of the city on the above locations: provided, that in locating the said railroad no injury shall be done to the water pipes now laid in and along said street: provided further, that the corporation of Richmond shall not be considered as hereby parting with any power or chartered privilege not necessary to the said railroad company for constructing said railroad and connecting the same with the depot of said company within the limits of the city."

These proceedings of the city council, and the two sections of the act of incorporation above quoted, constitute the foundation of the claim on the part of the railroad company, of a perpetual and irrevocable contract between the state and that company, by which for all time, and under all circumstances, they may run their cars propelled by steam through one of the principal and most populous streets of the capital city of the commonwealth.

It will be conceded, that if such contract exists at all, it originated in the two sections of the act of incorporation and proceedings thereunder above quoted. These, therefore, require a careful and candid consideration.

It is apparent that by the first section of the act incorporating the railroad company, the legislature delegated to the city council of Richmond the powers to select the terminal point within the corporate limits of the city, and under this act the railroad company could only locate its terminus at such point within the city of Richmond as should be approved by the city council. This plain

90 construction of the first section is recognized *and acted upon by the president and directors of the railroad company when they declare, in the resolutions adopted by them and sent to the city council, that "it is requisite that the point at which the railroad terminates within the corporation of Richmond should be approved by the city council."

And the city council in approving the terminal point, suggested by the president and directors of the Richmond, Fredericksburg and Potomac Railroad Company, adopted it (the intersection of Eighth and Broad streets) as the then "present termination of the same," and upon the express condition "that the corporation of Richmond

shall not be considered as hereby parting with any power or chartered privilege not necessary to the railroad company for constructing said railroad, and connecting the same with the depot of said company within the limits of the city."

Upon this construction of the first section, and with these plainly expressed conditions, asserting in emphatic terms the chartered powers and privileges of the corporation of the city of Richmond, the railroad company adopted the corner of Eighth and Broad streets as the terminal point within the city of Richmond from which they should build their road, and on which they built their depot and warehouses, &c.

In the resolutions approving the terminal point (without which approval the railroad company could not have commenced their work beginning within the corporation of Richmond,) we find the express and positive reservation of all the chartered rights and powers of the municipality. These included an absolute and entire control over the streets of the city, excepting only the privilege to the railroad company of constructing and connecting their road with the depot

91 on Broad street. Not a syllable is recorded about the mode or "manner of transportation, whether by horse-power or steam, the entire regulation of that subject being reserved to the corporation with the rest of its chartered powers.

It is argued, however, that the twenty-fourth section of the act of incorporation above quoted, giving to the company the power "to purchase and place upon their road all machines, vehicles, &c., of any description whatsoever, which they may deem necessary and proper for the purposes of transportation," confer upon the company the authority to run locomotives within the city limits. This reasoning is altogether inconclusive and illogical. If the assent of the city council had been absolute and unconditional, this view would not have been sound. It is manifest that this twenty-fourth section is a general provision extending to the whole road. The road passes through the counties of Henrico, Hanover, Caroline and Spotsylvania. The legislature did not require these counties to give their assent to the construction of the road, because these counties have no chartered rights and privileges; and in these counties the railroad company acquired not only a right of way, but an absolute right of property in their road, and necessary property acquired in those counties, because, as empowered by their charter, they condemned the lands of individuals for these purposes, and paid them an equivalent in money. But the legislature did require the assent of the city authorities before the company could lawfully pass its boundaries. Within the limits of the city of Richmond all the right which the company acquired was the right of way over the street for transportation of passengers and freight. This right was subject to the right inherent in the municipal authorities to control the use of the streets, and to protect the safety, comfort and

92 general welfare *of the citizens of the municipality. The general right, therefore, to use machines on their road, as provided in this twenty-fourth section, does not embrace the right, against the consent of the city authorities, to use locomotives on one of the principal and most populous streets of the city.

It is worthy of remark, that the city council have, ever since its approval of the terminal point in 1834, constantly asserted their right to prohibit the introduction of steam engines into the city. In 1845, after much contention for years on the subject between the railroad company and the city authorities, on motion of Mr. Wickham, one of the most distinguished citizens, as well as one of the most learned lawyers of the city, the following resolution prepared by him was adopted by the city council.

"Resolved, That the council of the city of Richmond not only maintains its right to prohibit the use of locomotives within the city whensoever it shall appear expedient to do so, but in contradiction to all allegation to the contrary they do most positively deny all responsibility to indemnify the railroad company for any such exercise of its legitimate powers. They admit no other right in this respect on the part of that company but to a favorable and indulgent consideration—a claim which, from its nature, becomes less and less the longer it is favored."

Up to the present time the city council have repeatedly and constantly asserted their right to prohibit the use of locomotives within the city limits, which they might or might not exercise in their own discretion, according as the safety and welfare of the citizens should require.

This right was as firmly maintained and confidently asserted under the general chartered powers, and the *rights inherent in every municipal corporation to guard and protect the safety of the citizens, and to regulate the use of the streets of the city, from the very inception of the construction of the railroad, as it is now, when, by the amended charter above referred to of the city, special power is conferred upon the city council to regulate the rate of speed of locomotives, engines and cars upon the railroads within the city, and to wholly exclude said engines and cars if they please; provided no contract will be thereby violated." But the railroad company confidently rely upon this proviso; and it is earnestly argued, that the adoption by the legislature of this proviso was a recognition of the claim of the railroad company to run their locomotives on Broad street for all time. This pretension is unreasonable and illogical. The only fair and legitimate inference to be drawn from the adoption of this proviso is, that the legislature, aware of the controversy between the city authorities and the railroad company on this subject, left it as an open question for the courts to decide, whether the chartered powers and privileges of the corporation of Richmond had been so modified and restricted by the act of incorporating the Richmond, Fredericksburg and

Potomac Railroad Company, as to deprive the corporate authorities of the right to prohibit the company from running steam engines on the streets of the city. This question was not intended to be decided by the legislature, but was reserved as a judicial question. The legislative declaration by the amended charter was simply that the city council should have power to regulate the speed of locomotives and remove them altogether, if in so doing no contract was violated. And the question as to the violation of the contract rights of the com-

94 pany is by that proviso submitted *to judicial determination; and that is the main question now submitted to this court.

Now it must be borne in mind that when the act incorporating the Richmond, Fredericksburg and Potomac Railroad Company was passed by the legislature in 1834, the charter of the city of Richmond was then in existence; and certainly none of the provisions of that charter were repealed by the adoption of the act incorporating the Richmond company; but remained in full force and effect. By the charter of the city, the corporate authorities are invested with the power to make and establish such by-law, rules and ordinances, not contrary to the constitution or laws of the commonwealth, as shall by them be thought necessary for the good ordering and government of such persons as shall from time to time reside within the limits of said city and corporation, or shall be concerned in interest therein." Not only were they invested with these chartered rights, specifically conferred by the terms of the charter, but with all those powers and privileges which by law are inherent in every municipal corporation, to guard the safety and promote the comfort and welfare of the citizens of the corporation.

The railroad company accepted the charter not only subject to existing laws and chartered corporate powers vested in the corporation of Richmond, but they adopted the terminal point of their road within the corporate limits approved by the city council, with the express reservation "that the corporation of Richmond shall not be considered as parting with any power or chartered privilege not necessary to the railroad company for constructing the said road," &c.

It is conceded that a charter granted to a corporation by the state may be, according to its terms, a contract between the state and corporation, the obligation of

95 *which cannot be impaired by subsequent legislation; but at the same time while this is conceded, it is also certainly true that corporations, like natural persons, are subject to remedial legislation, and amenable to general laws. Private corporations, even without any express reservation of the powers over them by the legislature in their charters, are subject, like individuals, to be restrained, limited and controlled in the exercise of their powers by such laws as the legislature may pass, based upon the principles of safety to the public.

It is well settled, and cannot now be dis-

puted, that the legislature may control the actions, prescribe the functions and duties of corporations, and impose restraints upon them to the same extent as upon natural persons, subject, of course, to the limitation of not impairing the obligation of contracts made between the corporation and the state. See *Redford on Railways* 428, and note and cases there cited.

"A corporation is," in the language of Chief Justice Marshall, in *Dartmouth College v. Woodward*, 4 Wheat. R. 518, "the mere creature of the law; it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence." And as was expressed by the same great judge in *Providence Bank v. Billings*, 4 Peters' R. 514: "Any privileges which may exempt a corporation from the burdens common to individuals do not flow necessarily from the charter, but must be expressed in it, or they do not exist."

A cardinal rule, in the interpretation of charters of incorporation, is thus laid down by Mr. Justice Grier in *Richmond Railway Co. v. The Louisa Railway Co.*, 13 How. U. S. R. 71. "Public grants are to be construed strictly, and any ambiguity in
96 the terms of the grant *must operate against the corporation and in favor of the public; and the corporation can claim nothing but what is clearly given by the act."

In *Charles River Bridge v. Warren Bridge*, 11 Peters' R. 420, 548, Chief Justice Taney enforcing the same rule said: "The continued existence of a government would be of no great value, if by implications and presumptions it was disarmed of the powers necessary to accomplish the ends of its creation, and the functions it was designed to perform transferred to privileged corporations." And this eminent jurist concludes his discussion of the subject by the declaration, "that no claim in any way abridging the most unlimited exercise of the legislative power over persons natural or artificial can be successfully asserted except upon the basis of an express grant in terms or by necessary implication."

Applying these rules of law and canons of interpretation to the charter of the Richmond, Fredericksburg and Potomac Railroad Company, it is clear that there is nothing in the privileges and franchises conferred by that charter which prevents the legislature either of itself (or through a municipal corporation to which it has delegated its authority), from prescribing rules and regulations for the exercise of those privileges and franchises. And it is equally clear that the authority granted in the charter of incorporation, to construct a road "from a point within the corporation of Richmond, to be approved by the city council to a point within the corporation of Fredericksburg," and the authority "to place upon said road machines and other vehicles necessary for the purposes of transportation," do not constitute a contract by which the said company may for all time run their engines upon

Broad street within the corporation of
97 Richmond, and which perpetually *prohibits legislative interference and control. Nor upon the most liberal rules of interpretation can it be said that the charter has conferred such extraordinary and unlimited powers upon this corporation, either "by express grant in terms or by necessary implication." Certainly there is no such express grant in the charter of incorporation. It cannot be implied from the fact that one of its terminal points was to be within the corporate limits of Richmond. The power to lay its track and move its cars through one of the streets of the city does not necessarily imply the power to move them by steam, nor does the authority to use steam engines on their road necessarily imply a perpetual grant for all time to run steam engines through the most populous streets of the city.

To give to the charter such an interpretation, would be to hold not only that the legislature had deliberately violated the chartered rights of the principal and capital city of the commonwealth by depriving it of the power to protect the public safety and promote the public welfare, but that the legislature had tied its own hands, and placed this corporation above and beyond the reach of the law. Before we can reach such a conclusion, we must see in the charter itself either an express grant in terms, or one which arises from the most patent and necessary implication. Seeing neither, I am forced to the conclusion that it was competent for the legislature to confer upon the city council the power "to regulate the rate of speed of locomotives, engines and cars upon the railroads within the city of Richmond, and to wholly exclude said engines if they please;" and that the ordinance passed in conformity with this act is valid.

Nor do I perceive that this ordinance is unreasonable and oppressive, and for
98 that reason, as was argued by *the learned counsel for the plaintiff in error, ought to be set aside.

This company was chartered more than fifty years ago. At that time much of what is now known as Broad street was a mere turnpike, neither graded nor paved, with, scattered here and there, houses on each side. It is now one of the most attractive and populous streets in the city. It being the most level and the widest street, and one most convenient to that part which contains the largest number of private residences, Broad street has now become the principal street, for the shop and retail business of this growing city. There is not only on this street a large and constantly growing resident population, but crowds are attracted to it, every day, and all hours of the day, from all parts of the city, especially ladies and children, from the fact that this street has now become the great mart for supplying the wants of families, in the varied and multiform retail business, necessary to meet the wants of a populous and growing city.

It is not therefore "unreasonable" that the city council, should, under this change

of circumstances, prohibit the use of steam engines on this street.

The voluminous evidence taken in this case not only shows, that these locomotives had the effect to injure the business and general prosperity of this principal street, and consequently of the whole city, but it is also proved that notwithstanding the great care and watchfulness with which this railroad has been managed, the use of steam power has been the occasion of many fearful accidents.

And under the general police power inherent in every municipal corporation (independent of the special powers conferred by the legislature "to regulate the rates of speed" of these engines "or to remove

99 move *them if they please") the city council might well exercise this authority. The general police power existing in the legislature, is transferred to every municipal corporation to be exercised by it, for the protection of the safety and general welfare of the citizens of such corporation, and in the exercise of such authority the municipal legislature (the city council) must of necessity be invested with a large discretion. *Ogden v. Saunders*, 12 Wheat. R. 213; *Fisher v. Harrisburg*, 2 Grant's (Pa.) cases 291; *St. Louis v. Weber*, 44 Mo. R. 547; *Commonwealth v. Robertson*, 5 Cush. R. 431. As was said by Mr. Justice Barbour, in *City of New York v. Miles*, 11 Peters R. 102, 139, in speaking of the general police power of a State—"By virtue of this it is not only the right but the bounden and solemn duty of a state to advance the safety, happiness and prosperity of its people and provide for its general welfare by any and every act of legislation which it may deem to be conducive to these ends, where the power over the particular subject or the manner of its exercise is not surrendered or restrained." All those powers which relate to merely municipal legislation, or what may perhaps, more properly be called internal police, are not thus surrendered or restrained; and consequently in relation to these the authority of the state is complete unqualified and exclusive.

This police power, says Chief Justice Redfield, in *Thope v. R. & B. R. Co.*, 27 Verm. R. 140, 149, "extends to the protection of the lives, limbs, health, comfort and quiet of all persons and the protection of all property within the state. It must of course be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others." The same eminent judge and

100 author says in his valuable *work on the Law of Railways: "There are confessedly certain essential franchises of such corporations (railroad companies) which are not subject to legislative control; and at the same time it cannot be doubted that these artificial beings or persons, the creations of the law, are equally subject to legislative control and in the same particulars precisely as natural persons. Railroads—so far as the regulations of their own

police affecting the public safety, both as to life and property, and also the general police power of the state as to their unreasonable disturbance of, and interference with, other rights, either by noise of their engines in places of public concourse, as in the streets of a city, or damage to property, either in public streets or highways—there can be no question whatever, are subject to the right of legislative control." 2 Redf. on Rail. § 232. And again, referring to the case of *Buffalo & Niagara Falls Railroad v. City of Buffalo*, 5 Hill (N. Y.) 209, the author says: "It has been held that a statute giving power to a common council of a city to regulate the running of cars within the corporate limits, authorizes the adoption of an ordinance entirely prohibiting the propelling of cars by steam through any part of the city. We should entertain no doubt of the right of the municipal authorities of a city or large town to adopt such an ordinance without any special legislative sanction, by virtue of the general supervision which they have over the police of their respective jurisdictions. Such must have been the opinion of the court in the case last referred to. Nelson, C. J., says: "A train of cars impelled by the force of steam through a populous city may expose the inhabitants and all who resort thither for business or pleasure, to unreasonable perils; so much so

that unless conducted with more than 101 human *watchfulness the running of the cars (in that mode) may well be regarded as a public nuisance." *Ib.* § 250, p. 646.

In "Pierce on American Railroad Law" the doctrine on this subject is thus succinctly and clearly laid down under the head of "Police Laws:" "A railroad company, although no power is reserved to amend or repeal its charter, is nevertheless subject, like individuals, to such police laws as the legislature may from time to time enact for the protection and safety of citizens, and the general convenience and good order. These laws although imposing liabilities and duties on the company other than those contained in its charter or existing when it was granted, do not impair the obligations of the contract implied therein.

Its property and essential franchises are indeed protected by the constitution, but the company itself is not thereby placed above the laws. It seems not to have been the design of that instrument to disarm the states of the power to pass laws to protect the lives, limbs, health and morals of citizens, and to regulate their conduct toward each other. Such laws may incidentally impair the value of franchises or of rights held under contracts, but they are passed diverso intuitu and are not within the constitutional inhibition."

Without multiplying authorities on this point I will simply refer to the following cases. *Vanderbilt v. Adams*, 7 Cowen R. 349; *Coates v. Mayor N. Y.* Id. 585; *Baker v. Boston*, 12 Pick. R. 184; 10 Barb. R. 245; 45 Maine R. 560; 5 Hill R. 209.

But it is insisted by the learned and able

counsel for the appellants, that the ordinance of the city council complained of, takes from the company one of its essential franchises, and seriously affects their rights of

102 *property without compensation, and is therefore void and invalid.

It has already been shown that upon a fair construction of the charter of the Richmond, Fredericksburg & Potomac Railroad Company, there was no contract either express or implied, by which the state bound itself for all time and under all circumstances, to permit this company to run its locomotives through the streets of the city; and that the ordinance violated no contract rights of the company.

Does it violate any essential franchise? and does it appropriate any property of the company? Clearly not. The ordinance does not prevent the company from making its connections with the depot on Broad street, but only regulates the mode by which these connections are to be made. It only declares that these connections shall not be made by steam. It only says to the company that the public safety and the general welfare of the city, in the opinion of the city council, (who are competent to judge of this matter, as the municipal legislature), requires now that the locomotives shall no longer traverse this most important street, because it exposes the inhabitants to unreasonable and constant perils and seriously affects the prosperity of the whole city. In doing this the city council are acting within their legitimate powers. They have violated no chartered rights; they have interfered with no essential franchise; nor can the railroad company claim any compensation; for in so doing the city council have not appropriated for the public use one dollar of the property of the company. It may be the company may in a certain sense, and to some extent be the loser by this ordinance; but upon

103 well established principles they have no claim to compensation, *because there is here no appropriation of the company's property, or violation of its essential franchises, but only a regulation of the mode in which their chartered rights and franchises may be exercised; and the company, like natural persons, must be subject always (unless protected by chartered rights or constitutional inhibition), to the salutary and all-pervading maxim of the law *sic utere tuo ut alienum non laedas*. The law is well established, by indisputable authority, and the universal assent of an enlightened jurisprudence, that every person (artificial as well as natural) holds his property subject to the limitation expressed by this maxim, exercised either by the legislature directly, or by public corporations to which the legislature may delegate it. Laws and ordinances relating to the safety, comfort, health, convenience, good order and general welfare of the inhabitants are comprehensively styled "Police Laws and Regulations." And it is well settled, that laws and regulations of this character though they may disturb the enjoyment of individual rights are not unconstitutional, though no provision is made for compensa-

tion for such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffers injury it is either *damnum absque injuria* or in the theory of the law he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure. The citizen owns his property absolutely it is true; it cannot be taken from him for any private use whatever, without his consent, nor for any public use without compensation; still he owns it subject to this restriction; namely, that it must be so used as not to injure others, and that the sovereign authority may by police reg-

104 ulations, *so direct the use of it, that it shall not prove pernicious to his neighbors or to the citizens generally.

These regulations rest on another maxim *salus populi suprema est lex*. This power to restrain a private injurious use of property is very different from the eminent domain. Under the latter, compensation must always be made. But under the former, it is not a taking of private property for public use, but a salutary restraint of a noxious use by the owner contrary to the maxim *sic utere tuo ut alienum non laedas*." See Dillon on Corporations, p. 209, 210; and cases there cited.

In *Commonwealth v. Alger*, 7 Cush. R. 53, Chief Justice Shaw, in an able and exhaustive opinion, in which the police power as contradistinguished from the right of eminent domain, is discussed and is peculiarly applicable to this case, says: "We think it is a settled principle, growing out of the nature of well ordered civil society, that every holder of property however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. * * * Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient. This is very different from the right of eminent domain, the right of a government to take and ap-

105 propriate private *property to public use, whenever the public exigency requires it, which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power, the power vested in the legislature by the constitution to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth and of the subjects of the same."

There are many cases in which such a power is exercised by all well ordered governments, and where its fitness is so obvious as to be recognized by all as reasonable and proper. Such are the laws to prohibit the use of warehouses for the storage of gunpowder near habitations or highways, to restrain the height to which wooden buildings may be erected in populous neighborhoods, and require them to be covered with slate or with incombustible material; to prohibit buildings being used for hospitals for contagious diseases, or for the carrying on noxious or offensive trades; to prohibit the raising of a dam, and causing stagnant water to spread over meadows near inhabited villages, thereby raising noxious exhalations injurious to health and dangerous to life. And so, upon precisely the same principle a railroad company may be prohibited from running their cars propelled by steam through the crowded streets of a populous city, thereby subjecting property to serious injury and human life to constant and unreasonable perils.

Nor does the prohibition of the noxious use of property, although it may diminish the profits of the owner, make it an appropriation to a public use, so as to entitle the owner to compensation. If the owner of a warehouses in the midst of a city could store in it quantities of gunpowder he might save the expense of transportation and storage at a distant point. If a landlord could let his building for a smallpox hospital, or a slaughter-house he might obtain an increased rent. If a railroad company is permitted to run their cars through the streets of a city propelled by steam, it might be less expensive and more convenient than if the same were drawn by horses. But all these are restrained, not because the public have occasion to make the like use, or make any use of the property, or to take any benefit or profit to themselves for it, but because it would be a noxious use contrary to the maxim *sic utere tuo ut alienum non laedas*.

It is not an appropriation of the property to a public use but the restraint of an injurious private use by the owner, and is therefore not within the principle of property taken under the right of eminent domain. This distinction is manifest in principle and is recognized by unquestioned authority. *Commonwealth v. Alger*, 7 Cush. R. 53; *Commonwealth v. Teuksbery*, 11 Metc. R. 55; *Baker v. Boston*, 12 Pick. R. 184; *Wadleigh v. Gillman*, 12 Maine R. 403; *Vanderbilt v. Adams*, 7 Cow. R. 349; *Coates v. Mayor &c.*, New York, 7 Cow. R. 585; 1 Dillon on Corporations § 93, pp. 209-210; 2 Ib. § 565, and cases there cited.

I am of opinion for the reasons given, that the ordinance complained of is within the scope and power of municipal authority—that this power has not been unreasonably or oppressively exercised—that the ordinance merely preventing the use of locomotives on the streets does not impair the obligation of any contract, nor violate the char-

ter of the railroad company and that it is therefore valid and of full force and effect. The judgment of the Circuit court should be affirmed.

Anderson and Bouldin, Js., concurred in the opinion of Christian, J.

Staples, J., dissented.

Judgment affirmed.

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*Moran v. Johnston & als.

March Term, 1875, Richmond.

1. Decree for Sale of Land—Appeal—Appointment of Receiver.*—After a decree for the sale of real estate to satisfy creditors having liens thereon, and an appeal from that decree by the debtor, the court below in which the suit was pending, may appoint a receiver to take possession of the property and rent it out, and collect the rents, until the further order of the court &c.

2. Sergeant as Receiver—Official Bond as Security.—If the sergeant of the city in which the property is located, is appointed the receiver, it is not necessary to require him to give security for the faithful performance of his duty, as it is covered by his official bond. Code of 1873, p. 1124, ch. 174, § 5.

This is a supplement to the case of Moran v. Brent & als. reported in 25 Grattan 104. After the decree had been made in that case for the sale of the property, and Moran had obtained an appeal from that decree, the Corporation court of Alexandria, in which the first decree was made, upon the petition of creditors of Moran who were parties in the suit, made a decree appointing the sergeant of the city the receiver of the court, and directing him to take possession of the real estate in the proceedings mentioned, and to rent it out and collect the rents, until the further order of the court &c. From this decree Moran applied to a judge of this court for an appeal; which was allowed.

Smoot, for the appellant.

*Decree for Sale of Land—Appeal—Power of Receiver.

—The principal case is expressly reaffirmed in *Adkins v. Edwards*, 88 Va. 316, in respect to the rule that after a decree to sell real estate to satisfy liens and appeal from that decree, the court below may appoint a receiver to rent out the real estate. See also, *Edmunds v. Scott*, 78 Va. 781; *Bristow v. Home Building Co.*, 91 Va. 29. In *Cralle v. Cralle*, 81 Va. 775, the principle case and *Littlejohn v. Ferguson*, 18 Gratt. 58, are cited for the following statement of the law: "Although, perhaps, an appeal in a chancery cause does not here, any more than in England, stop the proceedings under the decree from which the appeal is taken, yet there can be no manner of doubt but that the effect of an appeal, when fully perfected by execution of the proper *superadeos* bond, is to deprive the subordinate court of all power over the parties and subject matter of the controversy, until the cause is remanded back for its further action; and the only orders, therefore, which that court can rightfully make are such as are needful for the preservation of the *res* and rights of the parties pending the appeal."

Claughton and F. L. Smith, for the appellees.

109 *Anderson, J., delivered the opinion of the court.

This is a branch of the case of *Moran v. Brent & als.*, decided at the March term 1874 of this court. It is an appeal from an order made in that cause, after the decree was pronounced from which the appeal is taken, and pending the appeal, to put the real estate, which was sought to be subjected to the payment of the appellant's debts, into the hands of a receiver, to be by him rented out, until the rights of the parties in respect to that subject were determined.

A receiver may be appointed, though not prayed by the bill, if the circumstances of the case require it; and the application may be granted after decree, if a state of facts entitling the party to a receiver appears upon the proceedings in the cause. 2 Danl. Ch. Plead. & Prac. 1734. And it being grantable after decree, the pendency of an appeal from the decree is no reason why the application should not be granted, when it does not conflict, but is entirely compatible, with the grounds on which the appeal was allowed. In this case, the appeal was allowed upon the ground that the sale of the property, upon which there were various creditor liens, was decreed before the amounts and priority of those various liens were ascertained; and upon that ground the decree was reversed by this court. If the execution of the decree for the sale had not been prevented by the appeal, there would have been no necessity for a receiver. So far from the application, after the appeal was allowed, to put the property into the hands of a receiver to be rented out, being repugnant to the appeal, it was made necessary by the appeal, and could only be granted by the court of original jurisdiction.

"The original papers remain in the Circuit court after an appeal, and there is no difficulty in reinstating the case on the docket when a petition for rehearing is filed," which may be done while the appeal is pending, and does not involve the dismissal of the appeal. Both may proceed contemporaneously. And if there should be an appeal from the decree upon the rehearing, both appeals may be depending at the same time. *James Riv. & Kan. Co. v. Littlejohn &c.*, 18 Gratt. 53, 71, *Joynes, J.* Though after a final decree, and appeal therefrom to the appellate tribunal, the cause may be no longer pending in the court of original jurisdiction, it may in certain cases be brought up and restored to the docket, upon a petition for rehearing, pending an appeal; a fortiori it may, upon a petition for the appointment of a receiver, to preserve the fund, pending the litigation, which does not involve any matters litigated by the appeal. In *Spring & als. v. The South Carolina Insurance Company*, 6 Wheat. R. 519, it was held, as stated by the reporter, that in an equity case, the res in litigation may be sold by order of the Circuit court, and the proceeds invested in stocks, notwithstanding the pending of an appeal.

But it is assigned as error in this case, that the receiver was not required to give security. Mr. Daniel in his work on Pleading and Practice says: "A person to be appointed receiver must, unless otherwise ordered, first give security, to be allowed by the judge to whose court the cause is attached, duly to account for what he shall receive, on account of the rents and profits for the receipt of which he is appointed, at such periods as the judge shall appoint, and to account for and pay the same as the court shall direct." By the decree or order in this case James M. Stewart, the city sergeant of Alexandria, is appointed receiver, with power to rent out the said premises, and to collect the rents and profits thereof, until the further order of the court, and he is required to account for, and to report to the court the money he may receive, and how he has disposed of the same, &c. The sergeant of the city being appointed the receiver in this case, that requirement may be regarded as having been complied with, as it is provided by § 5, ch. 174, of the Code of 1873, p. 1124, that "any sheriff, sergeant, or other officer, receiving money under any order or decree, shall pay the same as the court may order; and if he fail so to do, he and the sureties in his official bond shall be liable therefor." The court is of opinion that it was a proper case for the appointment of a receiver, 2 Rob. (old) Prac. p. 385, citing *Coles' adm'r v. McRae*, 6 Rand. 644; and that the decree ought to be affirmed, with costs.

Decree affirmed.

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*Eacho v. Cosby.

March Term, 1876, Richmond.

1. **Court of Appeals—Jurisdiction—Amount in Controversy.**—E files his bill against the administratrix of C, to obtain possession and sale of property conveyed by C in trust to secure a debt to E of \$1000. E charges that there is still due to him \$640. The answer denies that there is any debt due from C to E. The property was not worth \$500. As the existence of the debt is involved in the decision of the case, the Court of Appeals, has jurisdiction of the case upon appeal by E.
2. **Equity Jurisdiction.**—In the progress of the suit in the court below a part of the property is sold under a decree by consent, and the proceeds deposited in bank to the credit of the cause, and the rest of the property is by like consent, decreed to the defendant upon her giving bond with security to pay \$300.

***Court of Appeals—Jurisdiction—Amount in Controversy.**—See *Campbell v. Smith*, 32 Gratt. 288, and *note*, citing the principal case; 4 Min. Inst. (3rd Ed.) 1093, and cases cited.

Trust Deeds—Insufficiency of Trust Property to Pay the Debt—Personal Liability of Grantor.—In *Watkins v. Dupuy*, 87 Va. 87, the principal case is cited, for the proposition that where property upon which a deed of trust is given to secure a debt is insufficient to pay it, in the absence of stipulation to the contrary, the beneficiary is a creditor of the grantor for the deficiency.

upon a decision in favor of the plaintiff. If the case was not one of which equity had jurisdiction originally, yet the court having taken jurisdiction and taken possession of the property and disposed of it, must proceed to decide the case.

3. **Deeds of Trust—Validity as Security.**—The deed of trust purports to be given to secure a note for \$1000 given for the loan of that sum by E to C. Though the note may not have been delivered by C to E, yet if he owed E a debt for which the note was to be given the deed is a valid security for it.

4. **Same—Same—Appeal—Reversal.**—The enquiry before the commissioner being as to the execution and delivery of the notes spoken of in the deed, and the commissioner reporting that there was no satisfactory evidence of the delivery, and the court having dismissed the bill, the decree will be reversed and the cause sent back for an enquiry whether C was indebted to E in a debt intended to be secured by the deed.

5. **Witnesses—Competency.**—The trustee in the deed is made a party plaintiff with E, in the original bill, but his name is omitted in the amended and supplemental bill. He is under the statute a competent witness to prove what passed between C and E and himself as to the preparation of the deed and note; he under the circumstances not being liable for the costs.

6. **Same—Same.**—The deed provides that upon a sale of the property by the trustee he shall receive five per cent. upon the amount of the sales. As all the property has been disposed of by the court, and the trustee therefore can never sell it, even if his right to commissions on a sale by him would render him an incompetent witness, it cannot affect his competency under the circumstances of this case.

In November 1870 Andrew Jenkins and Edward D. Eacho filed their bill in the Chancery court of the city of Richmond against Eliza Cosby in her own right and as administratrix of A. J. Cosby, in which they set out that on the 29th of March 1869 one Andrew J. Cosby, of the city of Richmond, applied to said Eacho for a loan of \$1000, which said Eacho loaned to him in good and legal currency of the United States; and that on the same day said Cosby executed a note payable to Eacho for the sum of one thousand dollars, payable eleven months after date, at the Planters National Bank of Richmond. That at the same time Cosby made and executed a deed of trust dated the 25th of March 1869, by which he conveyed to said Jenkins, the following personal property viz: one close carriage and harness, one open buggy and harness, two bay horses, one brown horse, one bay horse with one eye, one bay mare and colt and one cow, then in the use and possession of the said Cosby at his stable in the city of Richmond, in trust to secure the said note from Cosby to the said Eacho; and upon the failure to pay the said note when it fell due, the trustee, upon the request of said Eacho, should sell the said property; and upon such sale the trustee should have a commission of five per cent. on the whole amount of sale, &c.

The bill further states that the note was not paid when it fell due; but at various

times during the life of Cosby, he before and after it fell due, paid Eacho sundry small sums on account of the note, by which the amount due was reduced to \$640; and this amount was due when Cosby died on the — day of — 1870. That Eliza Cosby qualified as administratrix of said Cosby in 1870; and that she failed when applied to, to pay the debt. That he thereupon directed Jenkins, the trustee, to sell the property under the deed of trust, and he accordingly advertised it for sale; but when they went to the place of sale, the said Eliza Cosby and her counsel warned them from the premises, and violently and peremptorily drove them off, and prevented the sale of the property.

They further say that the property is wholly and completely in the possession of said Eliza Cosby; that she is insolvent in her own right; so that any remedy at law would be fruitless; and plaintiffs apprehend from her past conduct, that she will eloin the property and secrete it or dispose of it so that plaintiffs will be defrauded of their rights thereto. And said A. J. Cosby left no other property out of which the plaintiffs could obtain satisfaction of their debt.

The prayer of the bill was for an injunction to restrain the said Eliza Cosby, either in her own right or as administratrix, from interfering with the property mentioned in the deed of trust; and that the court would appoint a receiver to take possession of it; that all proper questions touching the rights of the plaintiffs to the property might be tried and decided by the court; and for general relief.

The court granted the injunction as prayed for, and directed the officer of the court to take possession of the property and to preserve and keep it safely until the further order of the court.

The officer reported to the court that he had taken possession of one horse, one carriage and harness, and one buggy and harness. And it was agreed between

*Eacho and Eliza Cosby that the officer should sell the horse, and deposit the proceeds of the sale in bank to the credit of the cause; that he should deliver the carriage and harness to her upon her giving security which was satisfactory to the officer, for the sum of \$300, to be paid to Eacho with interest, if the court should decree that the carriage and harness was embraced in the deed of trust; and that he should deliver to her the buggy and harness, Eacho laying no claim thereto.

The cause came on to be heard on the 13th of December 1870, upon the bill and exhibits, and the report and agreement aforesaid; and the court not at that time adjudicating any question touching the title to any of the property in controversy, decreed that the officer should sell the horse and deliver the carriage and harness as agreed by the parties, Eliza Cosby having given the bond, and also deliver to her the buggy and harness.

In January 1871 the defendant filed her

answer. She admitted that she as administratrix came into the possession of the carriage, horse and buggy, and had them appraised as a part of her intestate's estate. She denies the right of Eacho to interfere with her possession of the property, because she does not believe there is any such note as is described in the bill in existence, and she calls for its production, if any such there be. That the carriage seized under the authority of the court is not the carriage referred to in the deed filed with the bill: that the deed describes the carriage therein mentioned as a close carriage, and this is an open carriage:—that said A. J. Cosby did have a close carriage at the time of the execution of the deed, which he afterwards sold, after as she supposes, he considered the deed satisfied; as indeed he

116 *did sell all other property mentioned in said deed, except the horse and buggy in possession of the officer. And that A. J. Cosby lived nearly nine months after the maturity of the note aforesaid, and never did she hear one word of complaint from plaintiff about her husband's disposing of the property mentioned in the deed, or of any effort on his part to enforce the provisions of said deed until since his death. On the 25th of February 1871 the court made an order referring the cause to a commissioner with instructions to ascertain and report:

1st. Whether the note in controversy was actually given as alleged in the bill; and if given, whether the same, or any part thereof, has been paid; and if any amount has been paid thereon, what amount, and what is still due; and all the evidence produced before him touching the existence of said note.

2d. Whether the property taken by the sheriff under the restraining order in this cause, is, in reality, a portion of the identical property embraced in the deed of trust; and any other matter deemed pertinent to the issue, or demanded to be reported by either of the parties.

In May 1831 the commissioner returned his report, and with it the evidence before him. A part of this evidence was the depositions of the plaintiffs Eacho and Jenkins; which were excepted to by the defendant.

The commissioner in his report refers to this exception, and considers it well founded: the parties testifying to matters relating to the note and deed of trust, and Cosby the other party to these transactions being dead. And rejecting that testimony he reports that upon the first enquiry, the evidence in the cause is not sufficient to show that the note

in controversy was actually given as

117 alleged in the bill. And upon the *second enquiry, the carriage and harness being the only portions of property in controversy, the evidence was not sufficient to show that the carriage and harness taken by the sheriff, is in reality a portion of the identical property embraced in the deed of trust. The plaintiff Eacho excepted to the report of the commissioner so far as it excluded the evidence of Jenkins. He also

asked that the report might be recommitted on the ground of after discovered evidence. And he filed his affidavit stating that he had discovered evidence as to the identity of the property, and giving the names of the witnesses.

In January 1872 the cause came on to be heard upon the papers formerly read and the report of the commissioner, with the exception thereto, and upon the affidavit of Eacho; and thereupon the plaintiff asked leave to file his amended and supplemental bill; which application was opposed by the defendant; and the court allowed him to file the bill upon his paying the costs of the reference to the commissioner; which was done. And thereupon the defendant filed her demurrer and answer to the same; and the plaintiff replied generally to the answer, and joined in the demurrer. And by consent the cause came on again to be heard, when the court overruled the demurrer, and re-committed the report to the commissioner, and directed him to report all the facts and circumstances attending the making of the contract, the note and deed of trust mentioned in the original and amended bill, and whether the note in controversy was ever executed by A. J. Cosby, and if executed what has become of the same; and whether the property taken by the receiver is the same, or a portion of the same conveyed in the said deed of trust, and other matters, &c.

The amended and supplemental bill

118 is by Eacho *alone. In this bill he states that when he loaned the money to Cosby, he employed Andrew Jenkins, a real estate agent in Richmond, to act as trustee and take the said note. Jenkins drew said deed and note, and reported the transaction with Cosby as complete; and as he said nothing about the note plaintiff supposed he as his agent had kept it. And thus supposing when it became necessary to apply for the injunction, plaintiff supposing that Jenkins had the note, charged the existence of it in the bill. He says by way of amendment and supplement of said bill, that he was mistaken in supposing that the said note was delivered. He now charges that the note was not delivered to him or to said Jenkins, through the inadvertence of said Cosby; plaintiff being unwilling to think that the same was fraudulently withheld. Plaintiff nevertheless charges that the debt was contracted as alleged in the bill for borrowed money; and that it is unpaid except as admitted in the original bill, and is now a valid and subsisting demand against Cosby's estate, fully evidenced and secured by said deed of trust. He believes the note was among Cosby's papers when he died, and since then has been and may be now in the possession of his administratrix. And he calls upon her to say whether or not the note has been or is now in her possession, and if so to produce it.

In her answer the defendant says she does not believe that said Eacho loaned to her said husband A. J. Cosby, on the 25th of

March 1869, or at any other time, one thousand dollars, or any other sum of money, as alleged in said original and amended bills, and she calls for proof of any indebtedness of her late husband to said complainant. That no such note as that described in complainant's bill has ever been seen by her among her said husband's papers, or
 119 ever came *into her possession; and she cannot believe that complainant would have loaned her husband one thousand dollars without taking from him a note acknowledging his obligation for the same.

The commissioner returned his report with the additional evidence taken, and says that the pleadings and evidence in the cause since his former report, were not sufficient to induce him to come to a different conclusion from that before reported, and therefore he reports:

1st. That the note in controversy was not executed by said A. J. Cosby deceased.

2d. That the carriage and harness now in controversy, and which were taken into custody by the receiver in this cause, was not a portion of the same property which was conveyed by the said A. J. Cosby to Andrew Jenkins, trustee, by the deed filed with the bill.

This report was excepted to by the plaintiff.

The cause came on to be finally heard on the 27th of February 1872, when the court overruled the plaintiffs exception to the commissioner's report, and confirmed the same, and after authorizing the defendant to check for the sum of \$74.47 deposited in bank by the receiver as the proceeds of the sale of the horse, dismissed the bill with costs. And from this decree Eacho applied to this court for an appeal; which was allowed.

Excluding the testimony of Eacho and Jenkins, there was little evidence of the indebtedness of Cosby to Eacho, except that furnished by the deed of trust. That states the trust to be—"to secure to Edward D. Eacho, of the city of Richmond, the payment of the sum of one thousand dollars due by note drawn by the said Andrew J. Cosby, and payable eleven months
 120 *after date, and negotiable and payable at the Planters National Bank of Richmond." The deed was admitted to record on the 23d of April 1869 upon the acknowledgment of Cosby in the office. Jenkins proves his preparation of the deed and note at the request of Cosby, who stated that he owed Mr. Eacho some money, and that he had purchased a new carriage, and Mr. Eacho was going to let him have some more money to pay for it, upon condition that he Cosby was to execute a deed of trust upon that and some other property for the sum of one thousand dollars.

The most of the other testimony related to the identity of the carriage taken by the officer of the court with that mentioned in the deed; and as to that the evidence was unsatisfactory. It seemed to be strongly probable, if not certain, that the carriage in

the possession of the officer was purchased in May 1868.

H. A. & J. S. Wise, for the appellant.
 Guy & Gilliam and Spilman, for the appellee.

Staples, J. The first question which is presented at the threshold is the objection to the jurisdiction of this court. It is insisted that the only matter in controversy is in reference to the property in dispute, which is of less value than five hundred dollars. But this is an entire misconception. It is true that the main object of the bill is to recover the property embraced in the deed of trust, and to subject the same to the appellant's lien; but the claim asserted by him amounts to six hundred and forty dollars. The justice of this claim is controverted by the appellee, and was the subject of adjudication in the Chancery court. That

court was of opinion the claim was
 121 not sustained *by the evidence, and entered a decree dismissing the bill, without passing upon the questions arising in respect to the property. If we affirm that decree, the appellant is forever barred of recovering his debt. If we reverse upon the merits, a decree will be rendered in his favor for the amount claimed by him, or for such further inquiry as may ultimately lead to such a decree. So that in fact the principal matter in controversy here does not relate to the identity of the property, but to the validity of a claim greatly exceeding the amount necessary to the jurisdiction of this court. It would be difficult to imagine a case coming more directly within the principle governing the jurisdiction of this court.

The next ground of objection is, that the appellant has a plain and adequate remedy at law. The bill is filed by a creditor in a deed of trust against the personal representative of the debtor or grantor in the deed. The bill avers that the trustee attempted to take possession of the property with a view to a sale, but was forcibly prevented from so doing by the appellee and others combining with her; that the appellee is insolvent; that her securities upon her official bond are not responsible for the torts of the appellee in illegally detaining the trust property; and that strong reasons exist for believing that she will elude or so dispose of it as to place it beyond the reach of the process of the court. None of these allegations are denied in the answer, though the justice of the debt is strongly controverted. They may, therefore, be taken as true for all the purposes of the question of equity jurisdiction. These facts taken in connection with the loss or absence of the note referred to in the bill, I am inclined to think would have justified the jurisdiction of equity,
 122 if nothing else had occurred. *How-

ever this may be, it appears that no objection was made in the court below upon this ground. In the progress of the cause an order was entered by consent for the sale of a part of the property, and another part was taken by the appellee under an agreement to account for its value in the event of

an adverse decision; so that it is simply impossible for the appellant or the trustee now to maintain an action for the property. In this state of things to dismiss the bill for the want of jurisdiction, would be to deny the appellant redress in any form. This court having control of the fund, ought to go on and administer it according to the rights of the parties. Upon this point *Henly's adm'r v. Perkins*, 6 Gratt. 615, is a direct authority.

The next question is as to the correctness of the decree upon its merits. The learned judge of the Chancery court was of opinion, that "as the deed of trust refers to a negotiable note as the direct evidence of the debt, in order to complete that evidence it is incumbent upon the appellant to show that the note was not only executed by Cosby but delivered also; for although the deed of trust was recorded, the transaction was not consummated and complete until the note was delivered." The learned judge is certainly correct in stating that delivery is essential to the validity of a negotiable note. But the question of delivery is only important when the action is on the note, or it is sought to charge one who is only liable by reason of being a party to the instrument. When a debt exists independent of the note, the action is often upon the original consideration. If one is indebted to another for goods sold or money loaned, and executes therefor an instrument which is invalid, or which is never delivered, I imagine there can be no question as to the creditor's right

of recovery upon the original cause of
123 *action. If in such case the debtor executes a deed of trust or mortgage to secure the debt, and in the deed refers to a note, it will scarce be maintained that the deed is a nullity because there is a failure, fraudulently or negligently, to execute and deliver the note. The true inquiry is does the debt exist? is it due? When this is satisfactorily ascertained the form of the security is important so far only as it affects the remedy. It is not essential there shall be any bond or note whatever. The deed of trust or mortgage will be valid without any other evidence of the debt than is furnished by its own recitals. As was said by Mr. Justice Story in *Flagg v. Mann*, 2 Sum. R. 94, the true question is whether there is still a debt subsisting between the parties capable of being enforced in any way in rem or in personam. 2 Nash on Real Prop. 48, 49.

In this case the non-delivery of the note is a material circumstance proper to be considered in determining whether a debt is due. It may more or less tend to throw discredit upon the appellant's claim; but it cannot invalidate the deed if that claim be a just one. Whether it is or not is the only subject of inquiry. Upon this point the learned judge was of opinion that the deed of trust is not conclusive: that it is not even a direct, distinct affirmation that the sum named in the deed is due. Let this be conceded. It is certainly an acknowledgment of an existing indebtedness. Such an acknowledgment would furnish sufficient evi-

dence of the loan, in the absence of any countervailing or explanatory evidence. It must be admitted that such evidence does exist in this case. Whilst, however, it was not sufficient to justify a dismissal of the bill, it was sufficient to throw upon the appellant the onus of showing the amount of his advancements to or for

124 the appellee's intestate. The *cause was not ready for a hearing when the decree was rendered in the then existing condition of the pleadings and evidence. The inquiry directed by the chancellor was in reference to the delivery of the note. It is apparent that he was of opinion, as was the commissioner, that proof of such delivery was essential to the maintenance of the appellant's claim. This form of inquiry was well calculated to direct the attention of the parties from the real issue and proper subject of investigation. As before stated, that issue is not whether the note was actually delivered, but whether there was an actual loan of money, and the amount of such loan.

For these reasons I think the decree of the Chancery court must be reversed, and the cause remanded for further proceedings in conformity with these views. In that court the case must be recommitted to a commissioner, with instructions to state such legal testimony as the parties adduce, to require any discovery, and the production of any books and papers pertinent to the issue which either party may require of the other, and finally to report all the facts and circumstances bearing upon the question of the alleged loan.

Before concluding this opinion it is proper to notice the objection made to the evidence of Jenkins, the trustee. The commissioner was of opinion that he is incompetent, and refused to consider his testimony. The chancellor in his opinion says Jenkins' evidence is perhaps admissible. I must confess my inability to understand the grounds of this supposed incompetency. The statute declares "that no trustee or executor or other fiduciary shall be incompetent in any case by reason of being a party thereto, or of his being liable to costs in respect thereof, but

if liable to costs, he shall not be com-
125 petent unless some person *undertake to pay the same." The trustee was a party plaintiff in the original bill; but it is apparent he was a mere formal party, and the suit was substantially that of the creditor or cestui que trust. The name of the trustee was omitted in the amended bill filed by the leave of the court, and no longer appears in the proceedings as a party. Under these circumstances I do not think he is responsible for costs. The only remaining objection that can be urged is, that the trustee is entitled to commissioners. By the express provisions of the deed he only receives these upon a sale made by him. This cannot be done now or hereafter inasmuch as the property has been sold under the orders of the Chancery court, or by agreement of the parties placed beyond any control of the trustee. If therefore the trustee's

right to commissions creates a valid objection to his competency (as to which no opinion is expressed), that objection has been removed by the circumstances just adverted to. I cannot perceive therefore that the trustee has even a contingent interest in the result.

In regard to the identity of the property I do not deem it proper or necessary to express any opinion, as the case is to be remanded and the parties may produce additional evidence upon the question.

The other judges concurred in the opinion of Staples, J.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the decree of the Chancery court is erroneous; wherefore it is adjudged, ordered and decreed, that the same be reversed and annulled, and that the appellee, out of 126 the assets in *her hands to be administered, do pay to the appellant his costs by him expended in the prosecution of his appeal aforesaid here. And the court being of opinion that further investigation is essential to the justice of the case, doth order and direct that the report of commissioner Evans be recommitted to him, with instructions to inquire and report what sum or sums of money, if any, were advanced by the appellant to the appellee's intestate prior to or subsequent to the deed of the 25th of March 1869, and intended to be secured thereby, and the dates of such advancements respectively, and also any credits to which the appellee is entitled. To that end the commissioner shall take any legal evidence adduced before him, shall examine either of the parties on oath, if desired by the other, and require the production of any documents or papers pertinent to the issue. The said commissioner is also required to report specially any facts and circumstances which he may deem proper, or which may be required by either of the parties. The said commissioner is also authorized if desired, to make the like inquiries, and report in regard to the identity of the property, which is the subject of controversy, and claimed to be included in the said deed of trust.

Decree reversed.

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*Mott v. Carter's Adm'r.

March Term, 1875, Richmond.

1. **Contract for Sale of Land—Confederate Money.**—A Confederate contract for the sale and purchase of land in May 1863 upon a credit of one, two and three years, in which it was held that the value of the land at the time of the contract was the most just measure of recovery; and one-third of the purchase money having been paid, the vendee must pay two-thirds of the value of the land at the time of the sale, with interest.

2. **Suit by Administrator—Heirs as Parties.*—Bill by**

***Heirs as Parties.**—In *Taylor v. Spindle*, 2 Gratt. 45, it was held that in a suit by a judgment creditor to subject lands in the hands of a *bona fide* purchaser from the vendor, if pending the suit the purchaser dies, his heirs are necessary parties. See *Gallatin Land Co. v. Davis*, 44 W. Va. 115, 28 S. E. Rep. 749.

the administrator of the vendor against the vendee, to subject the land to pay the balance of the purchase money. Vendee answers, and insists that the heirs of the vendor should be made parties; but the court below, without requiring this to be done, makes a decree for the sale of the land. Upon appeal this court amends the decree, and directs that the heirs shall be made parties before a sale of the land, and then affirms it with costs to the appellee.

In May 1863 Wm. S. Carter sold to Charles D. Mott a tract of land in the county of Pittsylvania, including one hundred and thirty-four acres, for which Mott executed to him his three bonds, dated the 25th of May 1863, each for \$700, payable in one, two and three years, in current money of Virginia. Mott was put into possession of the land, and paid off the first bond within the year. No deed seems to have been made by Carter to Mott conveying the land to Mott, Wm. S. Carter died in 1870, and Robert W. Carter qualified as his administrator; and in April 1872 he filed his bill in the Circuit court of Pittsylvania county, against Mott, to subject the land for the payment of the unpaid purchase money. He insisted that though it may have been a contract 128 with reference to Confederate *States treasury notes as the standard of value, the land was at the time of the sale worth from four to five dollars in gold or its equivalent, and would at any time since the sale have sold for more than that, upon reasonable time. And therefore he insisted that the fair value of the land was the just measure of recovery.

Mott answered the bill, admitting his purchase of the tract of land, which he said contained one hundred and thirty-three or four acres, at the price of \$21 in Confederate money, and payable as above stated. He says he is informed and believes, and therefore charges that at the time of the sale by Wm. S. Carter to him, he had no title to said land, and he calls for proof on that subject. And he insists that the land shall not be sold without making the heirs of the intestate parties to the suit. He denies that at the time of the sale the land was worth four or five dollars in gold or silver, or that upon reasonable time it would have sold for more at any period since said purchase. And he protests strongly against the claim to the value of the land as the just measure of compensation, instead of the value of the Confederate money when it fell due.

A number of witnesses were examined as to the value of the land at the time of the sale, and the lowest valuation was three dollars per acre, and the highest was six; though this was as to its present value, which it was thought was enhanced by the running of the railroad from Lynchburg to Danville, within a mile or two from it.

The cause came on to be heard on the 6th of June 1872, when the court held that the contract for the sale of the land was a Confederate contract; but that the true and fair value of the land was the most just measure of recovery for the balance of the purchase

money, the defendant having paid one-third thereof. And *being of opinion from the testimony, that the land was worth five dollars per acre, decreed that the defendant C. D. Mott might at his election discharge the other two bonds for the second and last payments, at the rate of five dollars per acre; and that unless he should in writing, to be filed with the clerk of the court within thirty days from the date of the decree, elect to take the land on these terms, by paying the plaintiff in cash, or on such terms as he and the plaintiff might agree on, the amount ascertained as due upon the basis above established, that Robert W. Carter, who was appointed a commissioner for the purpose, should after advertising, &c., sell the said land at public auction on the terms of one-third of the purchase money for cash, one-third in twelve months, and the residue in two years, &c. And thereupon Mott applied to this court for an appeal from the decree; which was allowed.

Grattan, for the appellant.

Jones & Bouldin and Wm. M. Tredway Jr., for the appellee.

Staples, J. delivered the opinion of the court.

The court is of opinion that the contract between William L. Carter and the appellant Charles D. Mott, for the sale of the land in the bill mentioned, was entered into with reference to Confederate treasury notes as a standard of value; and that the fair value of said land at the date of the contract furnishes the most just measure of recovery in this case.

The court is further of opinion that the Circuit court did not err in fixing said value at five dollars per acre. The Circuit 130 court, however, instead of leaving *the amount of plaintiff's recovery to be settled by the parties, ought to have determined the same itself, or through the agency of one of its commissioners. That amount is easily ascertained by a simple calculation. The tract being estimated at five dollars per acre, the sum total of the purchase money would be six hundred and seventy dollars. The vendee having paid a sum equal to one-third, there is still due the sum of four hundred and forty-six dollars and two-thirds cents, to which the plaintiff is entitled, with interest thereon from the 1st day of January 1863.

The court is further of opinion that in a suit by the personal representative of the vendor against the vendee, to enforce the lien for unpaid purchase money, if the legal title has not been made, the heirs of the vendor ought to be made parties before a decree is rendered for the sale of the property. In this case it does not appear that a conveyance has been made to the vendee. In his answer the objection was explicitly made for the want of proper parties; but the objection was disregarded. In thus proceeding to direct a sale of the land before the heirs of the vendor were brought before the court,

the Circuit court erred. Inasmuch, however, as only the naked legal title is outstanding in said heirs, and there is no pretense of any obstacle or difficulty in obtaining said title, the decree of the Circuit court may be so amended as to require that said heirs by some proper proceeding shall be brought before the court before any sale is made under said decree. As thus amended the decree is affirmed, with costs to the appellee, he being the party substantially prevailing in all the matters of controversy before this court.

Decree amended and affirmed.

131 *Farmers Bank of Va. v. Gunnell's Adm'x.

March Term, 1875, Richmond.

1. *Negotiable Paper—Notice of Dishonor—Due Diligence.*—To fix liability upon the endorser of a negotiable note, the holder must use due diligence in giving him notice of dishonor; and where the holder and endorser reside in different localities, and at the time of the dishonor, and for months before and afterwards, the usual and ordinary intercourse by mail between the two is intercepted by a state of war, the holder does not prove due diligence, by proving simply, that he deposited in his post office, on the day of the dishonor of the note, a notice of dishonor addressed to the endorser at his place of residence.

2. *Same—Same—Same—Interruption of Intercourse by War.*—A state of war which intercepts intercourse by the ordinary and usual course of mail between the holder and endorser of a note, excuses the holder from giving notice of dishonor so long as such interruption continues; but diligence on the part of the holder requires that he should forward notice to the endorser as soon as the interruption ceases.

3. *Same—Same—Same—Same.*—That the note was made endorsed and discounted in the city of Alexandria, and that at that time that city was in the firm occupation of the troops of the United States, and the endorser after endorsing the note and before its maturity returned to his home within the lines held by the forces of the Confederate States, and remained there until May 1862, nine months after the note fell due, does not excuse the holder from giving the endorser notice of protest and non-payment of the note.

4. *Same—Same—Same—Same.*—That at the date of the protest of a note in August 1861, up to the 10th of April 1862, the city and a portion of the county of Alexandria, where the note was discounted, was in possession of the forces of the United States, and the endorser was within the lines of the forces of the Confederate States, and that the bank, the holder of the note at Alexandria, on the 10th of April ceased its banking operations by resolutions *of its board of directors, and turned all its assets over into the hands, management and custody of three agents; and the bank never afterwards resumed its business, is no excuse for the failure to give notice of protest and non-payment.

5. For other insufficient excuses, see the opinion of the court delivered by MONROE, P.

6. The ordinance of the Virginia convention passed June 24th, 1861, which provides that in cases specified, the parties to negotiable notes, bills and checks payable in such cities and towns (as before specified), shall remain bound after the maturity of such notes, &c., without demand, protest or notice, as if the requirements of the law in that behalf had been complied with, is as to notes made and discounted before its passage, in violation of that provision of the constitution of the United States, which declares that no state shall pass any "law impairing the obligations of contracts."

The case is fully stated in the opinion of the court delivered by Moncure, P.

F. L. Smith and Wattles, for the appellant.

Beach, for the appellee.

Moncure, P., delivered the opinion of the court.

This is a supersedeas to a judgment of the Circuit court of Fairfax county, rendered in an action of debt, brought by the president, directors and company of the Farmers Bank of Virginia against Eliza J. Gunnell administratrix of Joshua C. Gunnell, on a note for fifteen hundred dollars, made by John M. Johnson, dated Alexandria, May 31, 1861, payable sixty days after date, to the order of Alfred Moss, negotiable nad payable at the branch of the Farmers Bank of Virginia, at Alexandria, Virginia, endorsed, first by the said Moss, and then by the said Joshua C. Gunnell by the name of J. C. Gunnell, and discounted by the plaintiffs at their said branch, for the accommodation of the maker. The action was brought

133 in October *1870. Issue was joined on the plea of nil debit, which was tried by a jury. And on the 9th day of June 1871, verdict and judgment were rendered in favor of the defendant. A bill of exceptions was taken by the plaintiffs to certain rulings of the court in the progress of the trial, and was made a part of the record. The plaintiffs applied to a judge of this court for a supersedeas, which was accordingly awarded.

The questions arising in the case are, whether due notice of the dishonor of the note was given, by the plaintiffs, the holders, to the last endorser, Joshua C. Gunnell, or his administratrix, the defendant? or, if not, whether a sufficient legal excuse for not giving such notice was shown in the case? The plaintiffs maintain the affirmative, and the defendant maintains the negative of these two propositions. They are presented by the bill of exceptions, which sets out the facts proved on the trial, and the instructions asked for by the parties respectively, and refused or given by the court. Such of the facts as appear to be material are as follows:

The plaintiffs, to maintain the issue on their part, introduced the promissory note, with the endorsements thereon as aforesaid; also the notarial protest of said note by a notary public in due form; in the certificate of which protest it was stated, that on the same day on which the notary made present-

ment, demand of payment and protest of the notes, to-wit: on the second day of August 1861, he deposited in the post-office at Alexandria notice of protest addressed to each endorser, informing him that he was held liable for the payment of said note, one of which notices was directed to "J. C. Gunnell, Fairfax C. House, Fairfax county, Va." Also proved, that at the time of said endorsement and afterwards, the place 134 of residence *and post-office of Joshua C. Gunnell, was at Fairfax court-house, Virginia.

To maintain the issue on the part of the defendant, she proved, that the county and city of Alexandria, Virginia, were, on the 24th day of May 1861, taken possession of by the military forces of the United States, and was so held by them during the war, and that Fairfax court-house was in the possession of the military force of the Confederate States; that this state of things continued to exist up to, and after the maturity and protest of said note; that all regular postal communication between said points ceased from the 24th of May 1861, and until after the close of the war in 1865.

The plaintiffs thereupon proved, that Joshua C. Gunnell left Fairfax court-house on the 14th day of October 1861, and when the Confederate forces retreated from Fairfax court-house he went back with them; that he returned to Fairfax court-house about the 25th of December 1861, and remained there one day; that when the Confederate army fell back from Centreville towards Richmond, in the month of March 1862, the said Gunnell went with them; and remained within the Confederate lines till the month of July 1862, when he returned to Fairfax court-house.

The plaintiffs also proved, that the said Gunnell voted for the ordinance of secession; and that he was seen by several parties in Alexandria in the fall of 1863, remaining there continuously for one week on one occasion; and that he was taken from Fairfax court-house by the United States forces (but whether it was upon this occasion was not shown), and that whilst there he was at the post-office and had an interview with the post-master. It was further proved by the said post-master, that he knew the said 135 Gunnell well, *and that said post-master filled that office from the 1st of

June 1861, until some time after the close of the war; that in 1862, he established a military mail, exclusively for the convenience of the officers and soldiers of the Federal army, and exclusively under military control, from Alexandria to Fairfax court-house, by which he sent all letters addressed to all soldiers, and to such civilians as he knew; that it was the custom and usage of his office, after the expiration of six weeks, to forward to the dead letter office at Washington, all communications remaining in his office, and which could not be forwarded to their address by reason of military operations; that it was the custom and rule of the general post-office department at Washington city, to return to the writers of the

same, all letters which the officers of said department thought contained anything valuable.

The plaintiffs also proved by the cashier of the branch of the said Farmers Bank of Virginia, at Alexandria, that he was in the habit, and that it was his duty, of receiving and opening all letters of said bank, and that no letter containing the notice of protest of said note, addressed to the said Alfred Moss and Joshua C. Gunnell, was ever received by him from the dead letter office; that he ceased to be cashier of said bank on the 10th day of April 1862; and by a resolution of the board of directors of said bank, on that date the said branch bank ceased all further banking operations, and all its assets were turned over to three persons to take charge of; and that thereafter, said branch bank never resumed its banking operations.

The plaintiffs then read as evidence to the jury a check drawn by Joshua C. Gunnell, dated Alexandria, July 5th, 1862, for \$750, on the branch of the Farmers Bank of Virginia at Alexandria, payable to John M. Johnson or order, and endorsed "J. M. Johnson;" which check was presented at the bank and paid. The plaintiffs further proved that in March 1862 Joshua C. Gunnell said that he was under heavy liability for John M. Johnson, and for another large debt for other parties, the payment of which would ruin him; and that in order to provide against which he had executed a deed of trust, dated March 13th, 1862, a copy of which was read in evidence to the jury, and is inserted in the bill of exceptions.

And thereupon the plaintiffs asked the court to give to the jury five several instructions, which the court refused to give; but gave another in lieu of the second. To which action of the court the plaintiffs excepted. The defendant then moved the court to give to the jury two several instructions, which the court accordingly gave; and the plaintiffs again excepted.

We will notice these several instructions in the order in which they were offered and refused or given; and express, in the same order, an opinion on the questions involved therein; and first, as to the five instructions asked for by the plaintiffs, and the one given by the court in lieu of the second.

"No. 1. If the jury shall believe from the evidence, that the defendant endorsed the note sued on, and the same was presented at its maturity, at the office of discount and deposit of the Farmers Bank of Virginia at Alexandria for payment, and the same was not paid, and that said note was then and there duly protested, and that notice of said non-payment and protest was deposited in the post-office in Alexandria, on the 2d day of August 1861, addressed to the defendant at Fairfax court-house, Virginia, and that the said court-house was his place of residence, then they must find for the plaintiffs."

137 *The principle embodied in this instruction is believed to be true as a

general principle of commercial law, according to what is said in the petition for a supersedeas in this case: "that, when the endorser of a note has his domicile and post-office at a distance from the bank at which the note is payable, notice of non-payment and protest duly mailed, and directed to the endorser at his regular post-office, fixes absolutely his liability. It is not necessary that the holder should show that the notice of protest ever reached the endorser; and under the rule above stated, it is, indeed, wholly immaterial whether he ever received it or not. The posting the letter containing the notice properly directed, is all that it is obligatory on the holder to do to render the endorser liable." This general principle would have applied to the case, if the usual and regular mail intercourse between Alexandria and Fairfax court-house had not been obstructed by war or otherwise when the note in question was dishonored. But it was obstructed by war at that time, and continued to be so obstructed until the end of the war, in 1865. The principle, therefore, does not apply to the case. The posting of a letter properly directed, containing the notice, is generally held to be a sufficient service of the notice, because the mail generally affords the quickest and best medium of communication between parties. It may reasonably be presumed, and the law does presume, generally, that such a letter is duly received. But no such presumption can exist when flagrant war (as in this case) obstructs the mail communication between the places of the parties who have to give and receive the notice. To deposit the notice of non-payment and protest in the post-office at Alexandria, addressed to the defendant at Fairfax court-house, as stated in the instruction, was, in itself, under 138 *the circumstances of the case, no more due service of such notice, than would have been to deposit it anywhere else in the city of Alexandria. To constitute sufficient proof of due service of such notice, it was necessary to show that it was given in due time, after the removal of the impediment of war which existed at the time of the dishonor of the note. "It must always be remembered that the excuse of impossibility, on whatever facts it may rest, continues only so long as the impossibility continues; that is, if a party bound to give notice gives none, because he cannot give it at the regular time, but can give notice at a subsequent period, within which the notice may possibly be of use, he is bound to give it then. In other words, the excuse of an impossibility which is not permanent, is only an excuse for a delay until the impossibility is removed." 1 Parsons on Notes and Bills, p. 652. See also *Id.* 522; and *Hopkirk v. Page*, 2 Brock. R. 20, and the notes to that case in the leading cases upon Bills of Exchange and Promissory Notes by Redfield and Bigelow, pp. 430-446. According to these principles, it was held by this court in *Billgerry v. Branch & Sons*, 19 Gratt. 393, that where notice of demand and refusal to pay was put into the post-

office at New Orleans, on the 23d of October 1863, directed to the endorsers at Petersburg, Va., the war being then in progress, and there being no mail communication between New Orleans and Petersburg, the notice was insufficient.

We are therefore of opinion that the Circuit court did not err in refusing to give the plaintiff's instruction No. 1.

"2d. If the jury shall believe from the evidence that, although war flagrant existed between the United States and the so-called Confederate States, the defendant received the said notice of protest and non-payment, *deposited in the post-office at Alexandria, and addressed to him at Fairfax court-house, then they must find for the plaintiff."

This instruction is defective; for the reason, if no other, that it affirms the liability of the defendant, that without regard to the time when he may have received the notice, or whether he received it in due time or not, even though he may not have received it for several years after the termination of the war. There was no evidence before the jury which would have warranted them in finding that the defendant received such notice during the war, even if it could lawfully have been given during the war; a question which is not necessary to be decided in this case. We therefore think the Circuit court did not err in refusing to give the plaintiff's second instruction.

But the court in lieu of it gave the following: If the jury shall believe from the evidence that though war flagrant existed between the United States and the so-called Confederate States, the notice of protest deposited in the post-office at Alexandria on the 2d day of August 1861, addressed to J. C. Gunnell at Fairfax court-house, was actually received by him, then they must find for the plaintiff, if such notice was received by him as soon as it would have been received had it been transmitted by ordinary course of mail, after the resumption of the usual mail communication.

This instruction, whether objectionable or not, at all events did not prejudice the plaintiffs. It removed the defect in the plaintiffs' second instruction, by fixing the time at or before which the notice should have been received to be effectual. The notice would certainly have been effectual had it been transmitted by ordinary course of mail after the resumption of the usual mail communication; and the court 140 by this instruction *told the jury that the notice was effectual if received by the defendant as soon as it would have been (or, in other words, could have been) received, had it been so transmitted.

"3d. If the jury shall believe from the evidence, that the city of Alexandria and a portion of the county of Fairfax, was, at the date of the protest of said note up to the 10th day of April 1862, in the possession of the forces of the United States; and that the defendant was, at and between said dates, all the time within the lines of

the forces of the said Confederate States; and that said branch bank at Alexandria, on the 10th day of April 1862, ceased all its banking operations by resolution of its board of directors, and turned all its assets over into the hands, management and custody of three agents; and that said branch bank never afterwards resumed its business; then, in that case, the plaintiff is excused from giving notice of said protest and non-payment."

The plaintiffs were not excused from giving due notice of the dishonor of the note to the endorser, by the resolution of the board of directors of the said branch bank at Alexandria, on the 10th day of April 1862, to cease all further banking operations and turn over its assets to three persons to take charge of the same; nor by ceasing such operations, and turning over the said assets accordingly; nor by never thereafter resuming said operations. The corporation of the bank and its capacity of suing and being sued still continued to exist, notwithstanding the said resolution or the acts done in pursuance thereof as aforesaid; and the plaintiffs continued to be bound to give due notice of the dishonor of the note, in order to fix the liability of the endorsers thereon. The liability of an endorser is conditional, and the 141 condition *must be performed to make the liability absolute. The condition is, that due notice of dishonor must be given to the endorser if it be possible, as was the case here. If it was competent for the plaintiffs as aforesaid to turn all the assets of their branch bank at Alexandria over into the hands, management and custody of three agents, to be administered and wound up by them instead of by a board of directors; then those agents, instead of such a board, would represent the bank in regard to giving notice when necessary and due notice of the dishonor in this case might have been given through their agency. They were certainly not strangers who were incapable of giving such notice, in the meaning of the cases referred to by the counsel of the plaintiffs. *Chanoine v. Fowler*, 3 Wend. R. 173; 1 Leading Cases upon Bills of Exchange and Promissory Notes by Redfield & Bigelow, p. 383, and the cases cited in the notes.

We are therefore of opinion that the Circuit court did not err in refusing to give the said third instruction asked for by the plaintiffs.

"4th. If the jury shall believe from the evidence, that at the date and maturity of the said note, Alexandria county and city were in the occupation of the forces of the United States; and that Fairfax court-house was in the possession of the forces of the Confederate States; and that the defendant was a resident at Fairfax court-house; and that he voted for the ordinance withdrawing the state of Virginia from the United States; and that when the forces of the Confederate States fell back from Fairfax court-house to Centreville, and afterwards from Centreville towards Richmond, the said defendant fell

back with them, and remained within the Confederate lines until May 1862; then that the plaintiff is excused from giving
142 *any other or further notice of protest to the defendant."

We are clearly of opinion that the facts set out in said fourth instruction asked for by the plaintiffs did not excuse them from giving any other or further notice of protest to the defendant, and therefore that the Circuit court did not err in refusing to give that instruction.

"5th. If the jury shall believe from the evidence that the note sued on was made, indorsed and discounted in the city of Alexandria, and that at that time the city of Alexandria was in the firm occupation of the troops of the United States, and the defendant, after endorsing the said note and before its maturity, went within the lines held and possessed by the forces of the Confederate States, and remained therein until May 1862; then the plaintiff is excused from giving the defendant notice of protest and non-payment of said note."

We think the answer given to this instruction in the brief of the defendant's counsel is conclusive. "There is no evidence in the case to show where the note was endorsed; and even if it had been shown to have been endorsed in Alexandria the subsequent return of the endorser to his place of residence at Fairfax court-house, was no 'going within the Confederate lines,' in a sense to impose upon him any disability, or to relieve the plaintiff of any duty. After endorsing the note, the man certainly had the right to go home, without prejudice to his rights under the endorsement. The case in 9 Wheaton 598, *McGruder v. The Bank of Washington*, cited in the petition for writ of error, was the case of an endorser who left his place of residence after the endorsement; the present is the case of an indorser, who went to, and remained
143 at, his place of residence, *till after the note was dishonored." We therefore think the court did not err in refusing to give the plaintiff's fifth instruction.

As to the two instructions asked for by the defendant and given by the court; they are numbered 7 and 8, and are as follows: "No. 7. To fix liability upon the endorser, the holder must use diligence in giving him notice of dishonor; and where the holder and endorser reside in different localities, and at the time of dishonor, and for months before and afterwards, the usual and ordinary intercourse by mail between the two is intercepted by a state of war, the holder does not prove due diligence, by proving, simply, that he deposited in his post-office, on the day of the dishonor, a notice of dishonor, addressed to the endorser."

We think that the law is correctly stated in this instruction, and that it does not contain an abstract proposition, as supposed in the petition.

"8th. A state of war which intercepts intercourse by the ordinary and usual course of mail between holder and endorser, excuses the holder from giving notice of dishonor,

so long as such interruption continues; but due diligence on the part of the holder requires that he should forward notice to the endorser as soon as the interruption ceases."

The same may be said of this instruction that was said of "No. 7." Its correctness is shown by authorities already cited; and especially by the case of *Billgerry v. Branch & Sons*, 19 Gratt. 393.

We have noticed all the questions raised in this case in the court below, and there remains but one question to be noticed in the case; which was presented, for the first time, in the petition for a supersedeas.

That question is, "that under the ordinance of the *Virginia convention,
144 passed June 24th, 1861, the said Joshua C. Gunnell remained bound as endorser on said note, although he may not have received notice of the protest of said note."

That ordinance is in these words: "When any city or town wherein a bank is located, shall be occupied, invested, or access thereto interrupted by the enemy, or when there is no mail therefrom to the place or places to which notice should be addressed, the parties to negotiable notes, bills and checks payable in such city or town, shall remain bound after the maturity of such notes, bills and checks, without demand, protest or notice, as if the requirements of the law in that behalf had been complied with."

Without considering whether the question as to the effect of this ordinance is properly raised in the case, we are of opinion that it is conclusively answered by the provision of the constitution of the United States, which declares, that no state shall pass any "law impairing the obligation of contracts." And the prohibition extends as well to an ordinance of a convention assembled to form or revise a state constitution, as to an act of an ordinary state legislature. That due notice of the dishonor of a negotiable note should be given by the holder to the endorser as a condition of the liability of the latter, is one of the terms of the contract between the parties.

Upon the whole, we are of opinion that there is no error in the judgment of the Circuit court, and that it ought to be affirmed.

Judgment affirmed.

145 *Booker v. Kirkpatrick.

March Term, 1876, Richmond.

B and H were partners carrying on business in the state of Missouri, H living there and attending to the business, and B living in Virginia. In March 1861 they hired of K, several slaves to work in their factory, from that time to the end of the year, and they executed their three notes to K for the amount of the hires; and the slaves continued to work during the year in the factory. The war between the U S and the C S commenced the 17th of April 1861 and continued until 1865. **Held:**

1. **Partners Living—Different States—Effect of War—Dissolution.**—B living in Virginia, a part of the Confederate States, and H living in Missouri, a

part of the United States, their partnership was dissolved by the war.

2. ~~Same—Same—Same—Personal Liability for Partnership Debts.~~—But both partners are liable to K on their notes for the hire of the slaves, notwithstanding the dissolution of the partnership.

3. ~~Negotiable Notes—Based on Slave Services—Failure of Consideration.~~—During the year 1861 slavery was recognized as existing both by the United States and Missouri, and slaves owed no allegiance to either; and there could be no demand for their services by the United States or the state, which could occasion a failure in part of the consideration of the notes.

The case is fully stated in the opinion of the court delivered by Judge Christian.

Kirkpatrick & Kean, for the appellant.

Mosby & Brown, for the appellee.

Christian, J. delivered the opinion of the court.

This is a writ of error to a judgment of the Circuit court of Lynchburg.

146 *The suit was an action of debt brought by John Kirkpatrick, the defendant in error, against John M. Booker and E. S. Halsey, partners under the style of Booker & Halsey, to recover the balance due on three notes executed by the latter and payable to the former, in the aggregate amounting to the sum of \$1310, given for the hires of certain slaves for the period between 15th March 1861, and 31st December 1861.

At the June term 1869 both the defendants appeared and pleaded nil debit; and the case was continued from time to time, until the June term 1871, when the defendant John M. Booker tendered a special plea, in the following words: "And the said defendant, J. M. Booker, for further and other plea in this behalf, says, that at the time of the making of the several promissory notes in the declaration mentioned, the said defendant and his co-defendant E. S. Halsey, were co-partners under the style of Booker & Halsey, engaged in the manufacture of tobacco at or near Brunswick, in the state of Missouri; which business was conducted exclusively in the state of Missouri, and by the said E. S. Halsey, who was at that time, and long afterwards, to wit: for two years, a resident of the state of Missouri: that this defendant was at the time of making said notes, and ever since has been, and still is, a resident of the city of Lynchburg, in the state of Virginia, and remained there continually from the date of the making said notes, till and after 1st day of January 1862: that the said notes in the said declaration mentioned were given by said Halsey in the name of said firm, for the following consideration and none other, to wit: the said note for \$145, was given for the hire of a negro slave (naming him), and the said note for \$730, was given for the hire of six negro slaves (naming them), and the

147 said note of \$435, was given *for the hire of three negro slaves (naming them), which said slaves were the property of the plaintiff; and that the said hiring was from the 15th day of March 1861 (the

date of said notes) for the balance of the year 1861; and that the said slaves were so hired to be employed in the said business of manufacturing tobacco at or near Brunswick, in the state of Missouri, and were there so employed for the balance of the year 1861. And the said defendant further says, that after the making of the said contract of hiring, and the making of the said notes in the declaration mentioned, to wit: on the 17th April 1861 a state of war arose, and was continued and prosecuted during all the rest of the year 1861, and thereafter between the government of the United States of America to which the state of Missouri adhered and belonged, and the government of the Confederate States of America, to which the state of Virginia adhered and belonged, and during the portion of the year 1861, from the 17th April 1861 to the 1st day of January 1862, the city of Lynchburg, and the residence of this defendant and this defendant himself, were continuously within the limits and jurisdiction of the said Confederate States; and the town of Brunswick, and the residence and persons of the said Halsey, and of the said plaintiff and of the said slaves, and the business aforesaid, were continuously within the limits and actual jurisdiction of the said United States; whereby the said copartnership between the defendant and said Halsey was dissolved, as of the 17th April 1861, and the capacity and right of this defendant to use and enjoy the services of said slaves were wholly lost to this defendant for the said period, to wit: from the said 17th day of April 1861 to the end of that year. And so the said defendant says that as to him the consideration of

148 *said notes to the extent aforesaid has wholly failed; whereby he has suffered great damage, to wit: \$1085, as of 25th March 1861. And this he is ready to verify. Wherefore the said defendant prays that the said damages be allowed him and set-off against the said claim of the said plaintiff in his said declaration mentioned."

This plea was rejected by the Circuit court, and a judgment entered against the defendant for the amount due upon the notes as claimed in the declaration.

The court is of opinion that there was no error in the judgment of the said Circuit court, rejecting said plea, and entering the judgment as aforesaid.

The plea tendered, stripped of its verbiage, was in substance, that during the period of the contract of hire, from 17th April 1861 to the 25th December 1861, war was flagrant between the United States, of which the state of Missouri was a part, and the Confederate States, of which Virginia was a part; that Kirkpatrick the plaintiff and Halsey one of the defendants and one of the partners, and the slaves hired by them, were in the state of Missouri and remained there; that Booker was in Virginia and did not change his residence; that the breaking out of the war dissolved the partnership between Booker and Halsey; and that therefore as to Booker the consid-

eration of the notes for the hires of these slaves from 17th April 1861 to the end of the hiring, 25th December 1861, had failed.

Now this conclusion, of a failure of consideration, from the facts admitted in the plea, is as complete a non sequitur as can well be conceived.

It is admitted in the plea, that the slaves were delivered to Booker & Halsey at the contract price, that they were employed by the firm in the manufacture of tobacco at Brunswick in the state of Missouri 149 for the *whole period for which they were hired, and that the services of these slaves, (the property of Kirkpatrick), which constituted the consideration of the notes sued upon, were duly performed. But Booker, one of the partners, seeks, by this plea, to relieve himself (not his partner) from responsibility, for a just partnership debt, upon the ground that the war dissolved the partnership between him and his co-defendant, and that he could not avail himself of the services of these slaves because he was separated from them and his partner on different sides of belligerent lines.

Now conceding that the partnership between Booker and Halsey was dissolved, as it undoubtedly was (according to the principles settled by this court in *Taylor v. Hutchinson*, 25 Gratt. 536), by the breaking out of the war and the residence of the partners within different belligerent territorial limits and jurisdictions; yet such dissolution, plainly, did not absolve them or either of them from any obligation to pay the partnership debts.

Halsey who conducted the business in Missouri was bound to account to Booker for the partnership effects in his hands at the breaking out of the war and for any profits he made out of the partnership assets. Both partners were severally and jointly bound for all antecedent engagements. The dissolution of the partnership by public war no more extinguished the liability of the partners, than a dissolution by death of one of the partners.

In the leading case of *Griswold v. Waddington*, 16 Johns. R. 438, a case much relied on by the learned counsel for the plaintiff in error, Chancellor Kent says (p. 493): "The parties were still partners as to those goods which had actually been purchased by them before the war, and the parties 150 as partners were *bound to account to each other for the proceeds of those goods, and equally bound as partners to pay for them if not already paid for. A dissolution of a partnership has only respect to the future. The parties remain bound for all antecedent engagements. The partnership may be said to continue as to everything that is past and until all pre-existing matters are wound up and settled." See also *Taylor v. Hutchinson*, where the same subject is discussed and the same principles affirmed by this court.

It is therefore manifest that the dissolution of this partnership between Halsey and Booker did not relieve either of the partners from their antecedent obligations, and that

they are both jointly and severally bound upon the notes executed by them to the plaintiff on the 25th March 1861.

It may be proper to notice another point urged with much earnestness by the learned counsel for the plaintiff in error, though not strictly arising under the plea tendered by the defendant Booker; and that is, that these slaves whose services were the consideration of the notes sued upon, were persons whose allegiance, upon the breaking out of the war, was due to the United States government, and that the government had the right to demand their services; and therefore these services could not be controlled by the owner or the parties hiring them; and for that reason, they could not be regarded as property, the subject of hire; and hence there was a failure of consideration.

It is sufficient to remark, that during the period for which these slaves were hired, the institution of slavery was recognized both by the constitution of the United States and by the laws and constitution of the state of Missouri.

These persons, who by the federal 151 and state laws *were slaves, had none of the rights, and none of the obligations of citizens, and owed no allegiance to the government either of the United States or the state of Missouri. If allegiance could be predicated of persons who by federal and state law were slaves, that allegiance was due to their masters, and not to any government, state or federal. These slaves were the property of the plaintiff, of which it is admitted in the plea, the defendants had the exclusive use during the period of the contract of hire, and for which both of the partners are jointly and severally bound according to the terms of their contract with the plaintiff.

The court is therefore of opinion that there is no error in the judgment of the Circuit court of Lynchburg, and that the same be affirmed.

Judgment affirmed.

152 *Riddell & als. v. Johnson's Ex'or & als.

March Term, 1875, Richmond.

1. *Wills—Draftsman as Beneficiary.**—A bequest in favor of an attorney who writes the will is not necessarily invalid.

2. *Same—Onus Probandi.*†—The *onus probandi* lies in every case, upon the party propounding a will; and

**Wills—Draftsman as Beneficiary.*—In *Cheatham v. Hatcher*, 30 Gratt. 60, the court says, citing the principal case: "Again, it is said that Cheatham, the chief legatee, was the draftsman of the will. That circumstance does not invalidate the will. It simply imposes upon the court the duty of increased vigilance in seeing that the will was fairly executed, and that it does in fact carry out the wishes of the testatrix with respect to her property."

†*Same—Onus Probandi.*—Barton's Ch. Pr. (2d Ed.) page 608, foot-note 6, after citing the principal case, says: "The burden of proof of sanity is on the propounders of the will, but not so of absence of fraud

he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator.

3. **Same—Draftsman as Beneficiary—Suspicious Circumstance.**—If a party writes or prepares a will under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument; in favor of which it ought not to pronounce, unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased.

4. **Same—Same—Open to Explanation.**—J was an unmarried man with a large property, having a large amount in bonds. B had been his counsel for years, in whom J had great confidence, and for whom he had a strong regard. In February 1867 B wrote J's will, in which he gave the most of his real estate to a number of his illegitimate children, who were coloured persons. He then did not dispose of his bonds; which were in B's hands for collection. In June following J sent for B to write a codicil to his will, and after some previous provisions as to real estate among the same parties, and providing for the payment of his debts and expenses of administration, and any orders he might draw upon B in his lifetime out of the collections from the bonds, he gave whatever remained of these bonds in the hands of B at J's death, to B absolutely. J had a number of next of kin, and among them two sisters, to none of whom did he leave anything. It being clearly proved that J was entirely competent to make a will; that he dictated the bequest in favor of B without any suggestion from B or any other person, and repeated it; that it was read to him, and he clearly understood it, and intended it to be as it was written: and it appearing

153 further that he had been on "bad terms with his family for years, and had expressed more than once his determination that none of them should have any of his estate; the bequest to B was held to be a valid bequest.

This was a suit in equity in the Circuit court of Appomattox county, brought in September 1871, by Richard Johnson and many others, heirs at law and next of kin

or of undue influence. *McMechan v. McMechan*, 17 W. Va. 663, as reported in 41 Am. R. 662. The burden is on the propounder to prove not only the due execution of the will but the testamentary capacity of the testator. *Williams' Ex'or v. Robinson*, 42 Vt. 658, 1 Am. R. 359. See *Martin v. Thayer*, 37 W. Va. 28. A contrary view is taken in *Am. & Eng. Enc. Law*, vol. 25, p. 996, where many of the cases are collected, the text-writer adopting the more reasonable conclusion that the burden upon the propounder is only to prove the formal execution of the will. For what is regarded as undue influence, see *Carter v. Carter*, 82 Va. 624; *Miller v. Rutledge et al.*, *Id.* 663. The whole subject of undue influence and extent of testamentary capacity is well discussed and expounded in the case of *Chappell et al. v. Trent et al.*, 90 Va. 849. See also, *Tucker v. Sandidge*, 85 Va. 546; *Porter et al. v. Porter et al.*, 80 Va. 118. For extent of undue influence sufficient to vitiate a will, see *Floyd v. Floyd*, 8 Stro. 44, 40 Am. Dec. 626; note, p. 628. See also, *Wise v. Fort*, Va. Law Journal, 1883, p. 441."

of John H. Johnson deceased, against Albert Thornhill, his executor, Thomas S. Bocock and others, to set aside the last clause of a codicil to the will of the said John H. Johnson, deceased. The court made an order in the cause directing an issue *devisavit vel non* to be tried at its own bar, in which Thornhill the executor and Thomas S. Bocock, the legatee in the said clause of the codicil, should be plaintiffs, and the plaintiffs in the cause should be defendants.

On the trial of the issue Albert Thornhill, the executor, was offered as a witness to support the will, security having been given for the payment of the costs; and he was objected to by the defendants in the issue, as incompetent on the ground that he was one of the plaintiffs, named as executor and qualified as such, and also interested in the suit. But the court overruled the objection and admitted the witness: and the defendants excepted.

In the progress of the trial the defendants proposed to introduce James Gooding as a witness. His wife was one of the heirs at law of the testator, and they were plaintiffs in the suit; but they had executed an assignment of all their interest in the estate. The plaintiffs in the issue objected to him as a witness, on the grounds that he and his wife were parties and he was liable for costs: and the court excluded him: and the defendants excepted.

After the evidence had been concluded the plaintiffs *in the issue moved the court to give to the jury the following instructions:

1. That the paper mentioned in the issue, in order to be the will of the testator, John H. Johnson, must be proved to have been executed by him when he was of sound mind, according to the formalities prescribed by the statute, to wit: Must be proved to have been assigned by him in the presence of the subscribing witnesses, and to have been attested by them in his presence and in the presence of each other, all being present together; and the burden of proving this is upon the plaintiffs in the issue, Albert Thornhill and Thomas S. Bocock.

2. That the last clause of said paper, so far as it gives a beneficial interest to Thomas S. Bocock, must be regarded as a testamentary bequest, and its validity tested by the laws of testamentary bequests, and not by the law of contracts.

3. That if it be proved that Thomas S. Bocock, who wrote said paper, was at the time of such writing the attorney of John H. Johnson, and is himself a large beneficiary under its provisions, this raises a suspicion against it, and makes it the duty of the jury to be vigilant and jealous in examining the evidence in its support. But if the suspicion, which such fact ought generally to excite, be removed; and if it be proved that the said paper was prepared according to instructions freely and spontaneously given by the testator, and was distinctly read over to, and its purport

understood by him after its preparation, then the jury may find that it is the true will of the testator; it being the law of the land that an attorney may take a benefit under the will of a client if no undue influence was exerted by him over the testator, and the will was not executed under any mistake or misapprehension.

155 *4. That if it be proved to the satisfaction of the jury, that the said John H. Johnson, for a number of years of his life, extending down to the execution of said paper, entertained a feeling of aversion and dislike for his relations, who would by law be his next of kin and heirs-at-law, and had a fixed purpose not to give them any part of his estate, then this fact is sufficient to rebut any presumption against said paper, arising merely from the fact that none of said relations are made beneficiaries therein.

5. That unless the jury believe from the evidence that one or both of the propounders of the will, or somebody for him or them, induced the said Johnson to make said paper, or some provision thereof, by force, coercion, or by importunity which he (Johnson) could not resist, or procured the same by some other unfair means or practice, then the said paper cannot be held void on the ground of undue influence; it being the true interpretation of the law of wills that the influence to avoid a testamentary bequest must amount to force or coercion, and impose on the testator a provision not in accordance with his own free, unbiased will.

6. That neither sickness, old age, nor impaired intellect, even if the jury believe from the evidence that any one or all of them existed in this case, are sufficient to render void the provisions of said paper, or any of them; but if the jury also believe from the evidence that the testator at the time of executing the same "was capable of recollecting the property he was about to dispose of, the manner of distributing it, and the objects of his bounty," then they must find that he had legal capacity sufficient to make a valid disposition of his estate.

7. And finally, if the jury believe 156 from the evidence, *that the paper mentioned in the issue was signed and executed by the testator according to law, as set forth in the first instruction, that is several provisions were attested with the full consent of his will and understanding, uninfluenced by importunity and without any fraud practiced upon him by the propounders of the will, or either of them, or any other person, and that the testator had adequate testamentary capacity, then the said paper and all its provisions is the true will of said John H. Johnson, and it is the duty of the jury to find accordingly.

And the defendants in the issue moved the court to give to the jury the following instructions, to wit:

1. If the jury believe from the evidence, that on the 17th day of June 1867 Thomas S. Bocock was the sole professional adviser, as an attorney at law of John H. Johnson,

and had been such for some years prior to said time, and was on that day employed in his said capacity of attorney and professional adviser to prepare a codicil to the will of said Johnson, which will he had previously prepared for him on the 18th of February 1867, and did prepare the codicil to said will, which codicil is dated June 17, 1867, and was probated on the 9th day of August 1867, and that in the preparation of said codicil said Johnson had no aid from any other person than said Bocock, further than that Albert Thornhill, who is named as executor in the codicil, was present during its preparation, though not interfering in the matter beyond privately urging Bocock to write the bequest in his own favor when he saw Bocock hesitate to do it; and further, that when the preparation of the codicil was completed, and it was ready to be witnessed, William T. Pankey and James A. Agee, two neighbors, were called in to witness its execution, who read the

157 codicil to him, and *satisfied themselves that he understood it, and then duly attested it in his presence, and at his request then, although they believe that the decedent was competent to make a will, and did fully understand what he was about, and fully understand the contents of the codicil, and that the conduct of Bocock, the attorney, was fair, and his purposes honest, and that he did not designedly take, or conceive that he was taking, any advantage of his professional influence over his client, they must find that the bequest made under such circumstances to Bocock is contrary to the policy of the law and invalid, and that so much of said codicil as contains said bequest is not the true will and testament of John H. Johnson.

2. The jury are instructed that, under the circumstances under which the codicil of June 17, 1867, to the will of John H. Johnson was made, as shown by the testimony of the witnesses for the plaintiffs in this issue, they are bound to presume that the bequest in said codicil, contained in favor of Thomas S. Bocock, was made under undue influence.

3. The jury are instructed that as the testamentary disposition in favor of Thomas S. Bocock, made in the codicil of June 17, 1867, to the will of John H. Johnson, appears from the evidence in this case to have been formed in Johnson's mind in the presence of said Bocock, and while he was actually employed as the attorney of said Johnson, in preparing the codicil to his will, and while Johnson was without any competent independent advice, they are bound to presume, from the relation of the parties, that the bequest to said Bocock was the offspring of undue influence; and even if the subsequent execution of the codicil, in the presence of the attesting witnesses, and the withdrawal at that time of Bocock from

158 Johnson's presence, and the *other circumstances attending the execution, should satisfy the jury that this influence had been overcome by Johnson before the final execution of the codicil, yet when

Bocock subsequently heard of the wish of Johnson to alter this clause of the codicil, and contented himself with merely writing the letter and accompanying papers of June 25th, 1867, he so far failed—no matter how honest his purposes—in that full discharge of his professional duty which the law exacts from an attorney in his circumstances as to render invalid the bequest in his favor.

4. The jury are instructed that so much of the codicil of the 17th June, 1867, to the will of John H. Johnson, as makes a bequest to Thomas S. Bocock, having been prepared by the said Bocock as the attorney and professional adviser of said Johnson, cannot, under the law of this court, be held as a part of the true last will and testament of said Johnson, unless it be found by them from the evidence, that in the making of so much of said codicil as makes said bequest, the said Johnson had the aid of independent advice from some competent third party; and that the mere presence of Albert Thornhill, who was named as executor in the codicil, and whose only active intervention in making of said codicil was his privately urging on Bocock to write the bequest in his own favor, did not constitute or furnish such independent advice.

5. The jury are instructed, that to enable the plaintiffs in this issue to sustain so much of said issue on their part as involves the validity of that clause of the codicil of June 17, 1867, to the will of John H. Johnson, which contains the bequest to Thomas S. Bocock, they must have shown from the evidence, to the satisfaction of the jury, that Johnson was not only competent to make a will and fully understood the contents of said codicil, but that he intended the same, at the time of executing it, as a final disposition, in the event of his death, of the property embraced in it; and that his testamentary papers in regard to said property was not formed under the influence of the presence of the said Bocock, as his attorney and professional adviser, the existence of which influence the jury are bound to presume from the relation of the parties and their presence together; and that he had, during the preparation of the codicil, or prior to its execution, such independent aid or advice from some competent third party as actually restored him, before its execution, to entire freedom from any such influence.

6. The court instructs the jury that though they should believe, from the evidence, that on the 17th day of June, 1867, John H. Johnson was of competent mental capacity to dispose of his property, yet, if they should further believe from the evidence, that by the will of the said John H. Johnson, bearing date the 18th day of February, 1867, disposing of a part of his estate, Albert Thornhill was appointed the executor thereof, and Thomas S. Bocock was appointed his legal adviser thereunder, and a referee to settle any disputes that might arise under the same as therein specified; and that the said Albert Thornhill and the

said Thomas S. Bocock accepted the said several trusts therein respectively imposed upon them; and further, that at and before the said 17th day of June, 1867, the said Thomas S. Bocock was and had been for some years the general counsel and attorney of the said John H. Johnson in and about all of his legal business, and that on that day the said Thomas S. Bocock was employed as such attorney and counsel by the said John H. Johnson, in and about the special business of the drafting and execution of a codicil to the said will,

160 *designed to be a further disposition of the estate of the said Johnson, and that the said Thornhill, appointed the executor of the said will as aforesaid, was present and took an active part in the transactions thereof, and that the said Bocock, acting as such attorney and counsel, drafted the last clause of said paper, purporting to be a codicil to the said will, with the knowledge and approval of the said Albert Thornhill, executor as aforesaid, and named as the executor in the said alleged codicil, and that the said attorney and counsel failed and omitted, with the knowledge and approval of the said executor, to attend personally to the execution of the said alleged codicil, and withdrew himself from the room of the said Johnson, and remained out of doors while the said executor, together with the other subscribing witnesses to the said paper, went into the room and by the bedside of the said Johnson to take charge of the execution of the said papers by the said Johnson as a codicil to his will, and the said paper was then executed by the said Johnson without any advice, either from the said attesting witnesses or from any other person, and that afterwards the said Johnson expressed a wish to change that clause in the said paper which directed how his property and money should be disposed of after his death, and that said wish was communicated to the said counsel and attorney by the said executor, and the said counsel and attorney did not personally attend on the said Johnson for the purpose of executing the said wish, or send to him a competent and disinterested adviser, other than the said executor, to execute the said wish in the premises, but instead thereof, while remaining away himself, sent to the said Johnson by the said executor the letter of the 25th of June, 1867, together with the papers accompanying

161 *the same therein referred to, and never thereafter went to see the said Johnson before his death (on the 10th day of July, 1867), and no sufficient reason appears why his said counsel and attorney should not have done so upon said special business under the circumstances of the case in view of his relation to his said client as aforesaid, and of his interest under the said alleged codicil; and that his said client was in advanced old age, and afflicted with a disease or diseases expected soon to end in his death, and that the said executor and said confidential counsel and attorney were aware of his condition, and had notice of the same;

and that said counsel and attorney, after the execution of the said paper by his said client, and before his death, was in his immediate neighborhood and failed to call and see his client upon the said subject, but upon the death of his said client promptly went to his house, and, with the consent of the said executor, took charge and control of the property and bonds referred to in the said latter clause in said paper, and that he afterwards used the same with the knowledge and consent of the said executor as if the said paper were a valid codicil; and that the said Thornhill, named as executor in said will and said paper purporting to be a codicil, has never rendered any account of his transactions as executor, and has never received any money from the said counsel and attorney, or paid any debts due by said estate, but has given and submitted the whole management of said matters under the said paper of the 17th of June, 1867, to the control of the said counsel and attorney, and the said counsel and attorney has himself rendered no account of his transactions in respect to the same, and that the property and effects which came into the hands of the said counsel and attorney

162 under the said *last clause of said alleged codicil were of large amount and greatly exceeding in value the indebtedness of said estate, then the jury must find that said last clause of said paper is null and void, and is not a part of the will of the said John H. Johnson.

And the court gave the jury the said instructions asked for by the plaintiffs in the issue, and rejected and refused to give the said instructions asked for by the defendants in the issue; to which said several rulings of the court the defendants in the said issue excepted.

The jury found by their verdict, "that the paper writing dated the 17th day of June 1867, purporting to be a codicil to the will of John H. Johnson, deceased, is in all its parts and provisions the true will of John H. Johnson, deceased." And the plaintiffs in the suit, the defendants in the issue, moved the court to set aside the verdict of the jury, and to refuse to enter any decree in accordance therewith, because the said verdict is contrary to law and the evidence. But the court overruled the motion; and the plaintiffs excepted; and the court spread the facts proved upon the record.

Be it remembered, that on the trial of the issue in this case the following were all the facts proved before the jury:

It was proved that John H. Johnson died at his residence, in the county of Appomattox, on the 10th day of July 1867, about 3 o'clock in the afternoon. That on the 18th day of February 1867 he made a will, which was prepared for him by Thomas S. Bocock, who was then, and had for several years before that time been his attorney at law and legal adviser in all his business matters requiring the aid of an attorney. That said will was witnessed by William T.

163 Pankey, *James A. Agee and Albert Thornhill. That, on the 15th day of

June 1867, Thomas S. Bocock, who had been sent for by John H. Johnson, went to the house of said Johnson late in the afternoon, and learned from Johnson that he wished him, Bocock, to prepare for him a codicil to his will; whereupon Bocock told him that it was then too late to prepare the codicil that day, and undertook to come again on Monday and prepare it; and on Monday morning, about an hour after sunrise, Bocock accordingly reached Johnson's house again. When Bocock reached there on this occasion he found Albert Thornhill there. Albert Thornhill lived not far off, and had gone over that morning to see Johnson, not knowing anything of any purpose to make a codicil to the will. When Bocock arrived he told Johnson that he had come there to complete that little item of business, and that if he wished it done it would be necessary for Mr. Thornhill to go home and get the will, which was in his possession. Mr. Thornhill went and brought the will, and Mr. Bocock then told Mr. Johnson that he was ready to proceed; whereupon the preparation of the codicil began. Mr. Johnson, who said in the beginning that he would give nothing to his relations, had given several directions about disposing of his lands, which Mr. Bocock put in writing to his satisfaction, and they came to the disposition of his money and bonds and the residue of his estate. Mr. Johnson said he was "a little at a loss how to manage that," or "now you are too hard for me," or some such expression; and he spoke of his money being mostly out and barred by the stay law, and said that after all his just debts were paid, and particularly if many such debts came against him as Mosby's debt, there would be but little left; and said further, that he had thought

164 of giving his sister Sally *(Mrs. Dunn) and his sister Betsy (Mrs. Miller) \$500 each, but that he had heard they had threatened to sue his estate as soon as he was dead, and he would give them nothing; and said further, alluding, as witness supposed, to his relations, that he would not give any of them anything—they might get what they could at the end of the law: and he said to Mr. Bocock and Mr. Thornhill "I want you to give me your advice." Mr. Bocock told him if he (Bocock) was to advise him the will would not be his own, but his (Bocock's). He hesitated, and then asked Mr. Bocock how it would do to collect his money and put it in bank without interest. Mr. Bocock told him if he did so, and died without disposing of it, his relations would get it. Johnson said he did not want that; he did not want them to have it. He then asked Bocock how it would do for him (Bocock) to collect it, and hold it subject to his order. Bocock said that'l do. Johnson said suppose I draw orders on you. Bocock said he would accept them, payable when money sufficient was collected. Johnson then said now I can arrange it, and he told Mr. Bocock that if he did not order it out of his hands in his lifetime it was to be his. That it was now

11 or 12 o'clock, and Johnson called for his woman and ordered her to make a pitcher of lemonade, which was done, and she handed a glass to Thornhill and one to Bocock, who offered his to Johnson, who declined, and remarked, "these gentlemen would probably like to have theirs spiked," and ordered her to get his bottle of liquor. Then the business was suspended, because Johnson seemed to be tired, and he was allowed to rest until two or three o'clock, during which time Bocock and Thornhill withdrew from Johnson's room. Then Bocock and Thornhill again entered his room, and he seemed to be asleep, when

165 Bocock said rouse him and "let's get to work; then the business was resumed, and Johnson said a second and third time that he wanted him (Bocock) to collect his money, and hold it subject to his orders during his lifetime. Bocock asked what was to be done with it in case of his death. Johnson replied, if I do not order it out of your hands it will be yours. Bocock seemed unwilling, and refused to write that down, and said to Thornhill that he had never done anything to bring reproach on himself. Thornhill in a low voice, unheard by Johnson, who was a little deaf, told Bocock he ought to do so, as Johnson had told him several times; that Mr. Johnson had sent for him to write his will, and that seemed to be his will; and Johnson himself said, with some impatience, "I've told you several times, write it as I say." Bocock then wrote it down. Johnson then asked Bocock how it would be if he (Johnson) should draw orders on him before he had collected the money. Bocock told him he would accept the orders, payable when the money came to his hands. In the course of the preparation of the codicil, Bocock, who put it all down first in the form of notes, read over the notes to him several times, and the list of bonds appended to the codicil was prepared at the dictation of Johnson from memory. When it was completed, Thornhill, who had been told by Johnson that he wanted the same witnesses to the codicil who witnessed the will, sent for William T. Pankey and James A. Agee for the purpose. They came about night. Bocock, who was in the yard when Pankey came, gave him the codicil, and Pankey took the codicil from Bocock and went in and read it to Johnson. This was by candle-light. Twice during the reading Pankey asked him if he heard. Johnson both times said he did, and once said he had already heard it read. When the reading was completed

166 *Johnson signed it, and Thornhill, Agee and Pankey subscribed it as witnesses at his request, all three of them and Johnson being together when this was done. In the opinion of the subscribing witnesses Johnson was fully competent to make a will, and the witnesses took pains to satisfy themselves on this point. The will and codicil are in the following words and figures, to wit:

[See at close of testimony.]

During the preparation of the codicil,

several colored people, formerly slaves of Johnson, were about the house, among them Martha, who had been kept by him as a wife, and Albert and Washington, who were reputed to be his natural children. They withdrew from the room when the writing was done, but Albert and Washington were in the adjoining room, the door of which was open, and heard and saw all that passed, as Johnson was a little deaf, and conversation with him was necessarily loud. Johnson was an old man, seventy years old or more; at least that in 1859. His health on the 17th June had become bad. He had been for some time confined to his bed, but could get up and even sit up. He continued after the 17th June to grow worse until his death. The main symptoms of his disease was dropsy and inability to retain his urine, and he required constant attention, which was chiefly given him by his woman Martha. He slept a good deal, but had a habit, many years before his death, of appearing listless and closing his eyes, when really he would be watchful and attentive.

Between 1848 and 1860 William M. Cabell was his attorney and legal adviser. In the year 1859 Cabell prepared a will for him, by which he freed his negroes and gave to his natural children, some of whom were white and some black, the bulk of his estate,

167 but nothing *to any lawful relation.

He often, during the time Cabell was his attorney, expressed himself to Cabell as very hostile to his relations, with some of whom he had much bitter litigation, and said they had worried him all his life with law suits, and had hunted him like a wild beast, and he often declared his purpose of never giving them a cent, and to other witnesses he subsequently made similar declarations.

By the will of 1859 he made Cabell and one James A. Wright his executors, and gave each of them \$5,000 in lieu of commissions as executors.

Some days after the codicil was executed Johnson sent for Thornhill and said to him that Susan Johnson, and perhaps others, had been telling him he had given all his property to Bocock, and had no control over it. Thornhill told him it was not so, and that he would not have witnessed any such will, and told him he would go or send for any person he (Johnson) might wish to write the codicil over for him. He said no, he wanted no one but Mr. Bocock, and that Mr. Bocock would come down after his court in Lynchburg was over. Johnson said he wanted some alteration made in the last clause of his codicil, but what it was Thornhill could not get him to say. Thornhill told him he could not wait, because he could not live long. On the 24th June, Thornhill went to Lynchburg and saw Bocock, and told him what had taken place between him and Johnson since the codicil was written. Bocock thereupon wrote to Johnson, and sent, by Thornhill, a letter and two accompanying papers.

[See post.]

Thornhill took them to Johnson on the 26th

June. Johnson rose up and sat on the side of the bed and read the letter, but not the accompanying papers, and said he was satisfied, and that Mr. Bocock understood
 168 *the matter as he did, and that he had retained full control over his property, and if it pleased God he should live five or six months he might make some little change in the latter clause of his codicil.

Thornhill went to see Johnson every day but two from the 17th June till he died. He lived one and a quarter miles from Johnson. When he took the letter and accompanying papers from Bocock in Lynchburg, it was understood between him and Bocock that if Johnson wanted Bocock to come down before his court in Lynchburg was over, he, Thornhill, would send for him and let him know, and Bocock would come at once, which understanding was, however, not communicated to Johnson. No further communication took place between Thornhill and Bocock until the death of Johnson, at which time Bocock was at his own plantation, about three miles from Johnson's.

Bocock had some few days before come down to his plantation from Lynchburg, on his way to Buckingham court, where he was on Monday, the 8th day of July, and from which place he returned to his plantation on Tuesday, the 9th day of July, and when the death took place on the 10th July, he was sent for by Thornhill and went over to Johnson's at once.

On the night of the 17th June, after the codicil was finished, Washington Johnson, one of his colored natural children, approached his bedside and said to him, now, to a moral certainty, you have given Mr. Bocock everything, and have made no provision for us. He said, "I am not dead yet."

It was proved by Cabell that while he was attorney for Johnson, from 1848 to 1860, Johnson was a man of strong mind, hard in his disposition, even with his natural children, of inflexible will, and of a
 169 suspicious *disposition, and extremely bitter in his feelings towards his relations.

All the subscribing witnesses knew Johnson well, but Agee and Pankey were neither intimate with him, and very seldom saw him. Thornhill had known him for forty years, but was not in the habit of visiting him till the codicil was made, and very seldom before that time went to his house.

Some time during the war the professional relations began between Johnson and Bocock. Once during the war Johnson talked with James A. Wright, who was in the habit of transacting some of his business for him, about making a will and freeing his negroes, and talked of getting Bocock to write it for him. Wright told him that Bocock was speaker of the Confederate congress, and could do it as well or better than any other man.

It was proved by Cabell that during his attorneyship, and by another witness that subsequently, Johnson spoke of his estate being probably involved in litigation after his death, and declared his purpose of leav-

ing his executor strong-handed to defend it. A day or two after the codicil was made, Johnson was spoken to about making some provision for his servant Martha. He said when they were slaves, all they wanted was freedom; and when they got free they wanted a home, and now they wanted everything he had, and they shouldn't have it. On the occasion of the conversation above referred to, between Albert and Johnson at Johnson's bedside, Johnson said to Albert: "The stay-law and the bankrupt law are against my money. Before you were free it was nothing but freedom; then the state set you free, then you want money; now, you must work for money as I did. My estate is going to be sued; they are go-

ing to sue you and your children—
 170 *them in the cradle and them unborn.

Oh God, I wish I could rise from the grave and hear the contention. I leave my money to Bocock; so that he can't be bought. I leave it to him to defend you till the last dollar is spent. I might give you a bond, and you might hand it to a lawyer to collect and never receive a cent. I have been trying to collect my money and failed, and if Mr. Bocock should do so and have some left, who would have a better right to it than he who labored for it?" He said also that Bocock had been injured by the war, and was a public man, and had been disfranchised, and he intended to help him.

It was proved that the Circuit court of Lynchburg adjourned on the 29th June, 1867. The will bears date the 18th of February 1867, and in it he disposes almost exclusively of the land where he lived. From this he divided off eleven lots, which he gave to certain persons mentioned in them: and the remainder of the tract, which consisted of wood land, his executor was to hold for the benefit of those to whom he had given the lots of land; all of whom were persons of colour, and most of them were reputed to be his children. He appoints Thomas S. Bocock as the legal adviser of his executor, in all things touching the management of his estate, and he and the executor were to have full power to settle any difficulties arising among his devisees, about their respective interests under his will. And he appointed Albert Thornhill his executor.

The codicil bears date the 17th of June 1867. After making some slight changes as to the wood land reserved in the will, and making some other devises of land in the county of Prince Edward, and of interest in two houses in Lynchburg,
 171 among some of the same *persons mentioned in the will, he comes to the last clause which was the subject of contest in this case, and is as follows:

"I have deposited my bonds and claims mostly in the hands of Thomas S. Bocock, in whom I have confidence, with the understanding that I can draw on him for the money as it may be collected; and if I shall draw for any amount before the same shall be collected, he agrees to accept said order, to be paid whenever the funds may come into his hands to pay the same; provided the

whole amount drawn for may not exceed the net amount which may come to his hands for use. Now it is my will and desire at my death he shall proceed to collect all sums due me as the laws of the land may permit—interest when interest can be collected, and principal when that may be done,—and out of the net amount which may come into his hands, that he shall pay over to my executor whatever may be necessary for the payment of debts, also the commissions of said executor on collections made for my estate, and also all orders drawn on him by me in my lifetime, and accepted by him, as above stated; and any amount which may remain, after these payments, in his hands, shall never be claimed by my executor, or by any other person, by any authority from me; but the same shall remain his absolute property."

To this codicil was added a list of debts made out by him at the time, twenty-seven in number; being such as he remembered at the time, though not pretended to embrace all, or to be strictly accurate.

The letter referred to in the statement of facts proved, bears date Lynchburg, June 25, 1875, and is as follows:

172 *Dear Sir:

Our friend, Mr. Thornhill, informs me that you have expressed a wish to change the clause in the codicil to your will, which directs how your money shall be disposed of after your death. It was put down just as you directed, as you will remember, and after full explanation. Mr. Thornhill will read it to you again, so that you can bear it fully in mind. I wish to have it exactly to suit you. So far as I have any connection with it I wish it to be your will, and not that of any other person. Every is yours, and is altogether in your power. If it does not suit you as it stands you can change it in several modes. You can revoke the last codicil altogether, and make another if you choose, or you can make another codicil, altering the first so far as you wish to alter it; or leaving the will and codicil to stand as at present, you can draw an order or orders on me, payable after your death, in which you can direct that your money be given to whoever you wish. Just say who you wish to have it, and it shall be done accordingly. I send by Mr. Thornhill the form of a new codicil, and also the form of an order, such as I have indicated. He can have them, or either of them, changed to suit you. You have only to say what change you wish to make, and it shall be done. If I could leave here with propriety, I would go down immediately and aid you so far as in my power; but the Circuit court is in session, and will remain in session for some days longer. As soon as my business is through I will be down.

With best wishes, &c., &c.

The copies referred to in the letter, and sent with it were the copies of an order on Bocock directing that any net balance in his hands remaining after payment

173 *of debts and commissions of executor as aforesaid, be paid out and distrib-

uted among Johnson's relations, as the same would be paid and distributed under the laws of Virginia regulating the distribution of the money and effects of deceased persons not disposed of by will.

The form of the codicil was to the same effect.

The cause came on to be finally heard on the 28th of May 1874, when the court made all the proceedings and evidence had on the trial of the issue a part of the record, and decreed in accordance with the verdict of the jury, the paper writing dated the 17th of June purporting to be a codicil to the will of John H. Johnson deceased, to be in all its parts the true last will of the said John H. Johnson deceased, and that the bill be dismissed with costs. And thereupon the plaintiffs applied to a judge of this court for an appeal; which was allowed. The cause was most elaborately argued in printed notes as well as orally by Guy & Gilliam, John Howard and Cosby, for the appellants, and Kean and Kirkpatrick & Blackford, for the appellees; but it is impossible to do justice to the argument in a brief note.

Anderson, J. In view of the importance of this cause, the court has given to its consideration the most careful and earnest attention. And if we have erred in our conclusions, no fault is attributable to the learned counsel on either side, who have conducted the discussion with scrupulous fidelity to their respective clients, and with great research and distinguished ability.

It is not surprising that the mere 174 announcement, *that the decedent had given the bulk of his large estate to his attorney, who was the writer of his will, and a stranger to his blood, to the exclusion of his lawful kindred, should have excited comment in the country. And the fact, that the writer of the will was an eminent member of the profession, and had filled various posts of honor and high distinction in the service of his country, would naturally cause painful reflections in the public mind, and especially amongst the members of a profession which is so closely connected with the administration of justice, and who, in general, have been keenly sensitive, and justly so, to anything which might bring reproach or stain upon their fair and honorable escutcheon.

By the civil law, if a person wrote a will in his own favor, it was rendered void. I am not prepared to say that such a provision in our law would not be consonant with public policy, and a safeguard to public morals, especially when the writer of the will was the attorney of the testator. Not that such a disposition of his estate might not fairly be made by a testator, and that he might not justly regard his attorney his best friend, and the most worthy object of his benefaction, and bequeath his property to him free from all restraint and undue influence; but considering the relation of confidence between the client and his attorney, and the capacity which a venal and unscrupulous attorney would have to abuse that confidence, and considering the infirm-

ity of human nature, which requires from the best of men the daily prayer, "lead us not into temptation," and the relation of the legal profession to the pure and faithful administration of the laws, and the importance of its occupying a position which raises it above suspicion, it is argued with much force, that an attorney should be absolutely *incapable of taking a benefaction from his client by gift inter vivos or by will.

On the other hand it may be argued that by the law of England and America, the testator has the right, as he ought to have, to bestow his property on whom he will. He has the right to select the objects of his bounty. That his attorney may be the best friend he has in the world and the most worthy object of his benefaction; and if he has capacity to make a will, and freely and of choice desires to bequeath his estate to him, he ought not to be deprived of that privilege. Whether this be a just conclusion as to what the law should be, or whether it is best that the rule of the civil law should prevail, I think the current of decisions shows that it has not been adopted to its full extent as a rule in England or America.

In England it has not, and is distinctly so declared. (1 Williams on Ex'ors, 4 Amer., from last London edition, p. 91.) And the writer adds: "The act is not absolutely void, even though the person making the will in his own favor is the agent or attorney of the testator;" but the suspicion thereby is, for obvious reasons, greatly increased.

In *Billingham v. Vickers*, 1 Phill. R. 187, it is held that the act is not actually defeated, as it was by the civil law. To the same effect are *Paske v. Ollatt*, 2 Phill. R. 323; *Barry v. Butlin*, 1 Curteis R. 637; *Baker v. Batt*, 2 Moore P. C. C. 317; *Hitchins v. Wood*, Ibid 355, 436. The same is held in the American cases. A will by a client in favor of an attorney is not absolutely invalid. The existence of that fiduciary relation does not annul the act. *Wilson v. Moran*, 3 Bradf. R. 172. To the same effect is *Crispell v. Dubois*, 4 Barb. Sup. C. R. 393; *Cramer v. Cruinbaugh*, 3 Maryl. R. 491; *Watterson v. Watterson*, 176 1 Head's (Tennessee) R. *1; *Adair v. Adair*, 30 Georgia R. 104; *Nexsen v. Nexen*, 3 N. York Court of Appeals decision 360; *Goodacre & Taylor v. Smith*, 1 Law R. Probate and Div. 359. In *Coffin v. Coffin*, 23 N. York R. 9, Comstock C. J. said: "It is not a rule, or a principle of the law of testaments, that the draftsman of a will cannot be an executor, or take a benefit under it.

The counsel for appellants rely on *Meek & Thornton, ex'ors v. Perry & wife*, 36 Miss. R. 256, and *Garvin's adm'r v. Williams & al.*, 44 Missouri R. 465, as maintaining the rule of the civil law. Though the reasoning of the judges may tend in that direction, the decision in neither case goes to that extent. They do not hold that the will is absolutely void, but only that the relation of confidence raises a *prima facie* presumption of undue influence, which, unless rebutted, the will cannot stand.

The Mississippi case turned upon an instruction given by the court of trial to the jury in the following words, to wit: "That the law watches with jealousy transactions between guardian and ward; and if the jury believe that Louisa McKinnie (the ward) made a will in favor of her guardian whilst the relation of guardian and ward subsisted, the circumstances must demonstrate full deliberation on the part of the ward, and abundant good faith on the part of the guardian, or they must find against the will. The appellate court held that there was no error in the instruction.

The Missouri case also turned upon an instruction, which reciting all the facts in the case, asked the court to declare, that "the presumption arising from such fact is, that the alleged will was procured by the undue influence of J. P. Williams; and that presumption can only be repelled by satisfactory proof that no undue influence was used to procure the same."

177 *The appellate court held, that under the circumstances in which the will was made, it was presumptively invalid, and the burden of proving its validity rested upon those who sought to derive an advantage under it. The instruction, therefore, which was refused by the court should have been given. It is clear that in neither of the foregoing cases was it held, that on the ground of the relation of confidence between the testator and the legatee the will was absolutely void, but only presumptively so, which presumption it was competent for the propounder of the will to repel. And in this last case it will be observed that there was much in the conduct of Williams, besides the confidential relation, from which the presumption against the validity of the will might arise. But in these cases the doctrines enunciated are not entirely conformable to the rules which have been adopted and established by the current of English and American decisions.

These rules as laid down by Baron Parke in *Barry v. Butlin*, 1 Curt. Ecc. R. 637, are, first, "That the onus probandi lies in every case upon the party propounding a will; and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator;" and second, "that if a party writes or prepares a will under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the court, and calls upon it to be vigilant and zealous in examining the evidence in support of the instrument; in favor of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased." These rules are approved by the court in *Crispell v. Dubois*, 4 Barb. Sup. C. R. 393; also in *Cramer v. Cruinbaugh*, 3 Maryl. R., supra.

178 *In *Wilson v. Moran*, 3 Bradf., supra, the court says: "True, it is held that where the legatee who stands in a confidential relation to the testator, himself draws the will, this circumstance calls for

increased vigilance on the part of the court in ascertaining the validity of the will. But in such cases, the most that has been, or ought to be required, is satisfactory evidence that the testator was of sound mind, and clearly understood the contents of the will, and was at the time under no restraint. No case has gone so far as to overthrow a will duly executed when it was shown that the party executing it was of sound mind, and clearly understood its contents, though it was drawn by the person taking the estate."

It seems to me that the rules and principles by which cases of this nature should be decided are clearly and correctly stated in the foregoing decisions, and they are sustained by the almost unbroken current of English and American authority. Let us now apply them to the case in hand.

In the first place, I cannot doubt, upon the evidence in this record, that John H. Johnson was capable of making a will on the 18th day of February, 1867, when this will was executed, and also when he executed the codicil on the 17th of June following. The three subscribing witnesses, who are regarded in law as placed around the testator that no fraud may be practiced on him in the execution of the will, and to ascertain and judge of his capacity, all of whom are represented to be men of intelligence and respectability, were not only of that opinion, (and the law makes their opinion evidence,) but facts are proved by them and others, which, in connection with the intrinsic evidence furnished by the instrument itself, excludes all doubt that the testator was of sound disposing mind.

179 *In the next place we will inquire, had he knowledge of the contents of the codicil when he signed it? Being capable of making a will, it is not probable that he would have signed it without knowing what it contained. But the proof is positive and direct. It is proved that the testator himself gave instructions to Mr. Bocock, which were written down by him and afterwards read over several times to the testator and approved by him. The codicil was then written, and Mr. Pankey and Mr. Agee, who together with Mr. Thornhill had attested the will, and who the testator desired should attest the codicil, were sent for, and one of them, Mr. Pankey, who had been a justice of the peace for a number of years, read it to him. The testator said he heard it and well understood it. That he had heard it several times before, and it was written as he directed.

The proof is that "the codicil," after it had been written out, had not been before read to the testator, although the note of instructions had. The fair inference from the testator's remark, that he had heard it several times before, is, that there was no discrepancy between the note of instructions and the codicil. And Mr. Thornhill testifies that "all was read to Mr. Johnson in the notes," and "all was in the notes as it is in the codicil." These two things being established, first, that the testator was

capable, and secondly, that he had knowledge of the contents of the instrument, and the execution having been according to the requirements of law, ordinarily, further proof would be unnecessary to establish the will. But this case being of the class which calls upon the court to be vigilant and jealous in examining the evidence, and to be satisfied that the paper propounded does express the true will of the deceased, which satisfaction cannot be felt
180 *whilst suspicion rests upon it, we will further inquire, was the testator under restraint when he executed this codicil?

A valid testamentary disposition of property must be the voluntary act of a capable testator. In *Wilson v. Moran*, supra, the court said: "A will by a client in favor of an attorney is not absolutely invalid. The existence of that fiduciary relation does not annul the act; but still the circumstances call for unusual vigilance, to see that it was in consonance with the views and wishes of the testator." Baron Parke affirms in *Barry v. Butlin*, 1 Curt. R. 637, that all that can be truly said is, that if a person, whether attorney or not, prepares a will with a legacy to himself, it is at most a suspicious circumstance of more or less weight according to the facts of each particular case; in some, of no weight at all, varying according to the circumstances; for instance, the quantum of the legacy, and the proportion it bears to the property disposed of, and numerous other contingencies; but in no case amounting to more than a circumstance of suspicion demanding the vigilant care and circumspection of the court in investigating the case, and calling upon it not to grant probate without full and entire satisfaction that the instrument did express the real intentions of the deceased.

The quantum of the legacy and the proportion it bears to the property disposed of, according to this authority, is unfavorable to this will. But it is still only a circumstance of suspicion, which calls for vigilant care and circumspection. The turning point is, does the instrument express the real intentions of the deceased? The same principle is sanctioned and acted on in *Baker v. Bott*, 2 Moore P. P. C. 317. And in the subsequent case of *Durling v.*

181 *Loveland*, 2 Curt. R. *225, 227, Sir H.

Jenner Fust, referring to these passages in the judgment of Baron Parke, said, he acceded to every one of the doctrines and principles there laid down, but was not aware that the prerogative court had ever acted on any other or different. And they are recited by Judge Lomax in his book on executors, without dissent.

No presumption can be raised against the will or codicil in this case, from the fact that a stranger is preferred to his lawful kindred, when the facts certified in the record are examined. The relation was one of hostility; and the testator had long before formed the fixed and inflexible purpose that his relations should have no part of his estate; which purpose it does not appear

that he ever abandoned to the day of his death, though he thought at one time of making a small legacy to each of two sisters. By the will which was written for him in 1859 by his attorney, Mr. William M. Cabell, he left them nothing.

The evidence also clearly shows that he gives his illegitimate children all that he intended them to have. On whom then could he bestow the residuum of his estate? Mr. Cabell testifies that his feelings toward Thomas Bocock were very partial. And it is also in proof that he said he intended to help him as he had been injured by the war, and was a public man, and had been disfranchised. Being unwilling to do more for his illegitimate children, and not willing that his relations should have any part of his estate, who was there, that he would have been more inclined to make his residuary legatee than Thomas Bocock.

The provisions of the codicil were known by his children and relations, and by all who felt any interest. There was nothing clandestine in the transaction. No attempt was

made to exclude any one from the 182 testator's *person, or to conceal the dispositions he had made of his property. The will was not only ambulatory, revocable, or alterable, at the pleasure of the testator, from the 17th of June, when the codicil was executed, until the day of his death, the 10th of July, but the disposition in favor of Bocock could be changed simply by the testator giving orders on him. During this period the testator's relations and illegitimate children might have free access to him. The woman who waited on him and nursed him, his reputed wife, as well as his natural children, had every opportunity to bring what influence they could to bear upon him to change his will as to Bocock. Some of his children and one or two of his sisters availed themselves of this opportunity to approach him and to persuade him to change his will. But in vain. He was inflexible. He would not even do more for Martha, his reputed wife, though advised to it by his executor. All the evidence represents him as a man of strong mind and inflexible will. His sisters succeeded in disturbing his mind by representing that he had given all his bonds and choses in action to Mr. Bocock absolutely; and he expressed a desire to have some change made in that clause of his codicil. But the letter from Mr. Bocock satisfied him that it was all right, and that its provisions were just as he had directed and desired them to be. That letter represents the state of the case truthfully, and informs Mr. Johnson that he may revoke his codicil altogether, or may alter it either by executing a new codicil, or by giving orders on him, and actually sends him formulas, by which the testator can take every dollar from him and give it to whom he will. It is objected, that Mr. Bocock makes the order payable to the testator's "relations," knowing that he was

averse utterly to giving them anything. But he tells him in *his letter that Mr. Thornhill can make any

changes he may wish in those formulas. If Mr. Bocock inserted "relations" in the formulas, to intimate not that he should, but that he should not, make a disposition in favor of his relations, he does nothing to guard against his making a provision in favor of his illegitimate children.

It was also urged in argument, in this connection, that Mr. Bocock ought to have gone to see Mr. Johnson in order to aid him in the preparation of any papers he might wish to have prepared in relation to the disposition of his bonds and other charges on the money to be collected on them. If he kept away from Mr. Johnson to prevent him changing his codicil, or from drawing orders on him in favor of other parties, such conduct would deserve the severest censure and reprobation, and might be treated as a fraud upon those in whose favor the change was contemplated, though even such conduct could not effect a revocation of a will which had been duly executed, or defeat the probate thereof. Though the fact, if it were so, could not affect the issue involved in this suit, justice impels me to say that, in my opinion, such an inference cannot be fairly drawn from the facts appearing in this record. Mr. Bocock by his letter had plainly informed Mr. Johnson of all that was necessary to enable him to change the disposition of his bonds, &c., which he had made in his codicil, and informed him of his perfect right to make any change he thought proper, and to give the property to whomsoever he chose, and furnished him with the proper form of an order on him to effect such change, which he informed him he would respect: Thus giving him all the information he needed, and every facility to make the change which he could have

afforded him if he had been personally 184 *present. It is not fair to presume that he had staid away to prevent him doing what he had already given him every facility for doing, especially when a better motive can be assigned, and with better reason for his conduct.

Mr. Bocock was aware that it was in the power of Mr. Johnson to change his will at pleasure as long as he lived, and retained testamentary capacity, and that the bequest to him was conditional, and that it was in the power of Mr. Johnson to render it valueless simply by giving orders on him, and that Mr. Johnson was aware of it. He knew also that the disposition which he had made in his favor was known to his illegitimate children, and he had reason to believe would be made public; and that the numerous persons who would feel that they were interested to defeat it, would have unrestrained access to Johnson, and would probably bring every influence they could against him. Yet it does not appear that he did anything to guard against these influences. He did not keep the disposition made in his favor concealed from Johnson's family, which would have been the most effectual, nor did he against those influences speak a word to Mr. Johnson by way of caution, or to restrain him from giving orders on

him; but, on the contrary, told him that he would accept his orders payable when the money was collected, and which would be good after his death; and when he was informed by Mr. Thornhill that influences were brought to bear on the mind of Mr. Johnson to induce him to change this clause in his codicil, he wrote to him informing him that he had a perfect right to do so, and that his wishes should be carried out by him; and he furnished him with every facility he could to make any disposition he thought proper of the funds which were in his hands. In the conclusion of his letter *he says: "As soon

as my business is through I will be down;" but he never went to Mr. Johnson's house until after his death. He had a right to presume that after Mr. Johnson received his communications, if he wanted him he would let him know. He had given him all the legal advice and assistance by letter that he could if he were present. He preferred not to engage in a contest for a bequest of Mr. Johnson's property. He was willing to accept what he freely bequeathed him, but he was not willing to engage in a contest with the relations or with the illegitimate children for it. He chose therefore to surrender to them the whole field and to abide the result, without exposing himself to the imputation of going there to exert a personal influence over Mr. Johnson, to the prejudice of his blood relations and illegitimate children. It has been held that a person may by fair argument and persuasion induce one to make a will in his favor. Jarman on Wills p. 38-'9, and cases cited. And it is said by Mr. Perkins, in the 4th American edition of Jarman on Wills, to be the result of the cases, that "the influence to vitiate an act must amount to force and coercion, destroying free agency. It must not be the influence of affection and attachment, it must not be the mere desire for gratifying the wishes of another; for that would be a very strong ground in support of a testamentary act." Jarman on Wills 40, 41. Whether this be true or not, there is not an item of evidence in the record to show that Mr. Bocock, by any sort of intimidation or persuasion, influenced the testator to give him a benefit under his will, or that he even intimidated a wish that he would do so. It is a fair presumption from the evidence, that the first intimidation that he had ever had that

186 the *testator intended to make a testamentary disposition in his favor, was whilst he was engaged in taking a note of his instructions. And the intimidation seems to have taken him by surprise. The testimony of Albert and Washington, reputed sons of the testator, who say they were present, or in hearing, when the instructions were given, and when the codicil was executed, is positive and unequivocal, to the effect that the dispositions made in the codicil were dictated and suggested by Johnson, and originated in his mind, and were written by Bocock according to his instructions, and fully corroborates the testimony of

Thornhill.

If there was any sort of influence exerted by Mr. Bocock, to induce Mr. Johnson to give him so large a part, or any part of his estate, it does not appear in this record. On the contrary, the conclusion from the evidence, it seems to me, is irresistible, that the codicil expresses the real intentions of the testator, which were the suggestions of his own mind, and that it is the result of his free and unrestrained volition.

With regard to the question raised as to the competency of Albert Thornhill to testify in the cause, we think there is no error in the ruling of the Circuit court. By express statute, he is not incompetent by reason of his being executor: and it does not appear that he had any such interest in the establishment of the codicil as would disqualify him as a subscribing witness. As to the ruling with regard to the competency of James H. Gooding, the joint deed of his wife and himself releasing her interest in the estate of Johnson, if she had an interest in that estate, which would render her husband incompetent, it was thereby extinguished; and if she had not, no release was necessary to remove incompetency on that ground.

187 *But they were plaintiffs in the suit, and liable for costs. The rule which excludes a party to the record as a witness in the cause applies to all cases where the party has any interest at stake in the suit, although it be only a liability for costs, and excludes a prochein ami, &c. Murphy's adm'or & al. v. Carter & al., 23 Gratt. 485. The deposition of the wife of a prochein ami cannot be read, as he is liable for costs. If one is incompetent to testify, the other is also. Chapter 172, § 21, 22, Code of 1873, rendering parties to civil suits competent to testify in their own behalf, by express terms does not apply to husband and wife. There is no error, therefore, we think, in the ruling of the Circuit court, in excluding the testimony of James H. Gooding. Upon the whole, I am of opinion that there is no error in the decree of the Circuit court, and that it should be affirmed.

The other judges concurred in the opinion of Anderson, J.

Decree affirmed.

188 *McVeigh v. The Bank of the Old Dominion.

March Term, 1875, Richmond.

1. Bank Treasurer—Confederate Currency—Liability for Collections.—M was president of the O. D. bank located in the city of Alexandria, and he was a member of the firm of B & Co. of that city. In May 1861 M went to Richmond, where he remained during the war; and B & Co. removed to the same city. In January 1863, M collected of the treasurer of the state the interest on state bonds held by the bank; of course in Confederate money. After the war the O. D. bank may maintain an action of

assumpsit against M for the money so collected by him.

2. **Same—Same—Same—Investments.**—M invests the money so collected by him in a call certificate of the Confederate States, to have it ready to be applied to the uses of the bank, and he holds the certificates until such certificates are called in by the government. He then receives the money for it, and tries to lend it out, but fails; and he then deposits it in bank to the credit of B & Co., who are to pay interest upon it, and return it on call. In 1864 B & Co. invest this money, with their own, in tobacco, M intending it to be at his own risk; he holding himself bound to pay the bank as on an investment at six *per cent.* The tobacco is burned during the war. This was an appropriation of the money by M to himself, and he is responsible to the bank for the value of the Confederate notes at the time they were appropriated by him.
2. **War Interest.***—M is to be charged with interest only from the end of the war.

This was an action of assumpsit in the Circuit court of the city of Richmond, brought in October 1870, by the Bank of the Old Dominion, located in the city of Alexandria, against Wm. N. McVeigh, late president of the bank, to recover the sum of \$26,500, which it was alleged said McVeigh, as president of the bank, had collected in January 1863, from the State of Virginia *for interest upon the bonds of the state held by the bank. The declaration contained only the common counts in assumpsit.

The defendant demurred to the declaration, and pleaded non-assumpsit. And when the cause came on to be tried the court overruled the demurrer; and there was a verdict and judgment in favor of the plaintiff for \$1,104.17, with interest thereon from the 1st of April 1864, till paid.

In the progress of the trial the plaintiff and defendant asked for instructions, which were refused by the court, and others were given; and both parties excepted. The instructions asked and given are as follows:

Plaintiff's Instructions.

1. If the jury believe from the evidence, that the Bank of the Old Dominion had its domicile in the city of Alexandria during the war, that the defendant, while acting as president, residing in the city of Richmond, without authority collected on the 13th day of February, 1863, the sum of \$26,500, interest due the bank from the state treasury, and without authority of the plaintiff invested the same in Confederate securities, they must find for the plaintiff that sum with interest.

2. If the jury believe from the evidence, that the defendant, acting as the agent of the plaintiff, collected from the state treasury \$26,500, interest due the plaintiff, and without authority of the plaintiff loaned out the said money, the jury must find for

the plaintiff and assess the damages at \$26,500 with interest.

3. If the jury believe from the evidence, that the defendant, on the 13th day of 190 February, 1863, acting *as the agent of the plaintiff, collected from the state treasury \$26,500, and invested the same at his own risk in business in which he was interested, the jury must find for the plaintiff and assess the damages at \$26,500 with interest.

The defendant asked the court to give to the jury the following instructions, number 1, 2, 3, and 4; and in the alternative the instructions numbered 5, 6, 7 and 8, which are in the words and figures following, to-wit:

Defendant's Instructions.

1. If the jury believe from the evidence, that the defendant, on or about the 30th of May, 1861, departed from the town of Alexandria with the intention of going within the Confederate lines, and did then accordingly go into the Confederate lines and there continually remain during the war, and for the most part in the city of Richmond, the seat of the Confederate government; then that the office of the defendant, as president of said Bank of the Old Dominion, was, in legal effect, vacated and abrogated from the time of his said departure from Alexandria, and the defendant from that time ceased to be an officer or agent of the plaintiff; and no contract, express or implied, could or did arise between the plaintiff and the defendant, on account or by reason of any alleged dealings by the defendant with the funds of the plaintiff, given in evidence in this case; and the jury must find for the defendant.

2. That in the state of facts supposed in the foregoing instruction, neither by force of the statute continuing certain officers of corporations in office until their successors are appointed, nor by virtue of the election of the defendant by the plaintiff on 191 the 16th *day of January, 1862, as its president, shown in evidence, was the defendant continued or constituted an officer or agent of the plaintiff to transact its business within the lines of the Confederate armies, or endowed with any capacity to contract for, or to be contracted with, by the plaintiff in the premises; and the jury must find for the defendant.

3. That no subsequent ratification by the plaintiff of the defendant's acts as its agent during the war, nor acknowledgment by the defendant of such agency, can retroact to constitute the defendant an agent of the plaintiff during the war, under the circumstances appearing in evidence, or give rise to any obligation on the part of the defendant to account to the plaintiff in respect to the alleged dealing of the defendant with the plaintiff's funds, given in evidence in this case.

4. That in any event, if the jury believe from the evidence, that the defendant, as the agent of the plaintiff, received from the Richmond government interest on bonds of the State, belonging to the plaintiff, as in

*War Interest.—On the question of the allowance of war interest, see *Roberts v. Cocke*, 28 Gratt. 207, and note; *Valden v. Stubblefield*, 28 Gratt. 153; *Dromgoole v. Smith*, 78 Va. 670.

the declaration and bill of particulars set forth, the institution of this suit is a ratification by the plaintiff of such action of the defendant, and no recovery can be had herein against the defendant, merely on account of his receiving said interest, whatever was the character or depreciation of the currency in which it was so received.

5. That if the jury believe from the evidence, that the said interest was received by the defendant in Confederate notes, and that the defendant acted in good faith and to the best of his judgment in investing the same in Confederate call certificates, in the name of and for account of the plaintiff, then that said certificates thereupon became the property of the plaintiff, and the defendant is not responsible in this suit

192 for any *loss or damage, if any, which the plaintiff may have sustained by reason of such action of the defendant; and that in order to entitle itself to recover, the plaintiff must show, to the satisfaction of the jury, that it has suffered actual loss by the conduct of the defendant in collecting and dealing with their said certificates, and must prove the extent of that loss.

6. That if the jury shall believe from the whole evidence, that the defendant, after receiving the money of the plaintiff from the Richmond government, acted in good faith and according to his best judgment, in and about his management of and dealings with the same, then that he is not responsible in this action to the plaintiff for any loss sustained by the plaintiff in respect thereto, and the jury must find for the defendant. And this, notwithstanding the money of the plaintiff was invested by the defendant in Confederate States certificates, and said certificates were collected, and the proceeds placed by the defendant with C. A. Baldwin & Co., of which he was a member; if the jury shall further believe that the said money, so received and treated, was Confederate currency, and that by such change of investment from Confederate certificates to a loan to C. A. Baldwin & Co., no actual loss accrued to the plaintiff.

7. That if the jury shall believe from the evidence, that the defendant and his firm, the said C. A. Baldwin & Co., had, at all times during the war after the withdrawal of said fund from Confederate certificates and placing it with C. A. Baldwin & Co., ample funds of the same sort to meet any demands of the plaintiff, or for the plaintiff's use, to the extent of the amount received by them aforesaid, and that no demand was made by the plaintiff or for the plaintiff's use for said sum or any part of it, that the defendant is not responsible *to the plaintiff in this action, and the jury must find for the defendant.

8. That the jury are entitled to judge, from all the circumstances of the case, whether or not the defendant, in placing the proceeds of the Confederate certificates with C. A. Baldwin & Co., intended at the time personally to assume responsibility to the plaintiff for anything but Confederate cur-

rency. And that if the jury shall believe that the defendant intended to undertake to be responsible to the plaintiff only for Confederate currency, and that he acted in good faith and in his best judgment for the interests alone of the plaintiff in the matter, after having endeavored in vain to invest said money otherwise for the plaintiff, then that the defendant is responsible to the plaintiff only for the value of such Confederate currency as of the time when demand was made by the plaintiff of the defendant, to wit: on the day of the institution of this suit.

And the court refused to give any of the said instructions; but in lieu thereof gave the following instructions, to wit:

Instructions given by the court.

If the jury believe from the evidence, that the defendant believing himself to be president of the bank of the Old Dominion, and authorized to act for said bank, did in good faith collect in February 1863 from the State of Virginia, the interest due said bank, and invest the same for the said bank in such securities as were then regarded by the business community of Virginia as judicious investments, in this action he is not liable for anything except the interest which he

194 may have collected on such investments, with interest *thereon from the date of its receipt, unless he thereafter converted that investment and appropriated the proceeds thereof to his own use; in which event he is further liable for the value of such proceeds with interest thereon from the date of such appropriation. And the jury are instructed that a loan of the proceeds of such investment to, or a deposit thereof with the firm of C. A. Baldwin & Co., of which the defendant was a co-partner, is to be regarded as an appropriation to the use of the defendant.

Upon the application of McVeigh a writ of error and supersedeas was allowed him.

The facts material to the questions decided by the court are the following:

Before the late war William N. McVeigh was a resident citizen of the city of Alexandria, a member of the mercantile firm of C. A. Baldwin & Co., and president of the Bank of the Old Dominion located in that city. He was re-elected in January 1861, and again in his absence in January 1862. As president he from time to time collected the interest upon the bonds of the state held by the bank. In May 1861 he left the city of Alexandria, and took up his residence in the city of Richmond, where he remained until after the close of the war, and the firm of C. A. Baldwin & Co. also removed to the same city.

In July 1865 McVeigh addressed a written communication to the stockholders of the Bank of the Old Dominion, in which he says: We have been permitted again to meet together to transact business connected with this bank, and I beg here to submit a statement of my doings during the four years absent. Being separated from the board of directors by military armies, I had to act upon my best

judgment and upon the judgment of
 195 others with whom I advised. As *president of this bank, and as I considered it my duty to do, I collected, &c., mentioning two sums of money which he collected from the state for interest due on bonds of the state held by the Bank of the Old Dominion, and deposited on the same day in the Bank of Virginia to the credit of the first named bank; and stating that he paid, by his checks upon the Bank of Virginia, such banks as he could learn had balances against the Bank of the Old Dominion. In relation to these sums there was no controversy.

He then proceeds to state that on the 18th of February 1863 he collected from the treasurer the interest due on the state bonds held by the bank, up to the 1st of January 1863, being \$26,697, and that he invested, by the advice of W. G. Cazenove, one of the directors of the bank, \$26,500 in a Confederate convertible or call certificate, bearing six per cent. interest; and the balance he deposited in the Bank of Virginia to the credit of the Bank of the Old Dominion. This loan to the Confederate government continued until that government advertised for the return of all call loan certificates bearing six per cent. interest, by a certain day for payment, or they would become permanent six per cent. stocks; and then the certificate was presented, and the amount with interest paid in Confederate money; at which time a law of the state imposing a tax of one per cent. was immediately to take effect, and a law passed by the Confederate government, soon to take effect, of thirty-three and one-third per cent. tax on all Confederate currency held by banks or individuals. In order to avoid this heavy tax he made various efforts to lend out the money, but without success. As a last resort he placed it in bank to the credit of C. A. Baldwin & Co., of which he was a member, with the understanding that
 196 said firm was to *pay the bank the same kind of currency on call or demand with six per cent., so that the same should stand with C. A. Baldwin & Co. on the same terms as it did with the Confederate government. In his testimony given in this case he says:

At that time Baldwin & Co. and McVeigh had more of Confederate currency than they knew what to do with, and frequently lent out large sums to such persons as they could get to take it; and they would at any time have paid any call made upon them by the bank or for its use, for the said sum of \$26,500 and interest: and that said sum, with its accumulated interest, was invested by said C. A. Baldwin & Co., together with their own funds, in tobacco and other things which were destroyed by fire that occurred at Columbia, South Carolina, at Charlotte, North Carolina, and in the city of Richmond on the 3d of April 1865, at all which places the said firm had stored the said tobacco and other goods.

This investment was not made for the bank, but at the individual risk of McVeigh,

he determining to continue the amount as a six per cent. investment to the bank payable any day.

John Howard, for the appellant.

Claughton, for the appellee.

Staples, J., delivered the opinion of the court.

This is an action of assumpsit brought in the Circuit court of the city of Richmond by the "Bank of the Old Dominion" against William N. McVeigh, to recover certain money belonging to the plaintiff, which as is alleged, was collected by the defendant in the year 1863. During the trial instructions were asked for by plaintiff and defendant respectively, which were
 197 refused *by the court; and in lieu thereof certain other instructions given; to which both parties excepted. There was a verdict and judgment for the plaintiff; to which the defendant applied for and obtained a writ of error and supersedeas. It is not necessary to consider the various questions presented by these instructions. It will be sufficient to examine the two main grounds upon which defendant relies for a reversal of the judgment.

The first of these is, that the defendant in the year 1861 having left the city of Alexandria, where the bank was situated, having permanently located within the Confederate lines, his official connection with the bank as president was thereby dissolved, and his relations to that institution thereafter were those of a public enemy; and consequently no contract, express or implied, could arise between the parties during the existence of such hostile relations, and no action can be maintained against the defendant for any act done by him as president or agent of said bank during that period. In order fully to comprehend the doctrine here asserted, it is necessary to give some attention to the evidence. It appears from the defendant's own admissions, that although residing within the Confederate lines after the 11th of June 1861, he undertook to act as president of said bank; and in that character he collected from the state money belonging to the plaintiff. We must suppose that he honestly entertained the opinion that he had the right so to do. Any other supposition would be a direct imputation upon his good faith and fair dealing.

After the close of the war, in July 1865, the defendant addressed a communication to the stockholders of the bank, in which he gives a history of his official conduct during the period of his separation
 198 from the *institution, and his reasons for collecting the funds belonging to it. He states that being separated from the board of directors by military forces he had to act upon his best judgment, and upon the judgment of others with whom he advised. As president of the bank he collected in November 1861 of the state treasurer fifteen hundred and seventy-five dollars, being balance of interest due the bank 1st July 1861. On the 4th January 1862 he collected eight thousand one hundred and ninety

dollars, the interest to January 1862; which several sums, after the payment of certain claims against the bank, were deposited to its credit in the bank of Virginia. And on the 8th of February 1863 he collected twenty-six thousand six hundred and ninety-seven dollars, the interest due on the state bonds up to the 1st of January 1863, and invested the same, or nearly the same, amount in a Confederate convertible or call certificate, bearing six per cent. interest. The present controversy is in reference to this latter sum.

Now the position assumed in the instructions and in the argument of the defendant's counsel is, that the defendant's office or agency was abrogated by the war—that the act of the defendant as president, in collecting plaintiff's money, was null and void—that this act could not be ratified after the war by the plaintiff or defendant, so as to create a cause of action *ex contractu* against the defendant. Conceding all this, how does it relieve the defendant of the obligation to account to the plaintiff for money collected without authority, and appropriated to the defendant's individual use and benefit. It is a matter of no sort of consequence that he was not authorized to act as president: having undertaken to do so, he cannot set up the illegality of his own conduct to avoid the just responsibility arising out of the agency he assumed. It has ¹⁹⁹ been held in several cases, where money is received by an agent by force of a contract which is illegal, he cannot protect himself from accounting for what was so received by relying upon the illegality of the transaction in which it was paid to him. *Sharp v. Taylor*, 2 Phil. Ch. R. 801.

In *Terrant v. Elliott*, 1 Bos. & Pul. 3, the defendant, an insurance broker, having effected an illegal insurance for the plaintiff, and received the amount of a loss, endeavored to defend himself against the claim of his principal by showing the illegality of the insurance; but it was held the plaintiff was entitled to recover. *McBlair v. Gibbes*, 17 How. U. S. R. 236; *Kinsman v. Parkhurst*, 18 How. U. S. R. 289; 7 Rob. Prac. 455-6.

A fortiori does this principle apply, where the plaintiff is entirely free from censure, and the illegality of the transaction, if it be such, is attributable to the defendant alone.

The learned counsel argued this branch of the case upon the theory, that war *ipso facto* operates as a confiscation of the title to all property belonging to alien enemies, and that any person appropriating or holding such property cannot be required to account for the same to the former owner after peace is restored. But clearly war has no such effect. While it gives to the government authority to confiscate the property of an enemy, it does not itself confiscate, nor confer upon individuals such authority. If the government does not exercise the power, the title remains unchanged. During the existence of hostilities, the owners' remedies for its protection or re-

covery are suspended; but so soon as peace is restored, these remedies revive as fully and effectually as though they had never been disturbed. This is the doctrine ²⁰⁰ everywhere sustained by the comity of states. *Ware v. Hylton*, 3 Dallas' R. 199, 226; *Brown v. United States*, 8 Cranch's R. 170.

The learned counsel insists, however, that the defendant being a mere tortfeasor, the action against him ought also to have been in tort. But it is well settled, that in cases of this sort the plaintiff has his election of remedies. He may, if he pleases, waive the tort and sue in *assumpsit*. Indeed *assumpsit* is the appropriate remedy whenever the defendant has received plaintiff's money, which in equity and good conscience he ought not to retain. 1 Rob. Prac. 484.

The defendant's second ground of defence is contained in the fifth, sixth, seventh and eighth instructions, offered by him, and rejected by the court. The main proposition asserted in these instructions is, that the defendant having acted in good faith in collecting the money from the state and investing it in Confederate call certificates, the said certificates became thereby the property of the bank, and the defendant is not responsible in this suit for any loss or damage which the bank may have sustained by reason of the action of the defendant.

It will be observed that the proposition here asserted leaves out of view the important fact established by the evidence, that after the defendant had converted the certificates into treasury notes, as required by the Confederate government, he deposited the money in bank to the credit of C. A. Baldwin & Co., of which firm he was a member; and subsequently the entire amount, together with the other funds of the said firm, was invested in tobacco and other articles. This investment, as the defendant states, was made at his individual risk, he being confident it would pay him the interest, and save to the bank the heavy Confederate tax. He further states that the articles so purchased ²⁰¹ were destroyed by fires that occurred at Columbia, Charlotte and the city of Richmond, at which places the said firm had stored the property.

It thus appears that the fund did not perish upon the hands of the defendant, but was loaned by him to a firm of which he was a member, and was invested by that firm in private trade and speculation. It may be that the goods were destroyed, but we have no means of ascertaining the circumstances under which the destruction occurred. We do not know whether it might not have been prevented by the exercise of due care and diligence: whether considerable profits may not have been realized from this fund by previous investments. Upon these points the record furnishes no information; no inquiry was asked upon the subject; no issue made up. The defendant nowhere asserts that the money was wholly lost by him. He does not say that no profits were realized from its use; nor does he rest his defence upon the

destruction of the property. No such ground is taken in the instructions or in the argument. The learned counsel was too well satisfied it could not be maintained. The defendant having appropriated the plaintiff's money, having invested it in trade and speculation, must of course account for it, however unfortunately the speculation may have proved. The defendant is to be regarded simply as a borrower of the fund. His use of it, whether judicious or otherwise, whether profitable or not, cannot affect the right of the creditor.

The case is wholly unlike that of *Davis v. Harman*, 20 Gratt. 197. There the fund was in the hands of a commissioner acting under the order of a court of chancery. He did not appropriate a dollar of it to his own use; but deposited it in bank, where it perished with the fall of the Confederate government.

202 *Nor does the case bear any resemblance to that of *Pidgeon v. Williams*, 21 Gratt. 251. In that case the money was also deposited in bank; was so marked as to be easily identified as the property of the plaintiff; and so remained in the bank until the termination of the war, and the consequent destruction of the currency.

The defendant is charged only with the value of the Confederate notes at the time they were appropriated by him; and with this we think he has no just cause of complaint. The verdict and judgment, however, bear interest from the 1st day of April 1864. The interest ought to be computed only from the close of the war; for the plain reason, that plaintiff and defendant were, until that date, residents of hostile sections. To this extent the judgment must be amended and affirmed, with costs to the defendant in error. In thus affirming it, we see no reason to impute any blame to the defendant. He seems to have acted throughout with a conscientious regard for what he considered the best interest of the bank. But his motives, however conscientious, cannot exonerate him from liability for his collection and appropriation of money belonging to the plaintiff.

Judgment amended and affirmed.

203 **Blackford & als., Trustees, v. Hurst & als.*

March Term, 1875, Richmond.

1. Registry Laws—Deeds of Trust.—By the act of January 16, 1867, amending and re-enacting § 5 of ch. 119 of the Code of 1860, deeds of trust &c. are to be recorded in the clerk's office of the county or corporation court within the jurisdiction of which the real estate conveyed &c. is situated.

2. Same—Same—Hustings Court.—By the charter of the city of Lynchburg jurisdiction is given to the

Deeds—Recordation.—For reaffirmation of the doctrine laid down in the second headnote, see *Burgess v. Belvin*, 32 Gratt. 633; *Campbell v. Nonperell*, 75 Va. 292; *Boston v. Chesapeake, &c.*, R. Co., 76 Va. 185, citing the principal case.

court of Hustings for said city, not only within the limits of the corporation, but also for the space of one mile without and around said city. A deed of trust conveying real estate lying outside the corporation limits, but within one mile without and around said city, is to be recorded in the clerk's office of the corporation court of the city. And being so recorded it is valid, and has priority over subsequent judgments against the grantor in the deed docketed in the clerk's office of the county court.

The case is stated by Judge Anderson in his opinion.

Kirkpatrick & Blackford, for the appellants.

Mosby & Brown, for the appellees.

Anderson, J., delivered the opinion of the court.

By the 4th section of the act amending the charter of Lynchburg, passed December 8, 1866 (Acts 1866-'7, p. 460), jurisdiction is given to the court of Hustings for the said city, "not only within the corporate limits of said city, but also for the space of one mile without and around said city." On the 31st of July 1869, Thomas L. Johnson, S. W. Younger, and John T.

204 **Smith*, who were partners constituting the firm of Younger & Co., executed a deed of trust, conveying, with other property situated and being within the corporate limits of the city of Lynchburg, a lot of four acres of land lying outside of said corporate limits, in the county of Campbell, but within the jurisdiction of the Hustings court of said city, to the appellants, trustees, to secure the appellees equally with all other creditors of Younger & Co. And on the same day said deed of trust was admitted to record in the clerk's office of the Hustings court of said city, but never was recorded in Campbell county.

Afterwards, in 1870, judgments were severally recovered by the appellees against Younger & Co. in Lynchburg courts, which were regularly docketed in the clerk's office of the County court of Campbell county. And the question raised by this appeal is, was the recording of the deed of trust in the clerk's office of the Hustings court of the city a valid recordation as against creditors, or was it necessary that it should have been recorded also in Campbell county?

By section 5 of chapter 119, Code of 1860, p. 566, deeds of trust, &c., shall be void as to creditors and subsequent purchasers without notice, until and except from the time that they are duly admitted to record in the county or corporation wherein the property embraced in such contract may be. This section was amended and re-enacted by the act of January 16, 1867 (Acts of 1866-'7, p. 538), to read as follows: "Every such contract, &c., deed of trust, &c., shall be void as to creditors, &c., until and except from the time that it is duly admitted to record in the county or corporation wherein the property embraced in such contract or deed may be: provided, however, that all deeds

of bargain and sale, of trust, of gift, or mortgage, or *power of attorney, and all writings in respect to real or personal estate, intended to be recorded, where such real or personal estate, is situated, lying and being within the jurisdiction of a corporation or Hustings court, shall be recorded in the clerk's office of such corporation or Hustings court:" which means, we think, that when the property conveyed is within the jurisdiction of the corporation or Hustings court, the deed shall be recorded in the clerk's office of that court, and shall be void as to creditors until and except from the time it is so recorded: which clearly implies that from the time it is so recorded, it shall not be void as to creditors and subsequent purchasers without notice. It was the intention of the legislature, we think, by this proviso, to prescribe this recordation as to property so situated, as a substitute for recordation in the County court. But it is nowhere said, nor, we, think is it implied, that deeds thereafter made, of property so situated, shall be recorded in the county, as well as in the clerk's office of the corporation and Hustings court.

The foregoing section, as amended and re-enacted, is not in conflict with § 6 of the Code, which is as follows: "Notwithstanding any such writing shall be duly admitted to record in one county or corporation, wherein there is real estate, or goods, or chattels, it shall nevertheless be void as to such creditors and purchasers in respect to other real estate, or goods, or chattels, without the same, until it is duly admitted to record in the county or corporation wherein such other real estate, or goods, or chattels, may be." By virtue of the preceding section, as amended and re-enacted, the property lying or being within the jurisdiction of the Hustings court of the city, although outside of the corporate limits proper, is, as to purposes of recordation,

206 *virtually within the corporation, and need only be recorded in the corporation court; and in this case, the deed, not embracing other real estate, or goods and chattels, without the same, need not be recorded elsewhere. But if there is any conflict, section 6 must yield to section 5 as amended and re-enacted, which in point of time is the later enactment. Section 6 was not re-enacted, and is not therefore contemporaneous with section 5, as amended and re-enacted by the act of January 16th, 1867, but was enacted prior to the Code of 1860. If any of its provisions are in conflict with section 5, as amended and re-enacted, they are virtually repealed by the latter.

The deed of trust in this case having been recorded in the clerk's office of the Hustings court of the city of Lynchburg, conveying the lot or lots of land in question, lying within the jurisdiction of the Hustings court, was such a recordation as the statute required, and was valid against creditors and subsequent purchasers. And consequently, the lien so acquired by the trustees on the property embraced in the deed of

trust overreached any liens upon the same property acquired by subsequent judgments. The court is of opinion, therefore, to reverse the decree of the Circuit court with costs; and doth proceed to enter such decree as ought to have been entered by the said Circuit court.

Decree reversed.

207 *Belton v. Apperson & al.

March Term, 1875, Richmond.

Negotiable Instruments—Usury—Bona Fide Purchaser.

—In June 1868 B filed his bill to enjoin a sale of real estate by A, the trustee in a deed given to secure the payment of a negotiable note for \$1800. He says he supposed that C was the owner of the note, and charges usury in it, and sets it out. He makes C and A defendants, and calls upon them to answer on oath. He prays that they may be required to disclose the name of the holder of the note; that A may be enjoined from selling the property; that the note may be delivered up and canceled, and A required to reconvey said real estate to the trustee to whom the same was conveyed for the benefit of B's wife and children. The injunction was granted; and in June 1869 A and C answered. C said he was a broker, and the note was put into his hands for sale, and he sold it to S; and he had no interest in it. Both C and A say they do not believe there was usury in the transaction: It was a sale not a loan.

The cause stood upon the docket without any move in it, until December 1871, when B and his wife and seven infant children, by B as their next friend, asked leave to file an amended and supplemental bill. In this bill they are plaintiffs, and S is made a defendant with C and A. They set out the bill and answers, state a conveyance of the property by B to trustee for B's wife for life remainder to the children. They charge usury in the note, disclaim any discovery from defendants, ask for an issue, and if they prove the usury that the note may be declared null, the injunction perpetuated, and for general relief. **HELD:**

1. **Equity—Amended Bills.**—The rule in equity in regard to amendments, is, that they may be

*AMENDED BILLS.

The General Rule Stated.—Mr. Barton in his admirable work on Chancery Practice, (page 346) says that the general rules as to amendments have been so often departed from that it is now scarcely possible to give any very accurate definition of what may be included in an amended bill. He says, however, "The general rule is, that amendments can only be granted where the bill is defective in parties, or in the prayer for relief, or in the omission or mistake of a fact or circumstances connected with the substance of the bill, but not forming the substance itself, nor repugnant thereto." Barton's Ch. Pr. (2nd Ed.) 845, citing *Piercy, Ex'or, etc., v. Beckett et al.*, 15 W. Va. 444; *McComb v. Lobdell*, 32 Gratt. 185; *Christian v. Vance*, 41 W. Va. 754, 24 S. E. Rep. 506; *Burlew, Trustee, v. Quarrier et al.*, 16 W. Va. 108.

"As a general rule, the court will at any time before the hearing grant leave to amend where the bill is defective as to parties, or in the mistake or omission of any fact or circumstance connected with the substance of the bill or not repugnant

made when the bill is defective in its prayer for relief, or in the omission or mistake of some fact or circumstance connected with the substance of the case, but not forming the substance itself. The plaintiff will not be permitted to abandon the entire case made by his bill, and make a new and different case by way of amendment. But this rule has been much trenchoned upon, especially in the states and in Virginia.

208 *2. Same-Same-Alterations Permitted.—If

a plaintiff is not permitted to make a new case, he may by his amendments so alter the frame and structure of his bill as to obtain an entirely different relief from that asked for originally.

3. Statutes—Suits under.—If the lender of money is made a party to a bill filed under the 7th section of the act in relation to money and interest, and answers, he cannot be proceeded against under the 10th section of said act. See Code of 1849, ch. 141.

4. Same—Equity—Filing New Bills.—Upon the coming in of the answers of C and A, B might have dismissed his bill, and immediately thereupon have filed a new bill against S, under the 10th section of said act, and he might submit to a dismissal of his bill by the chancellor, and at once file a bill against S.

5. Amended Bills—Answers of Parties As to Whom Suit is Ended.—C and A having no interest in the note, the case is virtually ended as to them; and S not having been a party to the original bill, the answers of C and A cannot be read for or against him either under the original or amended bill, and the amended bill under the 10th section of the act may be filed.

6. Same—Delay in Filing.—As S was not a party to the original bill, and as the plaintiffs may at once file a new bill against him, the delay in tendering the amended bill cannot prejudice his interests.

7. Same—Introduction of New Parties.—Courts of equity will allow an amendment of the bill by the introduction of new parties, plaintiffs or defendants, when necessary to the ends of justice, or to prevent further litigation. As a general rule this is not a matter of course, but discretionary with the court.

8. Same—Same.—B's wife and children having an interest in the real estate conveyed in the deed, it is proper to amend the bill and unite them as plaintiffs with B.

9. Quere. Whether the original bill in this case is filed under the 7th or under the 10th section of the act.

thereto. This amendment may be made by common order, before answer or demurrer, and afterwards by leave of the court." See *Holland v. Trotter*, 22 Gratt. 186.

Same—Omission of Proper Parties.—Where the plaintiff has shown a right to relief against parties before the court, but has omitted to make other necessary parties, there the bill will not be demurred, but he will be allowed to amend. *Jameson's Adm'x v. Deshields*, 3 Gratt. 4. See also, *Sillings v. Bumgardner*, 9 Gratt. 273; *Stephenson v. Taverners*, 9 Gratt. 396; *Mowby v. Wither's Ex'ors et al.*, 80 Va. 82; *Welton v. Hutton*, 9 W. Va. 339.

Amended Bills—Time of Amendment.—The plaintiff may of right amend his declaration or bill before

In June 1868 Patrick Belton filed his bill in the Circuit court of Richmond, in which he states, that in April 1866 he received as a loan the sum of \$1000, from, as he believed at the time, one Parker Campbell, for which he gave his negotiable note for \$1300, payable one year after date, secured by a deed of trust; *which he exhibits with his bill. When the said note became due, he paid \$300, and executed a new note for \$1300, payable one year after date, which was secured by another deed of trust; which he also exhibits. After the said note became due he refused to pay the same because of the enormous usury to which he had been subjected. And thereupon J. L. Apperson the trustee in the last mentioned deed, advertised the sale of the real estate mentioned in said deed. Complainant is not certainly advised as to who is the present holder of said note, but has been informed that it is held by one Parker Campbell of the city of Richmond. He prays that said Apperson and Campbell may be made parties defendants to the bill, and required to answer the same on oath: that they be required to disclose the name of the person who is the true owner thereof: and that Apperson be enjoined from selling, or in any manner interfering with, the real estate conveyed to him as aforesaid: that the said note may be required to be delivered up and cancelled, and that said Apperson be required to reconvey the said real estate to the trustee to whom said property was conveyed for the benefit of the wife and children of the plaintiff, by deed, of which he files a copy. The injunction was granted.

In June 1869 Apperson and Campbell filed their answers to the bill. Campbell says he was and is a broker in the city of Richmond, and about the month of April 1866 some person, he thinks Lewis A. Phelps, brought to him complainant's note, and requested him to sell it for him. The note was for \$1300, payable one year after date, and was secured by deed of trust, and respondent sold it to M. H. Houston, and paid over the proceeds. That afterwards, about the 1st of May 1867, James L. Apperson, a broker of Richmond, brought to respondent another note for \$1300, made *by said Patrick Belton, at one year; and secured by a deed of trust, to sell. Respondent put the note on the

the defendant's appearance, and notwithstanding such appearance, a plaintiff in equity may, at any time in the vacation of the court wherein the suit is pending, file in the clerk's office an amended or supplemental bill, or bill of revivor; whereupon, the same proceedings may be had as if leave to file it had been previously obtained in court, but the court, on the motion of a defendant, made at the term to which process to answer the same is returned executed on him, or, if it be returnable to rules, at the first term after it is so returned, may dismiss such amended or supplemental bill, or bill of revivor. Va. Code, sec. 3253.

Same—Same—After Publication and Cause Set for Hearing.—"The rule of the court is, that after a publication, and the cause regularly set down, you can-

market, and sold it to Jacob S. Shriver, and paid the proceeds amounting to \$1060, less the usual brokerage, to Apperson. That he made no enquiry as to who was the owner of said notes, or the purpose or consideration for which either of said notes was made. He sold the first note for Phelps as the holder thereof, and the second for Apperson as its holder. He or his firm have no interest, and never had any, in either of said notes, except a broker's commission. He is advised that neither of said transactions was usurious; that there was no lending or borrowing of money in the transaction, but the bona fide sale of a negotiable note to an innocent purchaser for value.

The answer of Apperson is to the same effect as to the last note; he knew nothing of the first. Plaintiff applied to respondent's firm, who were bankers and brokers, to obtain for him some money. That respondent applied to Parker Campbell & Co. to take a note for \$1300 secured by deed of trust, and sell it for respondent's firm; and that Campbell & Co. sold it as he was informed, to Jacob S. Shriver, and paid the proceeds to respondent. He did not inform Campbell & Co. who was the owner of the note, or the purpose or consideration for which it was made, and that he at no time had had any communication with Shriver.

In December 1871, the plaintiff and his wife and their seven children, the children being infants and acting by the plaintiff as

their next friend, moved the court for leave to file an amended bill, which was tendered for the examination of the court, and deposited with the papers in the cause. On consideration whereof the court refused to allow them to file said amended bill; but 211 tendered to the plaintiff Patrick *Belton, leave to file his amended bill making Shriver a party defendant, and requiring him to answer the allegations of the original bill, and to make discovery on oath of the true consideration of the note in controversy, and all bargains, contracts or shifts relative to the same, and the interest and consideration thereof; but this tender was declined by the plaintiff. And then the cause coming on to be heard, on the motion of the defendants the court dissolved the injunction and dismissed the bill.

In the amended bill proposed to be filed, Patrick Belton, and his wife and their seven infant children, by their father as their next friend, are made plaintiff's; and the bill after setting out the substance of the original bill and the answers thereto, and that Shriver was the holder of and interested person in said note, states that on the 20th of May 1867 Patrick Belton conveyed the same real estate mentioned in the deed to Apperson to trustees in trust for Mrs. Belton for her life, and at her death to their children. They say that the said wife and children are necessary parties plaintiffs,

not amend by making parties, and cannot introduce new charges, or put a material fact in issue which was not in the case before; but you may prefer a supplemental bill." *Pleasants v. Logan*, 4 Hen. & M. 489.

Same—Same—After Special Demurrer.—After special demurrer to a bill, the plaintiff may have leave to amend, on payment of costs. *Rose v. King*, 4 H. & M. 475.

Same—Instances Where Amendment Allowed.—Where an executor has a claim against the estate of his testator, depending on a *quantum meruit* only, he may exhibit a bill in equity against his co-executors and legatees, to have such claim established and fixed at a certain sum. In such case, he ought to state the claim with reasonable certainty, by setting forth his own estimate of his services; but, should he fail to do so, his bill ought not to be dismissed, but leave to amend it should be granted on motion. *Baker v. Baker et al.*, 3 Munf. 222.

Bill being filed for the specific execution of a contract for the exchange of lands, if it appears in the progress of the cause that the defendant cannot comply with his contract, the plaintiff may amend his bill and ask for a rescission of the contract, and for such other relief as under the circumstances he is entitled to. *Parrill v. McKinley*, 9 Gratt. 1.

By Amending after Demurrer Plaintiff Loses Right to Appeal.—In amending, after a demurrer to the bill has been sustained, plaintiff loses his right to appeal on that ground. *Fudge v. Payne*, 86 Va. 803.

Cannot Deprive Defendant of Answer under Oath to Original Bill.—Where defendant answers under oath to the original bill, plaintiff cannot deprive respondent of the benefit of his answer under oath, by filing an amended bill dispensing with an answer under oath. *Throckmorton v. Throckmorton*, 86 Va. 768.

Omission of Fact Known at Time of Filing Bill.—The court will not allow amendments inserting facts or circumstances known to the plaintiff at the time of filing the original bill, unless some good excuse is offered for such omission—but the courts are very liberal in accepting excuses. *Barton's Ch. Pr.* (2nd Ed.) 346.

Making out New Case Improper.—It is well settled that an amended bill cannot make out an entirely new case. 4 Min. Inst. (2nd Ed.) 1263; *Sillings v. Bumgardner*, 9 Gratt. 273; *Coffman v. Sangston*, 21 Gratt. 263; *Hurt v. Jones*, 75 Va. 353; *Ewing v. Ferguson*, 33 Gratt. 548; *Shenandoah Valley R. R. Co. v. Griffith*, 76 Va. 913.

Same—Same—Same.—Says the court, in *Hurt v. Jones*, 75 Va. 353, "While great liberality has been manifested in modern times, especially by the courts of this country, in allowing amendments of pleadings (and with this increasing spirit of indulgence we find no fault), yet the courts everywhere agree in denying liberty to so amend and supplement a bill as to make an entirely new case."

May Ask for Different Relief.—The plaintiff may, by his amendments, so alter the frame and structure of the bill as to obtain an entirely different relief from that asked for originally. *Hanby's Adm'r v. Henritze's Adm'r*, 85 Va. 177, citing *Belton v. Apperson*, 26 Gratt. 207.

Same—Discretionary with the Court.—Amendments are largely in the discretion of the court, and are allowed with great liberality until the proofs are closed. *Barton's Ch. Pr.* (2nd Ed.) 345.

Liberality of the Courts in Allowing Amendments.— "The tendency of the decided cases is to relax the ancient rules and to allow amendments whenever it best serves the ends of justice so to do." *Barton's Ch. Pr.* (2nd Ed.) 345, note 6.

and that Shriver is a necessary party defendant, and for this among other reasons they ask that this, their amended bill, may be filed. They charge that there is usury in the loan of the said \$1300 to the said Patrick Belton, and they are ready to prove it, and ask for no discovery from the said Campbell, Apperson and Shriver. And making them parties to the amended bill, they say they ask for no discovery from them or either of them; but they pray for an issue to be tried by a jury, as to whether or not there is usury in the transactions aforesaid, with the said Patrick Belton; and if the jury find that there is, that the said note may be declared null and void, that the injunctions granted may be perpetuated, and for general relief.

212 *Upon the application of Patrick Belton, an appeal was allowed by this court.

Meredith and Cocke, for the appellant.
Ould, for the appellees.

Staples, J., delivered the opinion of the court.

The original bill in this case was filed to enjoin the sale of real estate under a deed of trust executed by complainant, upon the ground that the debt is tainted with usury. The only defendants are the trustee and one Parker Campbell, who negotiated the sale of the note secured by the deed. The bill, after stating the circumstances attending the execution of the note and the deed of trust, calls upon the defendants to answer on oath, and to disclose on oath the name of the person or persons who are the true owners of the note if the defendant Campbell is not the true owner.

The trustee answered, stating his connection with the transaction, denying all knowledge of the dealings which resulted in the loan, and expressing his belief that the contract is not usurious. Campbell also answered, stating that he is a broker in the city of Richmond: that the note was brought to him to sell: that he accordingly put it upon the market, and sold the same to one Jacob S. Shriver, who is the owner: that he, Campbell, made no inquiries in regard to the note: that he gave no information concerning it: that he has no interest in it, and never had any, except as to his commission: and that he is advised the transaction is not usurious, but is a bona fide sale to an innocent purchaser for value, in the usual and regular course of business.

These answers were filed at the June term 1869. No further steps seem to have
213 been taken in the cause *until the December term 1871. At that term the complainant, in connection with other persons named as co-plaintiffs, tendered an amended and supplemental bill, making Jacob Shriver, the holder of the note, a party defendant, in addition to the other defendants; disclaiming any discovery from him, asking an issue to be tried by a jury, and a decree annulling the contract.

The chancellor refused to permit the amended bill to be filed, and rendered a decree dissolving the injunction and dismissing the original bill. The only question it concerns us now to consider, is whether this refusal was proper under the circumstances. The ground taken in support of it is, that the borrower cannot be permitted to file a bill of discovery and relief, and under it obtain the answer of the defendants, and then file an amended bill disclaiming a discovery, and insisting upon an entire annulment of the contract: that if he proceeds under the 7th section of chap. 141, Code of 1860, he must be content with the relief afforded by that section: that is simply an exoneration from the payment of all interest; and having made such election he cannot be allowed to change his ground, to proceed under the 10th section, and insist upon a forfeiture of the entire debt.

It would seem to be very clear, that if the lender is made a party to a bill under the 7th section and answers, he cannot be proceeded against thereafter under the 10th section of the statute; but here the original bill is not against the lender, or against any one claiming in privity with him, or under whom he claims. It is against the trustee, who is regarded as the agent of both parties, and the broker who effected a sale of the note, and who has no further connection with or interest in the transaction.
214 action. When the original bill *was filed the complainant did not know who held the note in controversy: that fact was first disclosed in the answer of the defendant Campbell.

The question therefore before us, is not whether after a bill of discovery and an answer from the lender the borrower may proceed against him in an amended bill for an annulment of the contract; but whether having by mistake filed a bill against persons having no interest, and having obtained a discovery from them, the borrower is thereby precluded from a resort to the lender for an annulment of the contract upon the ground of usury.

There can be no question, I imagine, that upon the coming in of the answer to the original bill, the plaintiff might have dismissed his suit, and immediately thereupon brought a new bill, under the 10th section, against the lender. And he might equally submit to the dismissal of the chancellor, and at once file such bill against the lender. As to this there cannot be a doubt, I presume. The reason is apparent. The principle upon which equity courts have acted is, that no man shall be required to accuse himself, or to answer as to any matter which may subject him to a penalty or a forfeiture. When, therefore, the borrower called upon the lender to answer as to the usurious contract, the latter might demur to the bill, unless the plaintiff waived the penalty, and proffered to pay the principal and the legal interest. This was the practice of both English and American courts; and upon this practice the seventh section is based, modified, however, in requiring the debtor

to pay the principal due without any interest.

Now it is very clear that these principles can apply only to a bill against the lender. The waiver of the forfeiture must be as to him, as he alone can make the

215 *discovery; and the proffer to pay must be also to him, as he alone can receive it. It is true that both the waiver and the offer of payment are now dispensed with in practice. This, however, is only because the statute dispenses with both in a bill by the borrower against the lender for discovery and relief. When the bill is not against the lender, but some other person having no interest in the loan, the borrower's rights and remedies as against the former cannot be affected, whatever may be the result. As the lender cannot be prejudiced by any proceeding in a suit to which he is not a party, so he can derive no benefit therefrom. It is therefore very clear, that upon a dismissal of the original bill in this case, the complainant might at once file a new bill against the defendant, Shriver, disclaim a discovery, and ask for an issue under the 10th section of the statute.

The question is, may he not accomplish the same object by an amended bill. The rule in equity in regard to amendments is, that they may be made when the bill is defective in its prayer for relief, or in the omission or mistake of some circumstance connected with the substance of the case, but not forming the substance itself. The plaintiff will not be permitted to abandon the entire case made by his bill, and make a new and different case by way of amendment. *Shields v. Barrow*, 17 How U. S. R. 130, 144.

According to the English practice, where a party has mistaken his case, and brings the cause to a hearing under such mistake, the rule is, to dismiss the bill without prejudice to a new bill. But even there the rule is in many cases disregarded. Thus in *Mayor v. Dry*, 2 Sim. & Stu. R. 113, the complainant by his bill sought to set aside a deed upon the ground of fraud. The defendant answered insisting upon the

216 deed; the *complainant being satisfied the deed could not be successfully impeached, was permitted to file an amended bill relying upon it.

In *Smith v. Smith*, Cooper's Ch. Cas. 141, a bill for an account against the defendant as bailiff was allowed to be changed into a bill for the foreclosure of a mortgage. See the cases cited in 1 Daniel's Ch. Prac., page 408. It is said by the author just mentioned, that great latitude is allowed to the plaintiff in making amendments, and the court has gone to the extent of permitting a bill to be converted into an information. It has been held where a plaintiff filed a bill stating an agreement, and the defendant by his answer, admitted there was an agreement, but different from that stated by the plaintiff, that the plaintiff might amend his bill abandoning his first agreement and praying for a decree according to that admitted by the defendant.

In the different states it is well known, that the practice of courts of equity in allowing amendments is much more liberal than in England. Those courts while professing to adhere to the rule, that the plaintiff shall not by his amended bill make a new case, have allowed so many departures from it that it is now scarcely susceptible of any very accurate definition.

For example: In *Philhower v. Todd*, 3 Stock. R. 54-312, it was held, even after a hearing upon a motion to dissolve an injunction and the delivery of the court's opinion, that the injunction should be dissolved and the bill dismissed, the injunction might be retained, and the party permitted to amend by altering the frame and the averments of his bill.

In *Buckley v. Corse*, Saxton's R. 504, the bill charged that the plaintiff had title to the premises older than the defendant's mortgage, but that under the belief that the mortgage was prior to his estate,

217 the plaintiff *had agreed to pay it, and had advanced large sums on that account. The bill prayed for an account of the moneys thus paid. Upon the coming in of the answer denying the allegations of the bill, the injunction was dissolved. Afterwards the complainant had leave to amend by making it a bill to redeem the defendant's mortgage. See *Henry v. Brown*, 4 Halst. Ch. R. 245; *Harris v. Knickerbacker*, 5 Wend. R. 638; *S. C.*, 1 Paige's R. 209; *Bellows v. Stone*, 14 New Hamp. R. 175; *McDougal's adm'x v. Williford*, 14 Geo. R. 668; *Neale v. Neales*, 9 Wall. U. S. R. 1.

It is, however, unnecessary to multiply these citations from foreign courts, when we have cases so much nearer home.

In *Anthony v. Leftwich's Rep.*, 3 Rand. 238, the bill was filed for specific execution of a contract relating to land. This court was of opinion upon the pleadings and evidence, it was not a case for specific performance. It, however, remanded the cause to the Circuit court, with leave to the complainant to make new parties, and claim compensation for the improvements he had made on the land.

In *Parrill v. McKinley*, 9 Gratt. 1, the bill was for specific performance, and the plaintiff was permitted to file an amended bill asking for a rescission of the contract. If these cases do not show that the plaintiff is permitted to make a new case, they at least show that he may by his amendments so alter the frame and structure of his bill as to obtain an entirely different relief from that asked for originally. This is founded upon good reason. Why should the plaintiff be put to a new bill for different relief upon the same transaction when the object can be accomplished by an amendment. If there is danger that the defendant will be injuriously affected by the **218** amendment it will be refused, *and the suit will be considered as pending only from the time of the amendment.

In the case before us, the averments of fact are substantially the same in the amended

as in the original bill; the subject-matter of both is the same; and what is important to be considered, the relief asked for is the same in both cases. The only material difference between them is, that one asks for a discovery, and the other disclaims it. But this does not make a new case. It certainly has no such effect as to the lender who was not a party to the original bill. The complainant having obtained a discovery in regard to the ownership of the note, may well say he desires no discovery from the lender, as to whom he is full-handed with proof. Why should the latter complain. He is not prejudiced either by the original proceedings or by the amendment, to any greater extent than he would be by a new bill. So far as he is concerned, the amended bill is the commencement of the proceeding.

According to the rule laid down in *Marks v. Morris*, 2 Munf. 98, the aid of equity is granted to the borrower to enable him to try the question of usury before a jury, because by the form of the security he is deprived of his day in court. In such case the plaintiff may, therefore, if he pleases, waive the right to the defendant's answer. This rule, by which a court of equity gave its assistance to the vacation of the contract and the forfeiture of the entire debt, was questioned by eminent judges, entirely repudiated by others, and was finally overruled after a judicial controversy of forty years. The doctrine of *Marks v. Morris* has, however, been adopted by statutory enactment, and is now the law of the state, not to be questioned by this or any other court.

Brockenbrough's ex'or v. Spindle's adm'r, 17 219 Gratt. 21. The legislature *has in effect said, that a borrower who wants no discovery from the lender shall not be compelled, whether he will or no, to accept it; and further, that the operation of the statute against usury shall not be defeated by the form of the contract. When, therefore, the borrower asks for an issue and disclaims a discovery, he presents himself in the assertion of a pure legal right. His application, however made, whether by original or amended bill, must be received with as much favor as the assertion of any other legal right. A party cannot be deprived of a plain statutory privilege because the court may think its exercise harsh and oppressive.

If, therefore, the bill in this case is to be regarded as filed under the seventh section of the statute, I can see no conclusive reason why it may not be so amended as to the lender (a new party) as to conform to the tenth section.

But is the original bill under the seventh section? The counsel on one side contend that it is; the counsel on the other as strenuously maintain that it is not; and the judges are not agreed on the question. The truth is, it has features that bring it under either section. It calls upon the defendants to answer under oath; but this does not necessarily convert it into a bill of discovery and relief. In *Marks v. Morris* the prayer of the bill was, that the defendants may, on their corporal oaths, true and perfect an-

swer make to the premises, as fully as if they were particularly interrogated. The court say, that notwithstanding this prayer, it was not a bill of discovery and relief contemplated by the third (now the seventh) section of the statute. One of the reasons, and indeed the principal one, assigned for this conclusion was, that the appellant, so far from averring he stood in need

220 of a discovery, averred, on *the contrary, that he could prove the same by a particular witness whom he named. That averment is wanting in the present bill. It, however, contains another equally suggestive. It asks that the note may be delivered up to be cancelled, and the property be reconveyed by the trustee to the proper parties. This form of prayer is entirely inconsistent with the extent and measure of relief prescribed by the seventh section. It is true the complainant does not ask an issue; but inasmuch as he requires the securities to be cancelled, he is entitled to a trial before that tribunal which can alone declare the nullity of the contract on the ground of usury. This was the view taken in *Marks v. Morris*, and other cases. *McPherrin v. King*, 1 Rand. 172.

This original bill was manifestly prepared in great haste, and without due consideration. It is very probable the attorney was looking more to prevention of the sale than to the measure of his relief. It is impossible to say with absolute certainty what was intended, unless we can affirm with confidence that the plaintiff meant one form of bill exclusively. We ought not to deprive him of the privilege of stating by proper averments, in an amended bill, precisely the object in view.

The rule laid down in *Story Eq. Pl.*, § 391, is, that "where a matter has not been put in issue with sufficient precision, the court, even upon the hearing, will give the plaintiff liberty to amend his bill for the purpose of making the necessary alteration." Clearly, where so much uncertainty exists as to the objects of a bill, and there is an equity on the face of it, it is better to allow an amendment than to dismiss it. Such an indulgence better accords with the liberality of courts of equity in Virginia.

*The singular anomaly suggested by 221 the learned counsel *for the appellee, of the answers being evidence under the original bill and not evidence under the amended bill, does not exist in this case. The answers of the trustee and the defendant Campbell have accomplished their end. For all practical purposes they are out of the case. They cannot be read for or against the defendant Shriver, either under the original or amended bill. The matter of controversy is now between the borrower and the lender. The answer of the latter cannot be read of course, because the complainants have disclaimed any discovery from him.

The principal difficulty in this case grows out of the delay in tendering the amended bill. This difficulty might be insuperable

had the defendant Shriver been a party to the original bill from the beginning. But he is now for the first time brought before the court. He did not choose to make himself a party to the original bill, or to move for a dissolution of the injunction. The cause seems, by common consent, to have remained upon the docket without any action or motion by either party. However this may be, as the complainants may at once file a new bill against the defendant Shriver, the delay in tendering the amended bill cannot prejudice his interests.

The only remaining question is as to the new plaintiffs inserted in the original bill. They are the wife and infant children of the original plaintiff, and claim the lots in controversy, or an equity of redemption in them, under a deed executed for their benefit by the complainant subsequent to the deed of trust in controversy. These parties are, of course, directly interested in the subject-matter of this suit. The only question is, whether they may be united in the amended bill with the original plaintiff. It is the settled practice of courts of equity to

allow an amendment of the bill by
222 *the introduction of new parties, plaintiffs or defendants, when necessary to the ends of justice, or to prevent further litigation. As a general rule this is not a matter of course, but discretionary with the court. 1 Dan. Ch. Pr., page 405.

In *Mangkan v. Blake*, 3 Chancery appeal cases 32, the sole plaintiff in a creditor's administration suit alleged that she was the personal representative of a creditor of the testator. At the hearing it appeared that the plaintiff was not his representative, and she then applied for leave to amend the bill by adding the true party as a co-plaintiff with her, and by inserting other allegations to show that she had a beneficial interest in the debt which was the foundation of the suit. It was objected that the amendments amounted to a new bill, that the plaintiff's case was wholly changed, and that it was contrary to the practice of the courts to allow amendments under such circumstances. The court, however, permitted the amendments, saying they were not unreasonable, and did not cause any prejudice to the defendants. In *Sillings v. Bumgardner*, 9 Gratt. 273, it was held that when the plaintiff has an interest in the subject matter of the suit, the bill may be amended, and other persons having a like interest may be joined as co-plaintiffs. *Coffman v. Sangston*, 21 Gratt. 263, is to the same effect. These authorities fully maintain the amendment proposed by the introduction of the new plaintiffs.

For these reasons we are of opinion that the Chancery court erred in refusing to permit the amended bill to be filed, as requested by the appellants; and for this error the decree must be reversed, and the cause remanded for further proceedings in conformity with the views herein expressed. The reasons for this conclusion have been

given at greater length, because the
223 *question involved is one of first impression and not free from difficulty,

and because the appellee is sustained by the decision of the learned judge of the Chancery court, always received by this court with the greatest respect and consideration.

The decree was as follows:

The court is of opinion, that the Chancery court erred in refusing the leave asked for by the appellant and his co-plaintiffs to file the amended bill tendered by them and made a part of the record of this cause; and in dissolving the injunction and dismissing the original bill of the appellant with costs, without allowing said amended bill to be filed. Therefore it is decreed and ordered, that the decree of the said Chancery court be reversed and annulled, and that the appellant recover against the appellee his costs by him expended in the prosecution of his appeal aforesaid here. And this court proceeding to render such decree as the said Chancery court ought to have rendered, it is further decreed and ordered, that the said amended bill tendered as aforesaid be allowed to be filed, and proper process issued to mature the cause thereon, without prejudice to the injunction heretofore awarded; and that the cause be remanded to the said Chancery court for further proceedings to be had therein on the issues presented.

Decree reversed.

224 *Norfolk City v. Ellis.

March Term, 1875, Richmond.

Local Assessments.—The City council of Norfolk has authority under the charter of the city and the constitution of Virginia, to assess the expense, or a part of the expense, of paving a street upon the owners of the property on the street in the ratio of the front foot of their lots facing on the street.

This was an action of assumpsit in the Corporation court of the city of Norfolk, brought by W. H. C. Ellis against the city of Norfolk, to recover the sum of \$874.11, which he paid under protest, as the amount assessed upon a lot on Wood street in the city, owned by the said Ellis, for the paving of said street. The parties agreed the facts, and dispensing with a jury, submitted the whole case to the decision of the court.

By the charter of the city the council of the city of Norfolk have "the power to close, extend, widen, narrow, lay out, graduate, improve and otherwise alter streets and public alleys in said city, and have them properly lighted and kept in good order," &c. "And for the execution of their powers and duties, they may raise, annually by taxes and assessments in said city, such sums of money as they shall deem necessary to defray the expenses of the same, and in such manner as they shall

Local Assessments.—See *Sands v. City of Richmond*, 31 Gratt. 571, and *note*, and *Violett v. Alexandria*, 92 Va. 561, where the subject of local assessments is discussed in all its aspects and all the Virginia cases on the subject are thoroughly reviewed.

deem expedient, in accordance with the constitution and laws of this state and of the United States: provided, however, that they shall impose no tax on the bonds of the city."

225 *An ordinance of the city for paving and repairing streets, after providing a fund of \$150,000 for this purpose, to be raised by the issue of the bonds of the city, provides how the work shall be given out to contract, when it is ordered to be done by the councils; and by § 5, provides—That when any unpaved street is to be graded, curbed and paved, three-fourths only of the cost shall be assessed upon the lands or lots lying thereon. Such assessment shall be collected by the city collector as other taxes are collected. And by § 7, it is provided—That when a street is ordered to be paved, the city surveyor shall furnish to the street committee a plan of the street, the squares, the number of front feet of each lot, and the names of the owners thereof. From this plan the bills of assessment shall be made out by the commissioner of the revenue and delivered by him to the collector.

The streets recently paved under the ordinances were not ordered to be paved until all the conditions precedent to such ordering were complied with, as specified in the charter; and Wood street was ordered to be paved upon a petition of a majority of the owners of real estate fronting on said street, and by a unanimous vote of the councils in joint meeting. The plaintiff Ellis owned a lot fronting two hundred and forty feet on Wood street, which was unimproved, and before the street was paved was assessed at \$3000. The assessment on the lot was at so much per front foot, amounting in the whole to \$1165.48; and after deducting the one-fourth to be paid by the city, left the amount chargeable to the plaintiff \$874.11. And the ratio of assessments on all the lots on the street whether improved or unimproved was the same; viz: between four and five dollars the front foot. This tax the plaintiff paid under protest and compulsion.

226 *It appears that the lots on the corners of the streets are assessed for the pavement of both streets, so that a lot fronting twenty or forty feet on one street which was paved heretofore, and running on another street from one hundred to two hundred feet, is assessed on the whole length of the lot; and one case is stated, in which one person owns several lots on Queen street recently paved, valued in the aggregate before the improvement at \$9000, one of which lots fronts on Queen street two hundred feet, and has an average depth of three feet six inches. This lot was assessed before the improvement at \$150, and its proportion for the expense of paving the street is not less than \$1000.

Until the passage of the present ordinance the whole cost of the paving the streets of the city had been assessed upon the owners of real estate lying on said streets per front foot.

Upon the hearing of the cause, the court below rendered a judgment in favor of the plaintiff for the said sum of \$874.11, with interest from the date of the judgment and costs. And thereupon the City of Norfolk applied to a judge of this court for a writ of error and supersedeas; which was awarded.

W. B. Martin, for the appellant.

W. H. C. Ellis, for the appellee.

Staples, J. It has been held by this court that the provision in the constitution of 1851, declaring that "taxation shall be equal and uniform throughout the commonwealth, and all property, other than slaves, shall be taxed in proportion to its value," relates to taxation by the general assembly for purposes of state revenue; and does not
227 apply to taxes and levies by *counties and corporations for local purposes. *Gilkeson v. The Frederick Justices*, 13 Gratt. 577.

The present constitution however includes counties and corporate bodies also; so that the prohibition, which was formerly confined to the state government, must now equally apply to corporate bodies; but in either case the prohibition relates to taxation for purposes of revenue, and not to those assessments made by municipal authorities, upon the owners of real estate within the corporate limits, for local improvements. These assessments are not founded upon any idea of revenue, but upon the theory of benefits conferred by such improvements upon the adjacent lots. It is regarded as a system of equivalents. It imposes the tax according to the maxim, that he who receives the benefit ought to bear the burthen; and it aims to exact from the party assessed no more than his just share of that burthen according to an equitable rule of apportionment.

Whether these assessments are to be regarded as an exercise of the taxing power or the police power, or whether they are based exclusively upon the idea of compensation received in the form of benefits conferred upon the owner's property, is a question not necessary now to be discussed or decided. It is sufficient to say, that the right to make such assessments, unless prohibited by some constitutional provision, is almost universally conceded. Concurring with Judge Anderson that the power unquestionably exists; that it is vested in the corporate authorities of Norfolk, I am led to a conclusion the very reverse of that which he reaches. His view seems to be, that as the owner of real estate in a city is liable to an assessment only by reason of benefits conferred, all levies in excess of such benefits are unconstitutional and
228 void. But who is to *determine whether such excess does in fact exist?

What tribunal is to settle the question? Are the courts to take cognizance of such cases, enter into a critical examination of the assessments, strike a balance of benefit on one side and burden on the other, and sustain or annul as the one or the other may seem to prevail? In a large majority of such

cases, in the very nature of things, the courts cannot have before them the proper material for such investigations. I do not mean to say, that cases may not occur of such gross oppression and injustice as to require judicial interference: but they are exceptional, and must be decided as they arise upon the particular circumstances attending them, rather than upon any general rule or principle. My understanding has always been, that if the mode of assessment is regular and constitutional, if the power to levy the tax exists in that class of cases, the courts are not authorized to interfere merely because they may consider the taxation impolitic, or even unjust and oppressive. In such case the remedy is in the legislative and not in the judicial department. Cases, without number, might be cited in support of this principle. *People v. Lawrence*, 41 New York R. 137; *Providence Bank v. Billings*, 4 Peters' R. 514; *Langhorne & Scott v. Robinson*, 20 Gratt. 661; where the authorities are reviewed by Judge Joynes. In the case before us it appears that the city council of Norfolk, for the purpose of grading and paving its streets, has adopted the system of assessment by the front foot on lots adjacent to the street to be improved. The same system has been adopted in other towns and cities in the United States, and has been generally recognized by the courts as constitutional and valid. It is sustained by the highest courts in New York, Ohio, Michigan, Wisconsin, Missouri, California, Kansas, 229 *Connecticut and Pennsylvania. See Sedgwick on Stat. and Const. Law 502-'3-'5; and cases cited in Cooley's Const. Limitation 507.

I admit there are some opposing cases; but neither in number, learning, or weight of authority, do they bear any comparison with the decisions which affirm the validity of this mode of assessment. Upon reason and principles of natural justice, it may be sustained as apportioning the burden according to the benefit, as nearly, perhaps, as any other that can be adopted. That it may in some instances operate harshly, and even oppressively, is conceded; but this is true of all forms of taxation.

It has been well said by a learned jurist, "taxation is sometimes regulated by one principle, sometimes by another; and very often it is apportioned without reference to locality, or to the tax payer's ability to contribute, or to any proportion between the burden and the benefit." The citizen who is required to pay a tax of one thousand dollars for the support of free schools, to which he sends no children, while his neighbor, who has a half dozen to be educated, contributes nothing, may well complain of inequality of burdens. A county levy for the construction of a free bridge or other local work not unfrequently operates with peculiar hardship upon persons residing remote from the locality; and yet no one now questions the validity of such taxation. An ad valorem tax is regarded as the most just and equitable for the general

purposes of government. The reason is, that a rich man derives more benefit from taxation in the protection of his property than a poor man, and ought therefore to pay more. The same rule, however, does not necessarily apply to local assessments.

They are based upon the idea of benefit conferred by the work upon *the owners of adjacent lots. If the owner of the unimproved lot pays only according to its value as ascertained at the time, his contribution is not in proportion to the benefits derived. The lot which is worth but little to day may, by the opening, grading and paving of the street adjacent, be enhanced in a few weeks in value to the amount of thousands of dollars.

We are, however, not called upon to decide which is the most just and equitable system of taxation, but whether the one under consideration is in conflict with the constitution or laws of the state. And in this connection I cannot do better than quote from the opinion of Judge Peck, of the Supreme Court of Ohio, in the case of *Northern Ind. R. R. Co. v. Connelly*, 10 Ohio R. N. S. 159. He thus states and answers the objection to this form of assessment: "But it is said, that assessments, as distinguished from general taxation, rest solely upon the idea of equivalents, a compensation proportioned to the special benefits derived from the improvement; and that in the case at bar the railroad company is not, and in the nature of things cannot be, in any degree benefited by the improvement. It is quite true that the right to impose such special taxes is based upon a presumed equivalent; but it by no means follows that there must be in fact such full equivalent in every instance, or that its absence will render the assessment invalid. The rule of apportionment, whether by the front foot or a per centage upon the assessed valuation, must be uniform, affecting all the owners and all the property abutting on the street alike. It is manifest that the actual benefits resulting from the improvement may be as various almost as the number of owners and the uses to which the property may be applied. No general rule, therefore, could be laid down which

231 would do exact justice to *all. * * * *

The mode adopted by the council becomes the statutory equivalent for the benefits conferred, although, in fact, the burden imposed may greatly preponderate. In such case, if no fraud intervene, and the assessment does not substantially exhaust the owner's interest in the land, his remedy would seem to be to procure, by timely appeal to the city authorities, a reduction of the special assessment, and its imposition, in whole or in part, upon the public at large." I refer also to the cases of *People v. Mayor of Brooklyn*, 4 New York R. 419; and *People v. Lawrence*, 41 New York R. 137; where the whole subject is exhaustively treated, and the law of local assessments placed upon impregnable grounds.

Upon my first examination of this record

I was inclined to think that the assessment here was upon the owners of the several lots for the expense of paving the street in front of each lot respectively. This upon well settled principles is illegal. A more careful examination has satisfied me, that the assessment is apportioned at uniform rates among all the owners of lots lying upon that particular street. It is one of the facts agreed, that the plaintiff has been assessed at the same rate per front foot, on his property, that all other owners of real estate on said street have been assessed on their property. In other words, the street to be improved is made a taxing district, and the expense of paving it is assessed upon the adjacent lots in proportion to the frontage of each upon said street.

Unless the expense of paving a street is very enormous, it is difficult to understand how a tax apportioned in this manner, can operate with very great hardship upon the owners of real estate abutting on the street.

It appears also, that the pavement 232 was directed by *a unanimous vote of the two councils in joint meeting, upon the petition of a majority of the owners of real estate fronting on the street. The city pays one-fourth, and the owners of adjacent lots pay three-fourths of the expense. They are permitted to make their payments in what is known as paving bonds, received at par and payable in annual instalments of five years. The very fact that this improvement is made at the instance of a majority of those upon whom the burden falls, and that among all the members of the city councils not a vote is recorded against it, is very persuasive evidence, at least to my mind, there is no great hardship in the assessment, nor injustice in the system under which it was made. If either exists, if there are individual cases of wrong, the remedy is by a timely appeal to the city authorities; or to the legislature for an amendment of the charter. The courts cannot interfere except by an assumption of power not properly belonging to the Judicial Department.

These are my views, the results of a careful examination of the authorities, and such reflection as I could give the subject. The question is an important one, and I regret extremely that my other duties have prevented the preparation of a more elaborate opinion. For the reasons stated I think the judgment of the corporation court erroneous, and should be reversed.

Anderson, J. Upon petition of a majority of the owners of lots fronting on Wood street, in the city of Norfolk, the city council ordered it to be paved, and that one-fourth of the expense should be paid out of the public treasury, and three-fourths be assessed on the lots fronting on the 233 street. The defendant in *error being owner of one of the lots was assessed with \$874.11, which he paid under protest, and then brought suit in the Corporation court of said city to reclaim it, and obtained judgment. And the case is brought here by the city of Norfolk upon a writ of error.

The main questions are, "Have the city council authority to make assessments upon the owners of real estate, especially benefited, to pay the expense of the improvement, or any part of it? And is the per front foot apportionment lawful?"

I am not aware that these questions have ever been decided in Virginia. But numerous cases have been cited from other states, in which the power to make such local assessments has been maintained, though upon different grounds. In some of them the power has been derived from the right of eminent domain; in others from the taxing power. I think it is clear that the power cannot be derived from the former source. Government cannot take private property in the right of eminent domain, except by giving to the owner a just compensation therefor. And it has been held, and I think rightly, that money is not subject to the right of eminent domain. Why should the government take the citizen's money, to return it to him as soon as taken? The power cannot be derived from that source.

Is it taxation? If it is, it is prohibited by the constitution of this state. Section 1, article 10, provides "That taxation, except as hereinafter provided, whether imposed by the state, counties, or corporate bodies, shall be equal and uniform, and all property shall be taxed in proportion to its value, to be ascertained as prescribed by law." To raise revenue, it is required that all property shall be taxed, and it must be taxed in proportion to its value.

234 *But it is contended that although it is taxation, it does not fall within this constitutional limitation, because though it is a tax, it is not a tax on property but on benefits. But it seems to me that is untenable. If it is a tax at all, and is not a tax on property, it would be difficult to perceive what is a tax on property. It is an assessment upon the land of the defendant in error to pay for the improvement of public property, the paving of a public street, which incidentally enhances the value of his property. It cannot be said that it is not a tax on property, but on benefits, because it incidentally enhances the value of the property taxed. All taxation is for the benefit of the body politic; and the well being and benefit of the body politic benefits all its members. Therefore it may be said, that all taxation is incidentally for the benefit of the taxpayers, and may as logically be said to be a tax on benefits.

In other cases cited, it is said that whilst it is an exercise of the taxing power, it is not exerted for the purposes upon which the constitutional limitation was designed to operate. And in support of this position, *Gilkeson v. Frederick Justices*, 13 Gratt. 577, is relied on. In that case, art. 4, § 22, of the constitution of 1851, that "taxation shall be equal and uniform throughout the commonwealth, and all property, other than slaves, shall be taxed in proportion to its value," &c., was construed to apply "to the commonwealth's revenue, and to nothing else." This construction was put upon the

ground, that County courts, city councils, &c., had always exercised the power of local taxation for local purposes, and upon different rates and upon different subjects, and they were not expressly embraced in the constitutional limitation. Judge Samuels,

speaking for the whole court, says (p. 235 583) "the power of the general assembly to confer authority on County courts, city councils, corporations, and other organized bodies, to impose local taxes for local purposes, had been exercised from the adoption of the first constitution down to the formation of the last. The rates and subjects of taxation were different in many instances, if not in all; the powers conferred were not always the same, but were varied to meet the exigencies of particular circumstances, and frequently were left to the discretion of the body on which they were conferred. All this was known to the convention, yet no explicit provision was inserted in the constitution changing this power of the general assembly. Surely if a change in the whole scheme of taxation was intended, the convention would have expressed the intention in plain terms, and not have left us to arrive at it by forced construction." In the present constitution it is expressed in plain terms; and perhaps with reference to the above decision. Counties and corporations are expressly embraced within the limitation. And as the public streets are a subject of municipal regulation, and the putting them in good condition, and keeping them in repair, and paving them when necessary, and the raising money for such purposes, are as much a public duty and necessity, as to raise money for any other branch of municipal administration, taxation for such purpose necessarily falls within the aforesaid constitutional limitation; and this reasoning is consistent with the principles enunciated in *Gilkeson v. Frederick Justices*, supra. The case of *Langhorne & Scott v. Robinson*, 20 Gratt. 661, is under the constitution of 1830, which contained no restriction on the taxing power, and consequently has no application to this case.

If therefore it is a tax I can see no reason why it is not included in the general terms "taxation" and "tax" as employed in the constitution. If it is taxation, or an exercise of the taxing power it seems to me, that it plainly falls within the letter of the constitutional limitation; and within its spirit too. For I can see no reason why the legislature and municipal corporations should be limited in laying a tax for general purposes to uniformity and equality amongst those who are assessed with the tax, and should not be so restricted in laying a tax for local purposes. Equality in the one case is as essential to justice as in the other. Unless then we can find some other ground upon which the assessment is warranted it seems to me, that it is plainly prohibited by the clause in our constitution referred to above. If it is taxation, it is prohibited upon the ground that it is not equal and uniform;

and further, upon the ground that it is a tax on property, and is not apportioned according to the value of the property.

But I am inclined to the opinion, that it is not properly a tax; and that it is erroneously ranged under the taxing power, in the cases cited by the plaintiff's counsel. Whilst we have great respect for the judicial decisions of our sister states, and for the opinions of the able text writers, who seem to follow them, they are not binding authority upon this court: and I am the less reluctant to dissent from them upon this question, inasmuch as the decisions of other courts, equally entitled to our respect, hold that it is not an exercise of the taxing power. The question is one of first impression in this state; and not being trammelled by authority I feel free to consider it upon what I consider sound principles of law, and reason.

It is an assessment. But the word assessment does not always mean a tax. A jury of inquest, upon a writ of *ad quod damnum*, is directed to assess the damage 237 *to the owner of the lands through which the road passes, or which shall be condemned for the abutment of a mill dam, and the like. And a jury is required to assess the damage, to which the plaintiff in an action at law is entitled, in the execution of a writ of inquiry. And by section 67 of this same charter, the city councils are required to assess, and pay to any one whose house has been destroyed by the city authorities to arrest the progress of a fire, the damage he has sustained. In these cases assessment does not mean a tax. And so it may not in the provision of the charter now under consideration. It is evidently a mode of raising money to defray the expense of improving the streets, which is different from the mode of raising it by taxation. The charter empowers the councils to determine what proportion of the expense of the improvement shall be paid out of the public treasury, and what proportion shall be paid by the owners of real estate who are benefited. For the former the money is raised by taxation; for the latter it is raised by an assessment on the owners of the real estate which is specially benefited.

In the class of cases now under consideration, the improvement is chiefly for the benefit of the owners of the real estate which is adjacent to the street which is paved. And the design is, that they shall pay a proportion of the expense of the improvement beyond their contribution in common with other citizens, by taxation, according to the special benefits they receive. And the city having paid the whole cost by its bonds, the city councils are authorized to assess—that is, to ascertain and determine—what proportion of the cost paid by the city was for the owners of the real estate thus exceptionally benefited; a bill or an account of which is to be stated

by the commissioner of the revenue, 238 *and placed in the hands of the city collector. And to enforce the payment he is required to collect it as city

taxes are collected. This very language implies, that these assessments were not regarded as taxes. The city having paid part of the cost of a street improvement, which certain owners of real estate ought to have paid, it being to that extent for their peculiar benefit, in order to have it refunded to the city, the councils are authorized to assess each one with his fair proportion—that is, to ascertain and determine what he shall pay—which I think is made a charge upon his estate, real and personal, by the provision that it shall be collected as city taxes.

It seems to me, that these local assessments fall neither under the head of the taxing power nor the power of eminent domain. It is a distinct power vested in the councils by the charter, to enable them to perform their important function of providing suitable streets and highways for the city, to determine what proportion of the cost, if any, shall be paid by the city, and what portion the parties benefited shall pay. The portion of the expense which the city shall pay they may raise by taxation, it being for a corporate purpose; the part which the owners of real estate benefited should pay, being for individual benefit, and therefore wanting in an essential element of taxation, which must be for a public purpose, the charter impliedly authorizes the councils to apportion it amongst them, and to assess the amount against each of them, as a jury would assess damages. Independently of the power thus conferred upon the councils by the charter, they could not make the requisition upon the parties benefited. They could not do it under the taxing power, because the constitution requires a tax on property to be apportioned according to the value of

239 *property, real and personal. If this power was not specially given, all that the councils could do, if they were petitioned to have a street paved, and did not regard it of such public interest as to justify its being done wholly at the public charge, would be to agree that they would pay out of the public treasury, one-half, one-third, or one-fourth, or other proportion of the expenses as they might consider the public interest in the work would justify, provided the balance should be raised by the parties to be benefited. Such it is believed, has been the common usage in the administration of county affairs. The inhabitants of a section of a county, are desirous of having a bridge over a stream. It is a work in which they are peculiarly interested. And whilst it will be of general advantage to the county, the justices do not regard it as of such general advantage as to justify its construction wholly at county expense; and they propose to order it, and to pay a part of the cost, provided the balance is raised by private contribution. And in order to have the bridge those who are interested must raise the balance. And so, whilst the paving of a street may be of public benefit to a city, the council may consider that it will not be of such benefit as to

justify an outlay to have it done at the public expense in the whole, or in some cases, even in part. If then it is done, it must be entirely by private contribution in the one case, or partly in the other.

These contributions must be either voluntary or compulsory. If the former, the misfortune is that all will not contribute in proportion to the benefits they will receive from the improvement. The more liberal and public spirited will contribute more than their just proportion; some will barely do their part, and others will do little or nothing, willing to share in the

240 benefits, *but not in the burden. The inhabitants of Norfolk in providing a government for their city, provided in their charter that contribution in such case should be compulsory, and that the amount which those benefited ought to pay should not be left to their own biased judgment, but should be determined by the city councils, not arbitrarily, but according to benefits received. And the ground of compulsory contribution is, that it is a public improvement which enhances the value of their real estate in a way that it does not the real estate in the city generally, and benefits them especially as it does not the citizens in general, and that it is just and proper that they should be required to contribute specially to the cost of making it. The authority given by the charter to make these assessments is founded in this (under proper restrictions) just principle, and I do not regard it as falling strictly or appropriately under the head of the taxing power. But it is a distinct power vested by the charter in the councils, with the assent of the corporators, to ascertain and determine upon a question of quid pro quo what a member of the corporation should pay to it for the special benefits he receives from the improvement. If it be said he did not ask for it, that the work was not done at his instance and request, it might be answered, that he, being a member of the corporation consented, (for his consent to the charter must be presumed,) that the councils might, under certain prescribed conditions, decide for him whether the work should be undertaken and assess him with such portion of the expense as ought to devolve on him in proportion to the special benefits which he derives from the improvement. Their decision that the improvement is a work of public convenience or necessity, and

241 that it shall be made, supersedes *the necessity of a special request from him. It being a public work which must be paid for by the citizens, it is not right that those who derive special and extraordinary benefits from it should pay no more than the citizens generally. Therefore the principle of the charter which authorizes an assessment on the owners of real estate who are specially benefited by the improvement, to pay a part of the expense of the work, in proportion to the special benefits which they derive from it, over and above what they receive in common with the other citizens, it seems to me, is

founded in reason and justice, and a sound public policy. The power can only be exercised on this principle, or on the principle of taxation. If on the former, it is on the principle of a return for benefits received: If on the latter, it is on the principle the right of sovereignty to command. But we have seen that this right to command, this power of taxation, is limited by the constitution: That taxation must be equal and uniform, and that all property, real and personal, shall be taxed in proportion to its value, whether levied by the sovereign legislative power of the commonwealth or by municipalities. And if these assessments can only be supported as a tax, or under the taxing power, I could not consistently with my obligations to the constitution, sustain them. A plain mandate of the constitution ought not to be evaded by ingenious construction.

But the assessments being warranted, upon the other principle, the councils are clearly not authorized to make an arbitrary assessment—that would be despotism; nor an assessment in proportion to the value of the property owned by the parties assessed; or of their ability to pay; or of the value of their lots fronting on the street; or the size of them; or their

242 *per front foot. But these matters may all be considered, as well as the condition and situation of the lots, and the use to which they are or may be applied, and any other circumstance which may have any bearing upon the question of proportion of benefits received. Upon this principle in no case could the owner of a lot be assessed with a sum which would necessitate a sale of his lot for less than the amount of his assessment. For if he is benefited it must be by the enhanced value given to his real estate; and I cannot see how he would be benefited by the improvement if he was thereby forced to sell his real estate to pay it at a price not exceeding the amount of his assessment. It is in fact a judicial inquiry, and should be proceeded with as such.

It is contended that the councils in making the assessment exercise their legislative function. That I apprehend is a great mistake. The councils are invested with both legislative and judicial functions, as will be readily seen by inspecting the charter. This is a judicial function. The determination of what constitutes a benefit, and its valuation, says Mr. Sedgwick, are judicial acts, which do not pertain to the legislative function. Sedgw. on Const. Law, pp. 169, 174-'5, 177. In *State v. Collector of Newark*, 1 Ducher's R. 315, it was held that these local assessments were of a judicial character, and that the power of the court to review them was too well settled to be questioned. In *The People v. The Mayor &c., of New York*, 5 Barb. R. 43, it was held that it was competent for the Supreme court to vacate the estimate and assessment of the common council for the construction of a sewer, as the common council then acts in a judicial capacity. In

Parks v. The Mayor &c. of Boston, 8 Pick.

R. 218, it was held that the power 243 vested in the mayor *and aldermen of Boston, as to the laying out and altering of streets, is judicial, and a certiorari lies in such case. But it is unnecessary to multiply citations of authority further, in support of this proposition. It seems to be very clear both upon reason and authority, that the function is judicial and not legislative.

In my opinion it would be competent for the councils, and it would be the right way, to summon the parties sought to be assessed before them, to show cause against it, who should be allowed to be heard, and to adduce evidence upon the question: or the councils might make the inquiry through a commission, as is required by the statute of New Jersey, who upon an actual view, and upon such evidence as either party might adduce, should make their report to the councils for confirmation; and in either case the party should have notice. It has been held in New York and New Jersey that notice is necessary, although not expressly required by the statute.

But it is contended, that an apportionment according to the front foot extent of the lots along the street paved may be adopted as a safe and uniform rule for a just apportionment of the expenses according to the benefits received. It is possible that there might be a case in which it would so operate. But if so it would be an exception to the general rule. In New Jersey and the great State of Illinois, where they have immensely wealthy and populous cities, their experience seem to be different. In *State v. Hudson City*, 5 Dutch. R. 116, 117, it was held that an impost according to extent of front, absolutely excludes the idea of an assessment in the ratio of benefits. See also *City of Chicago v. Larned*, 34 Ill. R. Whether it is true to that extent or not, I think that enough may be seen in this brief record of the operation of the rule in

244 this case, to *show that the reverse of the proposition contended for is true. It shows that in the assessments made by the councils, under the operation of that rule adopted in this case, the owner of a lot valued at \$150, before the improvement of the street, was assessed with \$1,000 as his share of the expense of the improvement. A rule which produces a result so shocking to our every sense of justice cannot have the merit which is claimed for it, and cannot be relied on as the best practicable rule to make an apportionment among the owners of the lots benefited according to the benefits they receive from the improvement. But it is attempted, by the advocates of the rule, to parry the effect of this damaging fact, by alleging that the party thus demnified had not then applied to the councils for relief. He may be awaiting the decision of this cause, which seems to be treated as a test case. Whilst I would not regard the value of the real estate benefited as the rule upon which the assessments should be made, I would regard it as having an important

bearing, with other circumstances, in making a just apportionment of the benefits received; which we have seen is the only principle upon which the assessment can be made. The owner of a lot handsomely improved, with a costly residence upon it, would be greatly more interested in having a well-paved street than the owner of an unimproved lot; but upon the basis of apportionment per the front foot the owner of the unimproved lot having double the front, although the area was no greater, would be required to contribute twice as much to the pavement of the street. And between lots unimproved there might be a great difference in the benefits which they receive from the improvement on account of situation and other circumstances, although they

245 were equal in the front foot. And *yet the owners on this basis are required to pay the same. Their benefits are not equal. One may own a lot on which he has a costly hotel, and the pavement of the street may add 50 per cent. to its value by increasing his custom; but he is required to pay no more than the owner of an unimproved lot which is not a tenth of its value and from which he derives no income. Do they derive equal benefits from the improvement? A man of plain common sense would answer no. The same may be said with regard to the owner of a lot upon which there are valuable stores or machine shops. Is it not manifest that he derives much greater benefits from the improvement than the owner of an unimproved lot, or of one the improvements on which are of inconsiderable value, though of equal front, and from which he derives little or no income.

It is not without doubt and difficulty I have reached the conclusion that, under the constitution of Virginia this power of local assessment can be maintained at all. I am clear that it cannot be maintained under the taxing power. And that if it can be maintained at all it is by virtue of the judicial power vested in the councils by the charter, to assess the owners of real estate with a just proportion of the expense, according to the special benefits which they respectively derive from the improvement. I cannot conceive of any other principle upon which they could justly or lawfully be required to pay for a public work beyond their just liability, in common with other citizens, to taxation for public objects. The improved street is not theirs: It is public property. They have no right to use it that does not equally pertain to every other citizen. And it is urged with much force of reason, that it ought to be made at the cost of the

246 city by a *constitutional tax upon all the citizens. The only ground upon which they can be required to pay beyond their common liability with all other citizens, is, that the improvement is a benefit to them in a way that it is not to the citizens in common. And it is only to the extent of those benefits, and in proportion to the value of those they respectively receive, that they can be held liable. And this is a judicial question, which ought not to be

determined against them without notice and an opportunity to be heard. And in no case can they be assessed beyond the value of the benefits which they specially receive from the improvement.

But it is said that it is a power which the legislature could not exercise and therefore could not delegate. It is true that it is a power which the legislature could not exercise. And it is true, that the legislature cannot delegate a legislative power with which it is not itself invested. But I apprehend it is not true as to judicial power. The legislature can surely invest another tribunal with judicial power which it cannot exercise itself. And therefore it is only upon the ground that it is a judicial power vested in the councils by the consent of the corporations, that it can be maintained, and in my opinion, can only be maintained under the restrictions and qualifications which I have endeavored to explain.

It does not appear from the record, that these restrictions were observed by the councils in this case. It appears to be an arbitrary assessment per the front foot of the lots, and not, nor professed to be, in proportion to the benefits which the owners of the real estate derived from the improvement. The councils have not therefore confined themselves within the limits of their authority; and the assessment is void.

247 *In this conclusion I am fortified by the recent decisions of the Supreme court of Illinois; in one of which the great city of Chicago was a party; by repeated decisions of the Supreme court of New Jersey, and other cases. I am of opinion for the foregoing reasons, that the assessment in this case being without authority, is null and void, though it is competent for the councils to make another assessment upon the principles indicated in this opinion. I am therefore for affirming the judgment of the Corporation court.

Moncure P. and Christian J. concurred in the opinion of Staples J.

Bouldin J. concurred in the results of the opinion of Anderson J., but not in all his views.

Judgment reversed.

248 *Smith & als. v. Gregory.

March Term, 1875, Richmond.

Absent, BOULDIN J.*

I. J. executor of G, settles his accounts in 1860, and is found indebted to his testator's estate. He then qualifies as guardian of the legatee of the testator, and closes on his books his executorial account, and opens a guardian's account; and transfers the balance due from him as executor to his debit as guardian. At this time he has no property of his testator's estate in his hands. He afterwards in 1863 lays his account before a commissioner, and requests him to settle it as an account as guardian; but the commissioner settles it as an executorial

*JUDGE BOULDIN had been counsel in the cause.

account, and it is returned to the court as such.
Held:

1. Executor—Guardian—Transferring Indebtedness.*

—The executor could not transfer his indebtedness as executor to himself as guardian, so as to exonerate his sureties as executor from liability to the legatee for the amount.

2. Same—Same—Same—Commissioner's Account.—

The account returned by the commissioner, is to be looked to as showing in what character J held the assets of the estate.

II. Same—Same—Same—Same—Ward and Sureties.—

In 1866 J has a suit brought by his ward, by her next friend, against him, as executor and guardian, for the settlement of his accounts, and a commissioner reports the executorial account up to January 1863, and then opens a guardian account from that day, and transfers the balance due from J as executor to him as guardian; and the report is confirmed by the court. The ward having had no agency in bringing or conducting the suit, and the sureties of the guardian not having been parties to it, neither the ward nor the sureties are bound by it.

Robert Gregory of Mecklenburg county, died in 1856, leaving a widow and one child,

Rosa B. Gregory, an infant. By his will
 249 he loaned to his widow all his *estate, both real and personal, until his daughter was eighteen years of age, for the support of herself and her daughter, unless his widow should sooner marry; in which event he gave her certain slaves named absolutely. In the event of his widow marrying or dying before his daughter attained the age of eighteen years, he gave the remainder of his estate to his daughter. He appointed his brother James A. Gregory his executor; and he qualified as such and gave Alexander Smith and D. G. Smith as his sureties in his official bond.

James A. Gregory proceeded to administer the estate, and seems to have settled his executorial accounts regularly until January 1860. On the 1st of March 1858, he was indebted to the estate in the sum of \$2,480.67, and on the 1st of January 1860 the balance reported against him by the commissioner was \$4,016.37.

Mrs. Gregory having married again in 1860, and the whole estate, except the slaves

given to her, being the property of the daughter Rosa B. Gregory, James A. Gregory, in April of that year, qualified as her guardian, with William Smith and C. H. Pettus as his sureties. He then closed upon his books the executorial account which he kept, and opened on them an account as guardian of Rosa B. Gregory; and the first item in this account as guardian is a credit to his ward, under date of January 1st 1860—Amount due from estate of R. T. Gregory \$4,016.37. And the account was kept as a guardian's account upon his books. When, however, he submitted his accounts for settlement to the commissioner in 1863, the commissioner stated it as his account as executor; and reported the balance due from him as executor on the 1st of January 1862 to be \$4,659.80. Gregory states

250 in his evidence *given in this case, that he gave the commissioner his book containing the account as he kept it, and requested him to settle the account as a guardian's account; and when he saw that it was made off as executor, he enquired of the commissioner why it was done, and the commissioner said that as there was but one legatee it made no difference.

In 1860 when James A. Gregory transferred on his books the balance due from him as executor to his account as guardian, and at any time subsequent to that, he did not have in his hands, any money, stocks, bonds, accounts or assets of any kind belonging to the estate of his testator; but the amount so transferred was his personal indebtedness as executor to the estate. Nor did he afterwards make any investment of funds in the name or for the special benefit of his ward Rosa B. Gregory. He says in his evidence in this case, that both in 1860 and in 1863, his estate was ample to pay this and all his other debts. It also appears that at these dates and indeed until the decree in this case, there was a debt of \$1,000, contracted by the testator, which had not been paid.

At the rules in July 1866, James A. Gregory had a suit instituted in the Circuit court of Mecklenburg county, in the name of Rosa B. Gregory, by her next friend, against him as executor of Robert T. Gregory, deceased, and guardian of the plaintiff, asking that James A. Gregory might be required to render before a commissioner under the direction of the court, a full settlement of his accounts as executor and guardian. On the same day Gregory filed his answer, in which he says he has made several ex parte settlements of his transactions as executor, which he believes are satisfactory to all parties having an interest in them. Subsequent to these settlements, however, he, both as executor

251 *of Robert T. Gregory and as guardian of the plaintiff, has had a number of transactions, the consideration of which was Confederate States treasury notes; and he is advised that an account of these transactions can be properly and equitably adjusted only under and by the direction of a court of equity. Being so advised he unites in the prayer of the bill

***Fiduciaries—Transferring Liabilities.**—In *Utterback v. Cooper*, 28 Gratt. 271, the court agrees with the principal case in its disapprobation of the doctrine which accords to a fiduciary, at his pleasure, the right to change his liabilities, by charging himself in a particular character with a debt, and thus throw the burden on one set of securities to the relief of another. See also, *Barton's Ch. Pr.* (2nd Ed.) 712, 748, 848. Distinguished in *Caskie v. Harrison*, 76 Va. 91. See in *West Virginia*, *Gilmer v. Baker*, 24 W. Va. 92, and *Board v. Cain*, 28 W. Va. 770, both citing the principal case.

Same—Transferring Assets.—In *Williams v. Sloan*, 75 Va. 147, the principal case is cited for the proposition that where one person is a trustee for two others, in order that the assets which he holds as trustee for one *cestui que trust* may be transferred to the assets which he holds as trustee for the other, it is necessary that there be some specific act indicative of his intention to make the transfer.

for a settlement of these accounts by a commissioner.

On the 5th of September 1866 the court made a decree that the defendant James A. Gregory do render before one of the commissioners of the court, an account of his transactions as executor of Robert T. Gregory deceased, and also as guardian of Rosa B. Gregory; which the commissioner was directed to examine, state and settle, and report to the court.

On the 8th of September commissioner Atkins returned his report. He first states the account as executor, which he brings down to the 1st of January 1863, and states a balance in his hands at that date of \$4,599.93; which he settles by an entry of that sum transferred to J. A. Gregory's account as guardian of Rosa B. Gregory. He then states an account as guardian, charging him as of the 1st of January 1863, with this sum as guardian; and reports a balance due from the guardian on the 1st of September 1866 of \$5,350.20.

The cause came on to be heard on the 18th of the same month of September, upon the papers formerly read and on the report of the commissioner, which was received and considered by consent of parties by counsel, on consideration whereof, there being no exception to said report, the court confirmed the same, and decreed that James A. Gregory do, from time to time, and without any further decree, render before one of the commissioners of the court a further account* of his transactions as guardian of Rosa B. Gregory, which accounts the commissioner &c.

In March 1869 Rosa B. Gregory, who was still an infant under twenty-one years of age, by her next friend, brought a suit in equity against James A. Gregory as executor of Robert T. Gregory deceased, and as guardian of the plaintiff Alexander Smith, in his own right and as the administrator de bonis non of William Smith deceased, D. G. Smith, and Mary A. Pettus administratrix of C. H. Pettus deceased. In her bill after setting out the death and will of her father, the qualification of James A. Gregory as executor and guardian, and the suit brought in 1866, as herein before stated, she charged that at the time he made the transfer of his indebtedness as executor to his guardian's account he had no money or assets of his testator in his hands. She says that in the settlement of his account in 1866 he gave the first indication that he regarded the balance of \$4,599.93, as held by him in his character of guardian of the complainant; and she charges that at the time that account was rendered the said James A. Gregory was in insolvent circumstances. She charges that he had been declared a bankrupt, and had made a surrender of his property, and complainant is left to look to the sureties of said Gregory on one of his official bonds for the satisfaction of his indebtedness to her. She insists that the act of the commissioner transferring a balance found due by an insolvent executor who held no money or prop-

erty whatsoever belonging to the estate of his testator in his hands, could not shift the onus from the shoulders of his sureties as executor to those of his sureties as guardian of the complainant; and that she is entitled to look to the sureties upon the executorial bond for satisfaction of the indebtedness of the said *James A. Gregory to her. Certainly, however, she is entitled to look for indemnity to the sureties upon the one bond or the other. And making the said James A. Gregory, and Alexander and D. G. Smith his sureties in his executorial bond, and the said Alexander Smith the administrator de bonis non of William Smith deceased, and Mary A. B. Pettus administratrix of C. H. Pettus deceased, the said William Smith and C. H. Pettus, having been the sureties in the guardian's bond, defendants, she prayed that the court would decree against the said Gregory and his sureties in one or other of the official bonds aforesaid, for whatever may be ascertained to be the amount of his indebtedness to her, and for general relief.

At the March rules James A. Gregory filed his answer. He admits that he did in 1866 cause the suit aforesaid to be instituted, in which suit his accounts both as executor and guardian were settled by a commissioner, whose report was confirmed. That from these accounts as early as January 1st 1863 the entire balance due from him as executor was debited to him as guardian of the plaintiff; and he refers to these accounts. He denies that the report by the commissioner of the transfer of balance made by him as of January 1st 1863, was the first act or intimation of the respondent that he held the balance due on his executorial account as the proper funds of his ward Rosa B. Gregory. On the contrary, as appears from his original book of accounts, the last entry in his account as executor was made March 15, 1860. The balance due the estate at that time was \$4,016.37. On the 16th of April 1860 he qualified as guardian of plaintiff, and the said balance was transferred on his books to her credit in an account headed: R. B. Gregory to J. A. Gregory, guard., and from that time to the settlement

*aforesaid by the commissioner, every entry in relation to the estate was made by respondent on his guardian account; and he treated and regarded the whole of the estate as belonging to his ward Rosa B. Gregory, from and after the date of his qualification as guardian and transfer as aforesaid.

He further says that in April 1860, when he opened his guardian account as aforesaid and credited his ward with the balance due from him as executor, although the balance was not actually in his hands in cash, and so transferred, he was the owner, over and above his other debts, of property and effects, worth largely over, indeed many times over the amount thus transferred. He denies that he was in insolvent circumstances either in 1866 when the account above referred to was settled, or in

January 1863 when the balance was transferred by the commissioner to the guardian account. In January 1863 as in 1860 he was fully able to meet an indebtedness many times larger than the balance transferred; and in 1866 although his means were much reduced by the disasters of the war, he yet regarded himself as fully able to discharge the indebtedness in question after satisfying his other debts.

At the April 1869 term of the court, Rosa B. Gregory by her next friend, filed her petition in which after setting out the proceedings in the suit of 1866, as herein before given, she says that James A. Gregory is a bankrupt, one of the securities in the guardian's bond is dead, and his estate is believed to be insolvent, and the solvency of the other security is doubtful; and stating that though nominally plaintiff in that suit, she had no agency in bringing or prosecuting it, she prays that the said cause may be reheard upon the report of the commissioner, and that it may be

255 *heard with another suit in this court upon a supplemental bill in the nature of a bill of review filed by her by her next friend, against the said James A. Gregory as guardian and executor as aforesaid and against his sureties in his official bonds.

In May 1869 Alexander and D. G. Smith the sureties in the executorial bond, filed their answer referring to and adopting the answer of James A. Gregory as a part of their own, and relying upon the same and all the facts therein set forth as their proper and full defence. The only material fact not already stated is, that Atkins who prepared the papers and filed the petition in bankruptcy for James A. Gregory states, that nearly the whole of said Gregory's indebtedness was reported to him by Gregory as being due in 1860, or before that time; and that the indebtedness was very heavy.

In October 1871 Commissioner Atkins restated the accounts of James A. Gregory, in which he brings down the executorial account of James A. Gregory to September 1, 1866, and states a balance on that day due from the executor to his testator's estate of \$4,599.43 of principal and \$769.95 of interest. He states a guardian's account commencing January 1st 1863, which he brings down to September 1st 1866, and reports a balance due to the guardian of \$63.79.

The cause came on to be finally heard on the 27th of October 1871, when the court, being of opinion that the proceedings in the suit instituted by James A. Gregory in the name of his ward were irregular and erroneous, and that the plaintiff should not be estopped by the decree entered in that suit on the 18th of September 1866, reversed and set it aside. And the court being further of opinion that the defendant James A.

Gregory, being both executor and **256** guardian, *could not by his voluntary act transfer his liability on his official bond from one set of securities to the other, and that he had no authority to transfer the money due by him as executor to the guardian of Rosa B. Gregory, until the estate of

his testator was fully administered by the payment of all the debts and liabilities of the testator known to him; and that not having been done his securities on the executorial bond are responsible to the plaintiff for the amount due from him to the estate of his testator. And James A. Gregory admitting by his answer his indebtedness to the estate as reported by the commissioner in his report of September 8th 1866, and the defendants Alexander and D. G. Smith having by their answer adopted the answer of said Gregory, and the court reforming the said account by striking from the administration account the items which should be charged in the guardian's account, and giving credit for the balance due to the guardian on that account, decreed that the defendants James A. Gregory, Alexander Smith and D. G. Smith do pay to Robert Burton, legal guardian of Rosa B. Gregory, the sum of \$5,306.13 with legal interest on \$4,599.93, part thereof, from the 1st of September 1866, till paid, after being credited with the sum of \$1,300.16 as of this day; it being the amount of a bond due from the estate of Robert T. Gregory to R. R. Jeffress, and which has been transferred to the defendants Alexander Smith and D. G. Smith. And that the defendants pay to the plaintiff her costs. From this decree Alexander and D. G. Smith applied to a judge of this court for an appeal; which was allowed.

The case was argued in printed notes as well as orally, by Jones & Bouldin for the appellants, and Page & Maury for the appellee.

257 *Staples, J. The law is well settled that where an executor or administrator having assets in his hands, becomes the guardian of the legatee or distributee, he may elect to hold the share of such legatee or distributee in his character of guardian; and thus while he charges his sureties in the guardian bond he exonerates those in the administration bond. And it is equally well settled, that in order thus to shift the responsibility from one class of sureties to the other, some distinct act or declaration is necessary on the part of the executor or administrator, indicative of his intention to hold the fund in his character of guardian. *Myres v. Wade*, 6 Rand. 444; *Suope v. Chambers*, 2 Gratt. 319; *Alston v. Munford*, 1 Brock. R. 266, 278; note 6.

These principles are not controverted by the counsel on either side. While, however, they have a strong bearing upon the point in controversy they do not cover the entire ground. The question arising here involves some additional issues necessary to be considered. This will be better understood by a brief reference to the facts of the case.

The testator Robert T. Gregory, died in October 1856. James A. Gregory, one of the executors appointed by the will, qualified as such shortly thereafter. In April 1860 he also qualified as guardian of Rosa B. Gregory, an infant daughter of the testator and the principal legatee under the will. Both as executor and as guardian he executed

bond with sureties for the faithful performance of the duties of these several offices. As executor he received assets to a large amount; and at the time of his qualification as guardian in 1860, there was an acknowledged balance against him of more than four thousand dollars. Neither at that time

nor at any subsequent period, had he
 258 *in his possession or under his control, any money, bonds, stocks, credits or assets of any description belonging to the estate of his testator, but this balance was the executor's own indebtedness growing out of assets received by him and wasted or converted to his own use. This fact is proved by the executor himself, and is not controverted.

It is also claimed and not denied, that the executor after his qualification as guardian, by distinct acts and declarations more particularly to be adverted to hereafter, elected to charge himself as guardian with the balances due by him as executor. The controversy here is not between different sets of sureties; but between the infant legatee and the sureties in the administration bond. The guardian is himself a bankrupt; and the sureties upon that bond are in doubtful circumstances, if not entirely insolvent.

The ground taken by the appellants, is, that the same person being both executor and guardian, he had the right to decide for himself, when and to what extent he would transfer his account as executor to his account as guardian; and when he has made his election to transfer and does transfer a balance from one account to another his sureties, who have trusted to his discretion, are bound in the one case and relieved in the other by his acts; and in this case such acts of election were neither slight nor trivial, but they were solemn, decisive and repeated.

On the other it is insisted by the counsel for the legatee, that while the executor may elect to hold in one character or the other property in his actual possession or under his control, he cannot thus transfer a mere liability from one set of sureties to another; that all the cases upon the subject, proceed upon the idea that the executor has

259 funds actually in hand, and *that he is not a mere debtor for converted assets; and when he has been guilty of a devastavit in wasting or appropriating the estate a right of action at once accrues upon the bond, his liability and that of his sureties becomes fixed, and can only be discharged by actual payment, or what is equivalent to it: and when the executor is also guardian, although he cannot make a payment to himself; it is incumbent upon him to do what he would do if the payment was to be made to a third person, he ought to keep the trust fund separate and distinct from his own estate, and easily identified as the property of the ward.

These views, it seems to me, are so sensible, so manifestly in accordance with the dictates of common justice, they ought to prevail, unless the authorities plainly establish a different doctrine.

The Virginia reports do not show that this precise question has ever been decided, or even considered by this court. In the various cases upon this subject it does not distinctly appear, whether the executor had or had not wasted or converted the assets; but in the opinions of the judges expressions occur which plainly indicate that the funds were in the hands of the executor, or under his control, at the time of the election to hold in the character of guardian.

Thus in *Myers v. Wade*, 6 Rand. 444, 446, Judge Green says: The Chancellor properly held in this case, that the sureties for the guardianship, and not those for the administration, were responsible.

Mrs. Myers' admission in her answer that upon qualifying as guardian, she received the estates of the infants into her hands, though not conclusive, is prima facie evidence against her sureties, and is not contradicted." The decision might have been very different had evidence been adduced contradicting the answer and showing
 260 *that Mrs. Myers had not in fact received the estate in her hands as guardian, but was a mere debtor for assets received and converted.

In *Morros' adm'r v. Peyton's adm'r*, 8 Leigh 54, it appeared that the estate of one decedent was indebted to that of another, and the same person was administrator of both, and wasted the assets of the debtor estate. This court held that if it should ultimately appear that the funds received by the administrator from the debtor estate ought to have been passed over by him to the credit of the creditor's estate, then the sureties for the administration of that estate should be held responsible for the omission to pass them over, and for the administrator's devastavit of those funds.

It must be borne in mind, that at the time the funds were received by the administrator of the debtor estate, he was then administrator of the creditor estate also; and having the funds in hand it was his duty to pay himself as representative of the creditor estate if there were no debts of superior dignity against the debtor estate. And for his failure to do so his sureties for the due administration of the creditor estate were liable. But Judge Tucker declared that for the waste or misapplication of the assets of the debtor estate the sureties on that administration bond would be also liable. And so in the present case, if at the time or after his qualification as guardian, the executor had funds in his hands which he ought to have passed to himself as guardian, but failed so to do, the sureties for the guardianship might be held responsible. It would not follow that the sureties for the administration would not be also liable. In the case supposed, the executor having received assets his sureties become at once responsible. That responsibility can only be discharged by showing that he has properly applied the

261 *funds in his hands to the purposes of the estate; or not being so needed, they have been passed to his credit as guardian.

These are the views, I think, substantially, presented in *Morros' adm'or v. Peyton's adm'or*. That case so far from being adverse to the ground taken in the present case, may be regarded rather as an authority in support of it.

I do not propose to notice the other cases decided by this court, because it is not pretended that in either of them the question now before us was discussed or considered. The point being undecided in this state, the learned counsel on both sides have been extremely diligent in examining the decisions of other states. They have found many. It would be a most unprofitable consumption of time, it would extend this opinion an undue length, to enter into a discussion of these decisions, and to attempt to show wherein they have or have not any bearing upon the present case. It is sufficient to say, that they are conflicting, and while in some of them expressions occur which seem to accord to a personal representative the power to shift the liability from one set of sureties to another even where he has converted the assets, yet whenever the question here has been distinctly made and considered, the weight of authority sustains the views presented in this opinion.

It may be proper, however, to notice briefly, the case of *Taylor v. Deblois*, 4 Mason R. 133. That is a leading case, and is mainly relied on by the appellant. When carefully examined, however, it will be found there is nothing in it in conflict with what has been said here.

There the same person was both administratrix and guardian. The administratrix had settled her accounts in the Probate court, which showed a considerable
262 *balance against her due the distributees. She afterwards qualified as guardian of one of the minors; and thereupon she presented a certificate to the same court, stating that she had in her possession the funds belonging to her ward; and upon that she obtained from the court a quietus or decree exonerating her as administratrix and her sureties upon that bond.

Upon a suit afterwards brought by the ward, the question was whether the sureties on the administration or on the guardian's bond were liable. It was alleged by the ward, that at the time the certificate was presented to the Probate court and the quietus obtained the administratrix did not have the funds in her possession or under her control; but that they had been wasted by her or her agent. That in this respect the certificate was false, and the quietus fraudulently obtained.

This was the real issue between the parties. The sureties of the administratrix relied upon the decree as conclusive in the absence of fraud, under the statutes and practice of Rhode Island. And the court held there was nothing to show that the certificate was false or fraudulently obtained. Throughout the case, both in the pleadings and in the very learned and elaborate opinion of Mr. Justice Story, it

was impliedly conceded, that if the administratrix at the time of obtaining the quietus did not have the distributive share in her possession, but had wasted the same, her sureties for the administration would still be liable to the distributee.

Now if an executor who has wasted the assets may, by his mere election, transfer his liabilities to his guardianship account, it was a matter of no sort of importance whether the certificate was true or false, whether the administratrix had or had
263 not the funds in hand. *Such an inquiry was altogether immaterial. It would have been sufficient to say, that the certificate itself was an open and notorious act of election to hold as guardian, and such election exonerated the administration sureties, no matter what was done with the assets. But no such ground was taken by the counsel or the court; and I think the case strongly discountenances the idea that a personal representative, who is also guardian, guilty of a devastavit may at his pleasure charge one set of sureties and exonerate the other from all liability to parties interested in the estate.

It is true that Mr. Justice Story, in the course of his opinion, states another ground upon which, as he thinks, the responsibility of the administratrix and her sureties is discharged. He says: The administratrix after the guardianship having assets to pay the amount of the distributive share it was presently satisfied by way of retainer; and by operation of law there was a transmutation of the same to her as guardian, and she no longer held the same as administratrix.

Now it is sufficient to say, that this doctrine of transmutation of possession by operation of law, where the same person is both executor and guardian, has been repudiated by this court in every case before it. It was disapproved in *Morros' adm'or v. Peyton*, 8 Leigh 54; in *Swope v. Chambers*, 2 Gratt. 319; in *Harvey's adm'or v. Steptoe's adm'or*, 17 Gratt. 289, 300, 301; and by Judge Story himself in the subsequent case of *Pratt v. Northam*, reported in 5 Mason 95. As the time when the transfer is to be made depends upon the condition of the estate and the state of the administration, the court will not shift the responsibility from one set of sureties to the other without some act or declaration on the part of
264 the representative, indicating *an intention to transfer the assets. *Harvey's adm'or v. Steptoe's adm'or*, 17 Gratt. 289, 301.

I do not deem it necessary to answer further the various cases upon this subject, but will refer to *Phillips v. Minnings*, 14 Eng. Ch. R. 309, 315; *Harrison v. Nard*, 3 Dev. Law R. 417; *Claney v. Carrington*, Id. 529, and especially to the case of *Conky, Judge v. Dickinson et als.*, 13 Metc. R. 51. In the latter case the question arising here was discussed and carefully considered. The Supreme court of Massachusetts lays down the doctrine broadly, that if the sureties on the bond of the executor were liable

by reason of his misapplication of the assets, it was not competent for him to transfer that liability to his sureties on the guardian's bond. The assets were never in the possession of the guardian as such; nor was there any means by which he could obtain possession in that character. He could not sue himself; and he is not chargeable on the ground, that an executor or administrator is chargeable for a private debt which he owes the estate. That principle is grounded on the necessity of the case; and no such necessity exists in the present instance.

It seems to me that this view is well nigh conclusive. The ground usually taken in opposition to it is, that as the executor, being also guardian, cannot sue himself nor make a payment to himself, he must from the necessity of the case, have the right to charge himself in either character. The answer is, that if the executor does his duty no suit is required. It is only necessary for him to keep the funds of the estate separate and distinct from his own, faithfully apply them to the purposes of the estate if needed, and when the administration is closed, transfer the surplus in his

265 *hands to the guardian account, and the obligation of his bond is at once discharged and the sureties released. This court said in *Morrow's adm'r v. Peyton's adm'r*, that when the same person is representative of both debtor and creditor estate, it is his duty as representative of the debtor estate, to pass the funds over to himself as representative of the creditor estate. The same rule applies when the same person is both guardian and executor. Having the funds in his hands as executor, he may elect to hold them in his character of guardian; and his sureties will be bound by his election. In this way he fulfills the condition of his executorial bond as completely as if he had made the payments to a third person.

The rule which allows an executor guilty of a devastavit, at his pleasure to shift his liabilities from one set of sureties to another, is calculated to produce much inconvenience and injustice. Its effect is to hold out a premium for fraud and collusion by giving the power to the executor to favor one set of sureties at the expense of the other, without fear of detection and exposure.

It enables him at his pleasure, to transfer a liability from the party who ought primarily to bear it, to innocent parties, who ought not to be the sufferers.

It enables him, if so inclined, to defeat the just claims of the distributee by shifting the responsibility from capable and solvent sureties to those that are doubtful and insolvent.

It clothes a defaulting fiduciary who has wasted a trust fund, with an unlimited discretion, which ought to be accorded only to one who has faithfully performed his duty.

And finally, it takes from the sureties a strong motive to see to it that the personal representative faithfully *dis-
266 charges all the trusts and obligations of his office.

It is said, however, that much of the evil thus apprehended is imaginary, as this right of election can only be exercised by an executor or administrator whose solvency is unquestioned. But it is often difficult if not impossible to determine, especially after the lapse of years, what was the pecuniary condition of the executor at a given time. He may be a man of fortune to-day and a bankrupt to-morrow. He may be apparently possessed of ample means and at the same time overwhelmed with debt. The law does not look to the solvency of the fiduciary, but to that of his sureties. The object in taking the bond is to protect parties interested against losses and contingencies of this very character.

In the present case the executor is a bankrupt. He tells us, however, that before the war he was possessed of an estate amply sufficient to discharge all his liabilities. It appears that his bankruptcy was the result of debts contracted almost exclusively prior to the year 1860. Within fifteen months after his qualification as executor he had wasted or misapplied the assets to the amount of two or three thousand dollars; and within the next two years succeeding he had wasted more than two thousand dollars besides. The executor has never replaced the amount, nor attempted to do so. The funds were probably used in the payment of his private debts, or in the support of his family. It may be fairly presumed, that at no time could he have replaced the amount except by a sale of property. Upon his qualification as guardian he quietly transfers the devastavit to that account, and thus relieves himself and his sureties from any suit upon the administration bond. But even after

267 he had become guardian his *settlements before the commissioners were made in his executorial capacity; and these settlements were continued down to the 1st of January 1862; on which day a large balance is reported against him as executor. It does not appear that any other settlements were made during the war. The only transfer made to the guardianship account before the year 1866, consists of entries in the executor's private account book, made after his qualification as guardian in the year 1860. No such transfer appears by any of the settlements made in the County court.

The executor tells us he presented to the commissioner his book as guardian and asked him to make the settlement in that way; but the commissioner said there was but one legatee and it made no difference in which way the settlement was made.

Under our statutes and rules of practice these settlements before the County courts are entitled to peculiar respect and consideration. They are the sources to which creditors and legatees look for information touching the administration of the estate, and upon which sureties on the administration and guardian bonds rely to ascertain the nature and extent of their own liabilities. When a fiduciary thus charges himself with assets, when he deliberately holds himself out to the world as chargeable in a

particular character, neither he nor his sureties should be permitted to destroy the effect of admissions thus solemnly made, by any mere private entries of the executor himself, or by parol proof of verbal instructions given to the commissioner who made the settlements. As the records show one state of facts, and the executor's account book shows another, we must look, I imagine, to the records only. These show that

he was never charged as guardian with
268 these balances until the year *1866.

In that year a bill was filed in the Circuit court of Mecklenburg in the name of the ward, by her next friend, against the guardian and executor, asking for a settlement of his accounts in both capacities. In the progress of the suit the accounts were referred to a commissioner, and a settlement made by him. It seems that the commissioner refused to recognize the transfers made by the executor to his guardianship account in 1860. He brings the executorial transactions down to the 1st of January 1863; and on that day he finds a balance against the executor of nearly five thousand dollars. The commissioner then opens a guardianship account, and transfers to that account the executorial balance just mentioned; and this account is brought down to the 1st of September 1866.

The bill was filed the first Monday in July; the answer of the executor and guardian on the same day. Two months thereafter, on the 5th September 1866, the order for an account was entered; the account was taken and completed on the same day, and a decree rendered confirming it on that day.

It is admitted that the infant had no agency in bringing the suit, that it was brought by the executor, and conducted by him and in his interest throughout. It was to all intents and purposes his suit, in which for all practical purposes, he was both plaintiff and defendant. Neither the sureties on the administration bond nor the sureties on the guardian's bond were parties to it. This decree is relied on as conclusively settling the rights of the parties. In my judgment it binds no one except the executor and guardian. It may show an election in 1866, on the part of the executor, to transfer his liabilities to his guardianship account. It cannot operate as an election and transfer
269 in 1863, when there was no such election and *transfer, and in the very teeth of the public records to the contrary.

Nor can it operate as a release of a previous well ascertained liability on the part of the executor and his sureties, for a devastavit continued and acknowledged for years upon the public records. Had the sureties upon the guardian's bond been made parties they might be bound; but their liability would be merely cumulative, and would not affect that of the sureties for the administration. There is nothing in the decree which professes to exonerate them.

The executor's election to hold as guardian could not have any such effect, according to the principles already discussed. No such election would be permitted at this late

day, after such a length of time, except upon the most satisfactory proof of the entire solvency of the executor himself and the sureties upon the guardian's bond. The latter are confessedly in doubtful, if not insolvent circumstances. How they were in 1866 we do not know. We do not know what was the condition of the former at that time. We do know that he went into bankruptcy under the act of 1867 upon debts contracted before the war; and the reasonable, the fair presumption is, that he was much embarrassed if not insolvent in 1866.

I do not mean to impute any bad faith, or unfair conduct, or improper motives, to this executor. He is represented as a conscientious and honorable man. Whatever may have been his motives, however fair his proceedings, the proposition to my mind is not tenable in law or equity, that he can be permitted by his mere fiat to exonerate the only solvent sureties, the parties who are justly liable, and compel this legatee to seek redress upon a doubtful bond against parties who are not properly chargeable for the loss of this estate.

270 *In every point of view in which the case can be considered, I think the decree of the Circuit court is clearly right, and ought to be affirmed.

The other judges concurred in the opinion of Staples J.

Decree affirmed.

271

*Mason v. Jones & Wife.

March Term, 1875, Richmond.

M by his will gives his executor discretion to sell his whole estate real and personal.* He lends it to his wife for the support of herself and his daughter L, until the daughter attains lawful age or marries. He provides for the contingency of his wife's marrying again; and then says: Should my wife not marry, I wish when L comes of age or marries, one-half of my estate to go to my wife for life and the other half to L absolutely; and at the death of my wife the other half. He appoints J. his executor. The executor pays the debts, and sells the whole estate at public auction, nearly all of which is bought by the widow; and he takes her bond for the amount. He afterwards settles his accounts and is charged with the amount of the sales, and then settles with the widow and takes her receipt for the amount of her purchases. L marries, and she and her husband sue J. and claim one-half the amount reported against him at once, and security for the other half to be paid on the death of the widow. **Held:**

1. **Wills—Executors—Trust.**—The will does not create a trust of the estate in the executor. And

***Life Tenants—Right to Possession of the Corpus.**—In *Hawthorne v. Beckwith*, 89 Va. 791, the court lays down the rule that in case of a legacy of money or stocks the rule is that the legatee for life is not entitled to possession of the corpus, trusting to the profits, and it is the duty of the executor to invest the fund and hold it in trust until the determination of the life estate, unless as was the fact in the principal case, a different intention appears in the will.

when he had paid the debts he properly turned over the remainder of the property to the widow; and her receipt was a discharge to him. His taking her bond did not affect his responsibility.

2. *Same—Same—Discharge.*—Having properly turned over the property to the widow, who was the life tenant, his office was fully discharged, and he is not liable to L, who took in remainder.

In December 1854 Joseph W. Mason, of the county of Suffolk, died, leaving a widow and one child, an infant, named Lucy. By his will he says: 1st. I direct that all my estate, real and personal, be sold at the discretion of my executor. 2d. After 272 the payment *of my debts, I loan to my wife Frances, the whole of my estate for the purpose of supporting herself and supporting and educating my daughter Lucy, until Lucy shall attain to lawful age or marries, or until my wife shall marry. 3d. Should my wife marry again, then I lend her one-third of my estate during her natural life; the remaining two-thirds I give to my daughter Lucy, absolutely; and at the death of my wife the third loaned to her. 4th. Should my wife not marry, I wish when Lucy becomes of age, or marries, one-half of my estate to go to my wife for life, and the other half to Lucy absolutely, and at the death of my wife the other half. He appointed John T. J. Mason his executor, and guardian of his daughter. And he qualified as executor, but declined the guardianship of the daughter.

The executor paid the debts, and left the land, stores and property upon the farm with the widow, who cultivated the land for a year or more. He then on the request of the widow, sold the land, stores and other property, all of which, except two slaves, were purchased by the widow, who executed to him her bonds for the amount of her purchases. He in 1858 settled his accounts before a commissioner of the County court, the whole amount of the sales being brought into that account; and the balance reported against him was \$16,785.67. He then settled with the widow and took her receipts for the amount reported against him, which was made up of her purchases.

The widow did not marry again; but in October 1866 the daughter Lucy, then in the 18th year of her age, married J. B. Jones; and in July 1869 he and his wife instituted this suit in the Circuit court of Sussex county against John T. J. Mason, the executor, and his sureties, and the 273 widow, to recover the moiety *of the estate reported by the commissioner of the County court to be in the hands of the executor, and to require him to give security for the forthcoming of the other moiety on the death of the widow.

The cause came on to be heard on the 25th of April 1870, when the court made a decree according to the prayer of the bill, that John T. J. Mason do pay to the plaintiffs the sum of \$8,392.83, being one-half of the amount of principal reported by the commissioner of the County court, to be in his hands in July 1858, with interest thereon

from the date of the marriage of the plaintiffs; and that he should give security for the payment to the plaintiffs of the like sum of \$8,392.83 on the death of Mrs. Mason. From this decree John T. J. Mason applied to a judge of this court for an appeal; which was allowed.

Keily, for the appellant.

Mason & Stringfellow, for the appellees.

Anderson J. delivered the opinion of the court.

Joseph W. Mason by his last will and testament, dated December 29, 1854, after authorizing his executor at his discretion, to sell his whole estate, real and personal, loans it to his wife Frances, for the purpose of supporting herself, and supporting and educating his daughter Lucy, until she attains to lawful age or marries. He then provides for the contingency of his wife marrying again, which contingency never happened. He then by the 4th clause declares, "Should my wife not marry, I wish when Lucy becomes of age or marries, one-half of my estate to go to my wife for life, and the other half to Lucy absolutely, and at the death of my wife the other half." Lastly he appointed J. T. J.

274 Mason, the appellant, his executor, and guardian *for Lucy, who made probate of the will on the 4th of January 1855, and qualified as executor; but as the bill alleges, declined the office of guardian.

In October 1866, Lucy, having then attained eighteen years of age, intermarried with J. B. Jones. In 1869 they filed their joint bill in chancery against Louisa F. Mason, the widow of the said Joseph W. Mason, and J. T. J. Mason, his executor, and his securities, alleging that there was a balance of \$16,785.67, in the hands of the said executor, of which the said female plaintiff was entitled to one-half, which was due and payable to her, on the 23d of October 1866, the date of her marriage; and praying a decree for the same, with interest from that date, against the party or parties liable therefor; and further that the said executor be required to give additional security, to have the other moiety forthcoming at the death of the widow.

The executor answered, and admits his qualification as executor, and that he took possession of the money, bonds and other papers of his testator, and a small portion of the personal property, which he sold, leaving the land, slaves, and the bulk of the perishable estate, on the plantation in possession of the widow, according to the direction of testator's will.

He proceeded to collect and pay off the debts of the estate as rapidly as he well could. The widow took possession of the land, slaves, and other estate left on the plantation, hired an overseer, hired out one or more of the negroes, sold the crops, and collected the money, and exercised entire control over the same for that year, 1855. Late in that year, at her request, as he was authorized to do by the will, he offered the

land for sale, when the amount bid for it, not being as much as the widow thought it should sell for, she bought it herself, 275 *at the price of \$2,854, for which she executed her bonds, payable in one, two, and three years, the widow still keeping all the property, and absolutely controlling the same, until some time in the month of February 1856, when the executor, in the exercise of his discretion under the will, offered all the slaves and chattel estate for sale; at which sale she purchased all the slaves but two, and most of the perishable estate; and executed her bonds for the same, not paying one cent for the land, slaves, and perishable estate; and the whole remained unsettled until the fall of 1858.

On the 3d of June 1858 the executor settled his accounts with a commissioner of the court of Sussex county; which settlement was returned to the court and was confirmed, after lying one term without exception. In this settlement it seems that the executor was debited with the bonds executed to him by the widow for the land, slaves and other personal property; and the commissioner reported a balance against him on the 1st of July 1858, of \$18,075.49; of which the sum of \$1,289.52 was interest. The plaintiffs take no exception to this settlement, and seek not to disturb it.

On the 7th of October 1859, after the settlement aforesaid was confirmed by the court, the executor had a settlement with the widow, who executed to him her receipt in full, for the balance of interest due by him as executor as aforesaid, the same being due to her absolutely under the will of her deceased husband; and at the same time under her hand acknowledged the receipt from him of \$16,785.67, the balance of principal in his hands. This constituted the whole estate after payment of debts, which was loaned to her by the testator, by his will. He also took her bond for the amount bearing interest from the 1st of July 1858.

276 *As a result of the war the slave property, which probably chiefly constituted the estate, perished, and the widow was unable to pay over to her daughter on her marriage, one-half the amount which had been loaned to her. How much she paid or turned over to her, does not appear from the record. The answer avers from information received, that the appellee Jones, soon after the marriage took possession of all the property lately belonging to the estate of Joseph W. Mason, and had a sale of the same, except the real estate, which he rented out, and had received considerable money in that and other ways, in part, or whole of the estate which he now claims.

According to this averment the widow had surrendered everything to her daughter's husband, so that there was nothing found upon which the execution sued out by the executor against her upon the judgment which he had recovered against her in 1869 upon her bond aforesaid, could be levied; which tends to confirm the averment of the

answer. He also avers that a proposition had been made to him by Jones, before he brought this suit, that if the widow would convey to him the land he would accept it in full of his wife's interest in the estate, and obligate himself to support her the balance of her life; which proposition she had agreed to accept, showing a disposition on her part to surrender to her daughter's husband, not merely a moiety, but the whole of the estate which had survived the wreck of the war, and to be content with a mere support, which she would probably more than earn by assistance which she would render her daughter in her family.

There is nothing in the record to show that the female plaintiff would have been any better off if no sale had been made 277 of the estate; or that she has lost *or her mother gained anything by the sale, which the executor in his discretion might, or might not have made; or that she would have gained, if the sale had been made to a stranger; to which, however, the executor was in no manner restricted by the will. But if he had sold to a stranger the widow was entitled to the proceeds of the sale, by virtue of its being loaned to her by the testator; and whether she would have been able to have carried it, or any part of it, safely through a war which has wrecked the hopes and the fortunes of so many, is at least problematical.

But is the executor liable for the balance which was in his hands, and which he turned over to the widow, as is shown by her receipt? That is the main question. The decree appealed from holds him liable for the whole, without even an abatement for what the plaintiffs may have received from the widow, since their marriage.

Not even an inquiry was directed to ascertain the amount so received.

When property is vested in a trustee, and is trust property, and consists of stocks and other personal securities, it is conceded, that the trustee in whom the legal title is vested, must retain possession for the benefit of the remainder-man; but he may put the tenant for life in possession of the dividends, interest or income, by giving him a power of attorney to collect them as they become due. But the estate of Joseph W. Mason is not vested by his will in his executor in trust for his wife and daughter. By a fair construction of the will, if his executor should not sell, he lends his whole estate real and personal in kind, to his widow; if in the exercise of the discretion with which he is invested he should sell, he lends the proceeds of the sale to his widow; in either case after payment of his debts, for the support of herself 278 and *the support and education of his daughter, until she attains full age or marries; then to be equally divided, and one moiety to go to his wife for life, remainder to his daughter, and the other moiety to his daughter absolutely. He does not give it to his executor to be held in trust for such purposes. It is a loan directly to his wife, without the interven-

tion of a trustee. Nor is it an authority to his executor to loan it to his wife, which might imply a trust reposed in his executor, but it is a confidence reposed by himself in his wife, by a direct loan to her. If there is a trust and confidence placed, it is in his wife, and not in his executor. If there is an implied trust it is in his wife, as the trustee, and not in the executor; and she alone was amenable to the person in remainder.

"If the title of the tenant for life is a legal and not an equitable title, he is of course entitled to the possession; but the tenant for life is in such case an implied, or quasi trustee for the remainder-man, and a court of equity can enjoin him from injuring the inheritance." Perry on trusts § 540; Joyce v. Gunnels, 2 Rich. Eq. R. § 259. This was the case of a devise of real estate and slaves, by the testator to his wife for life, remainder to all the children of his daughter. The court held that it now may be considered as settled, that the tenant for life stands in the nature of a trustee to the remainder-man.

In Hovey v. Glover, 2 Hill Ch. R. 515, it was held that the tenant for life of slaves is bound to account, as a trustee for the remainder-man. It was also held in this case, that limitations of trusts of personality are the creatures of equity, and it is by regarding the tenant for life as trustee of the remainder-man, that equity takes jurisdiction to compel the execution of the trust to the remainder-man.

The office of the executor in the case 279 under judgment, *was to collect and pay the debts and to make sale of so much of the property as was necessary for the payment of debts, or the whole estate if in his discretion he deemed it to the interest of the estate to do so; and to turn over the residue of the estate, whether in kind or converted into money, to the widow to whom the testator had loaned it. This done he had completed the administration of the estate. He had discharged his executorial duty, and was functus officio. Kenney's adm'ors v. Kenney & als., 25 Gratt. 293. The executor sold the whole estate to the widow. If she had paid cash for the property he was required by the will to pay it over to her. It seems she gave her bonds for the property which she never paid. But as she was entitled to the money, if she had paid off her bonds, she settled with the executor, and gave him her receipt in full for the whole balance in his hands, as money lent to her by the testator. This receipt was a full discharge to him as executor, at least as against legatees.

Judge Lomax says, "There may be a case, Lord Redesdale has observed, where executors would be charged as against creditors, though not as against legatees; for legatees are bound by the terms of the will, creditors are not; and, therefore, if the testator direct the executor to collect the assets, and pay the proceeds into the hands of A, which is done accordingly, and A fails, if a creditor remain unpaid he may

charge the executors; but, as regards the legatees, the executors may justify themselves by the direction of the will. 2 Lomax on ex'rs, top p. 500, side p. 304; citing Doyle v. Blake, 2 Sch. & Lef. R. 229, 245. In this case the Lord Chancellor said, legatees are bound by the terms of the will; creditors are not so; and therefore in many 280 cases executors would be discharged *as against legatees, though not as against creditors. For example, in the present case if these gentlemen (the executors) had collected the effects and had paid the amount to Martin Horan, (who afterwards became insolvent, to whom the will had directed it to be paid, for certain legatees,) still, if a creditor had remained unpaid, he might have charged them upon the insolvency of Horan; whereas in the case of a legatee, the executors might justify themselves by the directions of the will." We think the law as thus laid down is reasonable and just, and it is decisive of this case. As against the legatee the executor may justify the payment of the balance due the estate in his hands, to the widow by the will.

The execution of her bond to the executor could not create a liability in him which otherwise had not existed. The bond, although for the whole principal sum, and interest thereon from the 1st of July 1858, she could have discharged, by the payment of only one-half the principal sum, to her daughter on her marriage. It would in equity have been a full discharge of the obligation. She would then be in possession of a life estate in the other moiety, and her daughter would be entitled to the remainder; and if any action of the court were necessary for its preservation, it could only be upon the application of the husband and wife, and not of the executor, who is functus officio. If there ever was any sort of trust in the executor it is terminated, whether by operation of law, or by a surrender of the trustee to the cestui que trust, or a presumption of a surrender from the fact that the purposes of the trust are accomplished, and the property is vested in the cestui que trust, who may after that time maintain an action on the title. Perry on trustees § 328.

281 *The court is therefore of opinion that the appellant from anything that appears in this record to the contrary, has faithfully executed the will of his testator, and there is no liability on him to the legatees, or either of them, for or on account of the fund which he had placed in the hands of the depository to whom the testator had loaned it; that he acted under the directions of the will, and cannot be liable to either of the legatees, who are likewise bound by the will, and that the bill ought to be dismissed as to him and his sureties. But as Louisa Frances Mason, the widow, may be liable to the plaintiffs, to what extent, it is not proper for this court to indicate, as it has not been passed on by the court below, the case will have to be remanded to that court, for further proceedings as against her, if desired by plaintiffs,

and dismissed as to the executor and his sureties with costs.

The court is therefore of opinion to reverse the decree of the Circuit court with costs, and to remand the cause.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the executor of Joseph W. Mason, the appellant, having turned over the whole of the estate in his hands to Louisa Frances Mason, the widow, to whom it had been loaned by the testator by his will, he is not liable therefor, or for any part thereof to the legatees. It is therefore ordered and decreed that the decree of the Circuit court of Sussex be reversed and annulled, and that the bill be dismissed as to the appellant and his securities, with costs; and that the appellees pay to the appellant his costs expended in the prosecution of his appeal 282 here. And *the cause is remanded to the Circuit court of Sussex county for further proceedings to be had therein, if desired by the appellees, against Louisa F. Mason, in conformity with the opinion filed with the record.

Decree reversed.

283 *Huff & al. v. Broyles & al.

June Term, 1875, Wytheville.

1. **Statutory Recoupment—Breach of Warranty—Separate Action for Damages.**—A party who in an action of debt against him files a plea under the statute, Code of 1873, ch. 168, p. 1098-1100 of the breach of the warranty in the sale of an animal, and claims to be relieved to the extent of the price paid for the animal—in which he succeeds—cannot maintain another action for other damages and expenses he has incurred on account of the breach of said warranty.
2. **Same—Same—Damages.**—A party filing a plea under said statute, may claim and recover all the damages he has sustained by the breach of the warranty, which he could recover in an action for a breach of the warranty.
3. **Same—Same—Same—Separate Action.**—If a party filing such a plea only claims and recovers a part of the damages he has sustained, and then brings an action to recover for other damages, a plea of the former judgment is a good plea in bar to the action.
4. **Practice—Demurrer—Judgment.**—In such action defendant pleads non-assumpsit, and a special

*Special Plea in the Motion of a Plea of Set-Off.—In *Am. Manganese Co. v. Va. Manganese Co.*, 91 Va. 272, it was held that the meaning of the words "or any other matter" used in sec. 3299 of the Code is restricted by the enumerated defences which precede them, and hence no set-off can be pleaded by the defendant which does not grow out of the contract in suit." For instances of the special plea in the motion of a plea of set-off, see *Thornton v. Thompson*, 4 Gratt. 121; *Fleming v. Toler*, 7 Gratt. 301; *Cunningham v. Smith*, 10 Gratt. 255. See generally, 4 Min. Inst. (3rd Ed.) 791. and Graves' Notes on Pleading, 96. In West Virginia, the principal case is cited in *Peck v. Mailing*, 22 W. Va. 742.

plea of the former judgment, vouching the record, to which special plea plaintiff demurs. The court sustains the demurrer, and the plaintiff not replying further to the special plea, the court may render judgment for the defendant without trying the issue upon the plea of non-assumpsit.

This was an action of assumpsit in the Circuit court of Floyd county, brought in June 1871, by Charles H. Huff and Jackson Godbey against Adam Broyles and Oceola Sitgreaves, to recover the amount of certain expenses the plaintiffs had incurred in relation to a jack purchased by them from the defendants. The case is stated by Judge Moncure in his opinion. There was a judgment in favor of the defendants; 284 and the *plaintiffs applied to a judge of this court for a writ of error and supersedeas; which was awarded.

Shelton and Tompkins, for the appellants. There was no counsel for the appellees.

Moncure P. delivered the opinion of the court.

The question presented by this record is, whether a vendee, who, in an action on the contract for the price of the property purchased, files a plea under the statute, alleging any such failure in the consideration of the contract, or any such breach of any warranty to him &c., as would entitle him, either to recover damages at law from the plaintiff &c., or to relief in equity, in whole or in part, against the obligation of the contract; and who, in such action, obtains relief to the full extent of the price; is entitled to recover in an action subsequently brought by him, any damages which he may have sustained by the said breach of such warranty over and above the price of the property?

The statute referred to is contained in the Code of 1873, chapter 168, pp. 1098-1100. Section 5, of the chapter, provides, that "in any action on a contract, the defendant may file a plea alleging any such failure in the consideration of the contract, or fraud in its procurement, or any such breach of any warranty to him of the title or the soundness of personal property, for the price or value whereof he entered into the contract, or any other matter as would entitle him either to recover damages at law from the plaintiff or the person under whom the plaintiff claims, or to relief in equity, in whole or in part, against the obligation of the contract; or" &c.; "and, in either cases 285 alleging *the amount to which he is, entitled by reason of the matters alleged in the plea. Every such plea shall be verified by affidavit." Section 9 provides, that "a defendant who files a plea or account under this chapter, shall be deemed to have brought an action against the plaintiff (at the time of filing the same), for the matters mentioned in such plea or account, and the plaintiff shall not, after the plea or account is filed, dismiss his case without the defendant's consent; but shall be entitled to every ground of defence against the defendant's demand, of which he might have

availed himself by any special plea or otherwise, in any action brought against him upon the same demand. On the trial of the issue in such case, the jury shall ascertain the amount to which the defendant is entitled, and apply it as a set-off against the plaintiff's demand, and if the said amount be more than the plaintiff is entitled to, shall ascertain the amount of the excess, and fix the time from which interest is to be computed on the same or any part thereof. Judgment in such case shall be for the defendant against the plaintiff for said excess, with such interest from the said time till payment."

The plain purpose of this statute was, to give precisely the same measure of relief on a plea filed under the same, as could be obtained in an independent action brought for the same cause, and to prevent one cause of action from being divided into two. So that the same objection exists to a claim of a part of the damages for the same breach of the contract under the statutory plea and another part in an independent action, as to a claim of a part in one action and another part in another action. One cause of action cannot be divided into two or more; and a judgment in one action is a bar to another action for the same cause. "A defend-

286 ant who files a plea or account *under this chapter, shall be deemed to have brought an action against the plaintiff, (at the time of filing the same,) for the matters mentioned in such plea or account" &c., is the language of the 9th section of the chapter, and can leave no doubt as to the intention of the legislature to place the plea upon precisely the same footing with an independent action for the same cause.

The property sold in this case was a Jack, and there was a warranty by the vendors in the contract of sale that he was a sure foal-getter. In an action of assumpsit brought by the vendors against the vendees, among other things, for \$300 the agreed price of the Jack, the vendees, besides other pleas, filed a plea of set-off under the statute aforesaid, alleging a failure in the consideration of the said contract and a breach of the said warranty, and that the said Jack was not a sure foal-getter, and was utterly useless as such; and that by reason of his impotency the consideration of the said contract had failed. The vendors replied generally to the said plea; and the issue thereon being tried by a jury, verdict and judgment were rendered in behalf of the vendees, to the full extent of the said sum of \$300, the price of the said Jack; for which sum credit was given, to take effect from the 1st of November 1860, the date of said contract, by reason of the matters set up by the said special plea.

After that action was determined, the vendees brought an action of assumpsit against the vendors for the same alleged breach of the said warranty; alleging that, relying upon said warranty, after purchasing said Jack, they paid license thereon for same for two years, hired a groom to attend upon him, stabled and fed said Jack, and

put him upon the stand for two years, and thus incurred expense and damage to 287 *the amount of \$400; and claiming to recover the said amount of damage in the said last mentioned action, besides having been relieved in the former action from the payment of the said sum of \$300, the price of the said Jack as aforesaid.

The vendors, besides pleading non-assumpsit to the second action, to which plea there was a general replication, on which issue was joined, filed two special pleas, relying on the said judgment in the former action as a bar to this action, and vouching the record of that action in support of the said pleas. The vendees moved to strike out the said two special pleas, because the same had not been sworn to by the defendants or either of them; but the court overruled the motion, and at the instance of the defendants' counsel permitted one of the defendants, who was then in court, to swear to the same; which was done. To which ruling of the court the plaintiffs excepted. And this was the subject of their bill of exceptions No. 1.

The plaintiffs then filed a special replication to the said two special pleas, alleging that the claims asserted in this action were not the same with, but different from, the claim asserted by the special plea in the former action, and were not settled and adjudicated in that action. To this replication the defendants demurred, and the court sustained the demurrer and rejected the replication; to which ruling of the court the plaintiffs again excepted; and this was the subject of their bill of exceptions No. 2.

The defendants thereupon moved the court to give judgment in the cause upon the pleadings as they then appeared, which motion was resisted by the plaintiffs who desired delay until the return of the sheriff upon an attachment awarded against a witness on the preceding day, and demanded 288 a jury to try the *issue of fact in the cause, (which was upon the plea of non-assumpsit,) but the court overruled the plaintiffs' objection; and it seeming to the court, on an inspection of the record filed with the defendants' special pleas, that the matters and things in the plaintiffs' declaration mentioned, had been settled and adjusted on the merits, as in the said special pleas alleged, judgment was thereupon rendered in favor of the defendants against the plaintiffs. To which opinion of the court overruling the plaintiffs' objection, refusing the delay aforesaid, and the demand for a jury aforesaid, and giving the judgment aforesaid, the plaintiffs again excepted; and this was the subject of their last bill of exceptions, to-wit: No. 3. To that judgment, a writ of error and supersedeas, being applied for by the plaintiffs, were awarded by a judge of this court, and that is the case we now have under consideration.

We are of opinion, for reasons already stated, that the judgment in the former action is a bar to the latter action, and that there is no error in the judgment rendered

in the latter action; unless there be some technical or formal error in the case. But we think there is none such; and certainly none which requires a reversal of the judgment. There are but three errors assiged in the petition for a supersedeas; 1st, in not sustaining plaintiffs' motion to strike out the special pleas; 2d, in sustaining the demurrer to the plaintiffs' replication; and 3d, in refusing the plaintiffs' demand for a jury to try the issues of fact, &c. We think the following are sufficient answers to these assignments of error:

1st. The court properly refused to strike out the special pleas. They were good pleas of former judgment and recovery.

289 *2dly. The court properly sustained the demurrer to the plaintiffs' replication, which was not a sufficient answer to the special pleas. Those pleas presenting good bars to the action, admitted of but one answer, and that was, a replication of nul tiel record.

3dly. There was no occasion for a jury to try any issues of fact in the case. There was no issue of fact but the general issue upon the plea of non assumpsit; and that issue became immaterial when the special pleas stood confessed by the failure of the plaintiffs to make any other answer to them after the demurrer to the special replication was sustained. The case then stood as if there had been a replication of nul tiel record to those pleas and a judgment of the court on such issue in favor of the defendants. Whenever one complete bar to the action is established by the judgment of the court, all other pleas in bar which may remain untried then become immaterial, and the case is ended. When the special pleas remained unanswered and were thus confessed, it was the province and duty of the court to enter judgment as it did, in favor of the defendants. The whole case then depended upon the record of the former action which was vouched in support of the plea and as part thereof, and there was no occasion for the intervention of a jury.

We deem it unnecessary to notice the many authorities collected in the notes to Smith's Leading Cases on the subject of recoupment and set-off in cases of warranty in contracts of sale of personal property; because, whatever doubt or difficulty there may be on the subject according to those authorities, which are to some extent conflicting,

290 there can be none under our *statute, the language of which is plain and unmistakable.

We are therefore of opinion that there is no error in the judgment and that it ought to be affirmed.

Judgment affirmed.

291 *Dunn v. Dunn & als.

June Term, 1875, Wytheville.

Absent, ANDERSON J.

*Multifariousness.**—J. was a partner in a mercantile

**Multifariousness.*—For a discussion of what constitutes multifariousness, see *Nulton v. Isaacs*, 30

business with W and A. That partnership was dissolved; and J and A formed a partnership to carry on the same business at the same place; and this partnership was dissolved. Afterwards J filed his bill against W and A charging that both partnerships are indebted to him and asking for a settlement of their accounts. W demurs and answers, the demurrer being contained in the answer and not stating the grounds of demurrer. **Held:**

1. The bill is multifarious.

2. The demurrer is sufficient in form.

This was a suit in equity in the Circuit court of Washington county by J. B. and W. A. Dunn against W. W. Dunn, A. J. Dunn and others, to have a settlement of the accounts of two mercantile firms, one of which consisted of the plaintiffs and the two named defendants, and the other consisted of the plaintiffs and A. J. Dunn. W. W. Dunn appeared and filed a demurrer and answer, the demurrer being contained in the answer, and not stating the ground of demurrer, except that the bill is not sufficient in equity to entitle the plaintiffs to the relief which they seek. Upon the hearing the court sustained the demurrer and dismissed the bill with costs. And the plaintiffs applied to a judge of this court for an appeal; which was allowed. The case is stated by Judge Moncure in his opinion.

292 *Johnston & Trigg and Sheffey, for the appellants.

Gilmore, for the appellee.

Moncure P. delivered the opinion of the court.

In 1859 J. B. and William A. Dunn, surviving partners of themselves and John Dunn, late merchants and partners trading under the style of John Dunn & Sons, claiming to be creditors of A. J. Dunn and W. W. Dunn in about \$4,000, and also of the said A. J. Dunn in about \$1,500, and that W. W. Dunn resided out of the state, and A. J. Dunn was preparing to remove from the state, and each of them had property within the state, sued out of the Circuit court of Washington county a foreign attachment against the said debtors and their property for the purpose of recovering the said debts. In their original bill in the said suit they charge, among other things, that in the year 1849 a partnership was formed to merchandise at Tazewell court-house between the firm of John Dunn & Sons and A. J. Dunn and W. W. Dunn, the style of which partnership was John Dunn & Co., and which lasted about two years, when it was dissolved by mutual consent. A new firm was

Gratt. 726, and *note*; *Buffalo v. Town of Pocahontas*, 85 Va. 225; *Wash. City Sav. Bank v. Thornton*, 83 Va. 157; *Batchelder v. White*, 80 Va. 103; *Sadler v. Whitehurst*, 83 Va. 48; *Stuart's Heirs v. Coalter*, 4 Rand. 74.

Practice in Chancery—Demurrer.—In *Matthews v. Jenkins*, 80 Va. 463, the principal case is cited for the statement that it is settled law in this state that a demurrer in the form prescribed by the statute, and assigning no grounds, inserted in the answer, is sufficient. The principal case is cited in *Cook v. Dorsey*, 38 W. Va. 200, 18 S. E. 468.

then formed called A. J. Dunn & Co., consisting of John Dunn & Sons and A. J. Dunn, which commenced in 1851, was managed at Tazewell court-house, its place of business, wholly by A. J. Dunn, and was dissolved in 1853. There was no written contract of partnership in either case. There has never been any settlement of either of these firms. The assets of the first are in the hands of A. J. and W. W. Dunn, and of the second in the hands of A. J. Dunn. The plaintiffs therefore pray, among other things, that A. J. Dunn and W. W.

293 Dunn be made defendants to the *bill, that an account be taken to ascertain the amount due to the plaintiffs from A. J. and W. W. Dunn, and from A. J. Dunn individually, and that a decree be rendered against them for the sums found due, and also for the sale of the property of either of them to satisfy said decree.

Afterwards, to wit, in March 1861, an amended bill was filed by the plaintiffs, in which they charge, among other things, that W. W. Dunn owned a house and lot at Tazewell court-house which he sold to Thomas R. Smith for \$1,500, which was still due, but had not then become payable. They therefore pray that the said Smith and A. J. and W. W. Dunn be made defendants to said amended bill, that the said purchase money may be made liable for their said claims, that the said Smith be enjoined from paying it away or otherwise disposing of it until the further order of the court, that the settlement prayed for in the original bill be made accordingly, and for further and general relief. An injunction was awarded, which appears to have been forthwith perfected by the execution of the proper bond.

The record does not show that anything further was done in the suit until 1870, about nine years after the filing of the amended bill. In that year W. W. Dunn, who was then still a non-resident of the state, filed a demurrer and answer to said original and amended bills. Before proceeding to answer he "demurs to said bills, and says they are not sufficient in equity to entitle the complainants to the relief which they seek, or to any relief in this court." But if respondent be held bound to answer said bills, he proceeds to answer the same accordingly; in which answer he sets out his defence, denies that he owes

the firm of John Dunn & Co. one cent,
294 but *charges that said concern, upon a full and fair settlement, owes him; says that he "knows nothing of the new concern charged by complainants to have been entered into by John Dunn & Sons and A. J. Dunn, as he had nothing to do with it, and cannot imagine how he is interested in any way with the settlement of the business of that concern;" and prays that the injunction may be dissolved and the bills dismissed.

After that demurrer and answer were filed nothing further appears to have been done in the suit until the 14th day of September 1872, when the cause came on to be heard upon the bill and amended bill of the com-

plainants and the demurrer of W. W. Dunn thereto; on consideration whereof the court sustained the demurrer, dismissed the bill, and ordered that complainants pay the defendant W. W. Dunn his costs. From that order the said J. B. Dunn and W. A. Dunn, surviving partners of John Dunn & Sons, applied for and obtained an appeal from a judge of this court.

There is no assignment of error in the petition for an appeal, except that "neither the demurrer nor the decree of the court assign any reason why the bills should be dismissed;" and that "the court, instead of dismissing the bill, should have overruled the demurrer and allowed the case to proceed on its merits." The case was submitted to this court upon the petition and upon a brief filed by the counsel for the appellee. In that brief it is contended that "the Circuit court did not err in sustaining the demurrer in this case and dismissing the bill, as it was clearly multifarious." Story's Eq. Pl. sec. 271, note 1; Newland v. Rogers, 3 Barb. Ch. R. 434; Boyd v. Hoyt, 5 Paige R. 65, 79, note 1.

295 *The question then which we now have to solve is, whether the bill be multifarious or not.

If it be so, it is because there are united in the bill a demand against A. J. Dunn and W. W. Dunn jointly, for a settlement of the partnership accounts of the firm of John Dunn & Co. and for a balance claimed to be due to the plaintiffs upon such settlement; and a demand against A. J. Dunn individually; for a settlement of the partnership accounts of the firm of A. J. Dunn & Co., and for a balance claimed to be due to the plaintiffs upon such settlement; the said two firms being wholly unconnected with each other; and the defendant W. W. Dunn having no interest in the firm of A. J. Dunn & Co., or in the settlement of the partnership accounts of that firm, and not being responsible, in any way, for any demand of the plaintiffs against that firm or any member of it.

We are of opinion that the bill is multifarious upon that ground, and was therefore demurrable, according to the authorities referred to in the brief of the counsel for the appellee. In Story's Eq. Pl. § 271, it is said that "a bill should not be, what is technically termed multifarious; for if it is so, it is demurrable, and may be dismissed by the court of its own accord, even if not objected to by the defendant. By multifariousness in a bill is meant, the improperly joining in one bill distinct and independent matters, and thereby confounding them; as, for example, the uniting in one bill of several matters perfectly distinct and unconnected against one defendant, or the demand of several matters of a distinct and independent nature against several defendants, in the same bill. In the latter case, the proceeding would be oppressive, because it would tend to load each defendant with an unnecessary burden of costs,

296 by swelling the pleadings *with the statement of the several claims of the other defendants, with which he has no con-

nection. In the former case, the defendant would be compellable to unite, in his answer and defence, different matters wholly unconnected with each other; and thus the proofs applicable to each would be apt to be confounded with each other, and great delays would be occasioned by waiting for the proofs respecting one of the matters when the others might be fully ripe for hearing."

The doctrine on this subject is fully set forth in the work referred to and in the cases cited in the notes thereto; but it is unnecessary to state any more of it in this opinion. There are some nice distinctions in the cases, and it is sometimes a difficult question to determine whether a bill is multifarious or not. But without noticing those distinctions any further, it is sufficient to say, that consistently with them all, the bill in this case appears to be plainly multifarious. In note 5 to § 271, before quoted, it is said, that "multifariousness must be objected to by the defendant on demurrer, and cannot be objected to by him at the hearing. But the court may, however, take the objection at the hearing sua sponte; for the court is not bound to allow a bill of such nature, although the parties may not take the objection in season." In this case there was a demurrer at the beginning of the answer, though the causes of the demurrer are not assigned therein. According to the English practice, and that of many of the other states of our Union, it appears that the causes are assigned in the demurrer; but such is not the general practice in this state. On the contrary, it seems to be usual with us to embody the demurrer in the answer, in general language, as was done in this case; and that practice 297 seems to be *recognized, it be not expressly authorized, by the Code p. 1093, ch. 167, § 31, which says that "the form of a demurrer or joinder shall be: 'The defendant (or plaintiff) says that the declaration (or plea &c.) is not (or is) sufficient in law.'" In this case there could have been no doubt as to the ground intended to be relied on in support of the demurrer. For besides that it is palpable on the face of the bill, it is made even more so by the allegation of the answer, that "respondent knows nothing of the new concern charged by complainants to have been entered into by John Dunn & Sons and A. J. Dunn, as he had nothing to do with it, and cannot imagine how he is interested in any way with the settlement of the business of that concern."

We are therefore of opinion, that there is no error in the decree of the Circuit court and that it ought to be affirmed.

Decree affirmed.

298 *Kirby v. Goodykoontz & als.

June Term, 1875, Wytheville.

Absent, STAPLES and ANDERSON Js.*

I. Trustees—Investment in Confederate Bonds—Liability.†—Where a trustee in a deed to secure creditors

*JUDGE STAPLES had been counsel in the cause.

†Trustee—Investment in Confederate Bonds—Liability.

has received in June 1861 in good money, a part of the trust fund applicable to pay a creditor who is ready to receive payment, his investment of the fund in Confederate bonds, under an order of the court made on his motion in a suit which he had brought for the administration of the trust, is invalid, and he continues liable for the fund; and this whether the creditor was or was not a party in the suit.

2. Same—Same—Interest.—In this case the court below, whilst giving a decree in favor of the creditor for his debt, disallowed the interest on the debt during the war. On appeal by the trustee the decree of the court below was affirmed generally.

This was a bill filed in the Circuit court of Floyd county, in August 1860, by Andrew J. Kirby, trustee in a deed from James B. Headen and wife to secure the payment of debts due from Headen, to have the direction of the court in the administration of the trust fund. In the progress of the cause all the debts seem to have been paid or settled, except a debt due to Lane & Tompkins, which was assigned by them to D. & J. Goodykoontz. This debt was secured on specific property mentioned in the deed, and on the balance of the proceeds of other property after paying the debts first charged thereon. The only question in the cause arises upon an exception by these defendants, *to the last report of the commissioner, in which the trustee is allowed a credit for \$1000 invested under an order of court in the cause in a bond of the Confederate States. This order was made before D. & J. Goodykoontz became parties in the cause. There was also an exception by the plaintiff to the charge of interest upon this debt during the war. The cause came on to be finally heard on the 25th of August 1873, when the court sustained both exceptions, and made a decree against Kirby in favor of D. & J. Goodykoontz, for \$629.10 with interest on \$626.02, a part thereof, from the 22d of September 1859, until the 17th day of April 1861, and from the 10th of April 1865 until paid, and their costs. And from this decree Kirby obtained an appeal from a judge of this court. The facts are stated by Judge Christian in his opinion.

Taylor for the appellant.

Phlegar for the appellees.

Christian J. delivered the opinion of the court.

This is an appeal from a decree of the Circuit court of Floyd county.

The main if not the only question, we have to consider, is, whether the said Circuit court erred in sustaining the exceptions taken by the appellees to the commissioner's report, which in the settlement of the account of the appellant as trustee under the deed of Headen and wife allowed to said trustee a credit of \$1000, which he claims

ity.—See *Cole v. Cole*, 28 Gratt. 365, and *note*, and *Carter v. Dulaney*, 30 Gratt. 192, and *note*. See also, *Leake v. Leake*, 75 Va. 792; *Fultz v. Brightwell*, 77 Va. 751.

was a part of the trust fund invested by order of the Circuit court in the bonds of the Confederate States.

300 *The appellant Kirby, was trustee in a deed of trust executed by Headen and wife on the 29th day of February 1860, to secure numerous creditors of said Headen. By the provisions of said deed his creditors are divided into different classes, and different and specific property conveyed to secure to the several classes of creditors their several debts, according to their priorities declared in said deed.

In the second class of the debts thus secured was one due to Lane & Tompkins for the sum of \$626.02, with interest from 22d September 1859. This debt together with another debt of \$300, was secured by the conveyance of certain real estate known as the Tentmire tract and a certain lot and blacksmith shop. These two parcels of land were expressly charged in the hands of the trustee with the payment of these debts. In addition to this specific security upon this real estate there was a provision that out of the proceeds of other property, if the property conveyed specifically for that purpose should not be sufficient, the balance remaining should be paid before other debts named. Lane & Tompkins assigned their debt thus secured to D. & J. Goodykoontz, in whose favor the decree appealed from was rendered.

The real estate charged in the deed with the payment of this debt was sold in 1860. The Tentmire tract brought the sum of \$557.50, three-fourths of which, \$433.11, was paid to the trustee on the 28th July 1861. It is not proved when the balance was paid; but the whole was due in a sound currency. The blacksmith shop and lot brought \$110, and was paid to the trustee in March 1862. It thus appears that at least \$543.11, the proceeds of the sale of the specific property dedicated by the grantor to the payment,

in part, of this debt, came into the hands of *the trustee, not one dollar of which he ever paid over to those entitled to receive it under the deed. But the commissioner's report further shows (and to this there is no exception,) that there remained, of other property sold and moneys collected, (which were first appropriated to other debts, but the balance to the payment of the Lane & Tompkins debt if the whole should not be paid by the proceeds of the sale of the real estate above referred to,) in the hands of the trustee the additional sum of \$390.52, which was also dedicated by the grantor to the payment of this debt. It is thus conclusively shown that on the 2d of June 1861 the trustee had in his hands at least \$823.11, of the very fund which the deed had charged with the payment of the Lane & Tompkins debt.

The record further shows that this debt was assigned to D. & J. Goodykoontz on the 4th day of June 1860, and on the very day of the assignment David Goodykoontz gave notice thereof to the trustee, and demanded payment of the debt. The trustee declining to pay them, was then informed

by Goodykoontz that they would need the money in September following, an expected the debt should certainly be paid then. The trustee Kirby had no further communication with Messrs. Goodykoontz until January 1863, when he pressed upon them to receive this debt in Confederate money; which they refused.

In April 1863 the trustee Kirby obtained, upon his motion, from the Circuit court of Floyd the following order: "It appearing to the court that A. J. Kirby, trustee in this cause, has in hand a fund which at present he is not able to dispose of, and the court is not at present advised what disposition ought to be made of said fund, doth order and direct, that said Kirby trustee do invest said funds at interest until the **302** further order *of the court, in such manner as he may deem prudent, under the provisions of the act of the General Assembly of Virginia passed March 5th 1863."

Under this order the trustee Kirby made an investment in Confederate bonds, and now produces a bond of \$1,000 which he insists must be received as a credit to the trust fund remaining in his hands; and now gravely proposes to pay, with this bond, the debt due to the appellees.

This pretension cannot be tolerated for a moment. This court has had occasion, more than once, to construe the act of March 5th 1863. See Campbell's ex'ors v. Campbell's ex'or, 22 Gratt. 649; Crickard's ex'or v. Crickard's legatees, 25 Gratt. 410.

In these cases this court has held, that before a party can avail himself of such an investment made under an order of court, he must show affirmatively, that, 1st, the fund he proposes to invest was received in the due execution of his trust; and 2d, that he is not able to dispose of the same, there being no hand to receive it. When these two things concur the investment will be lawful and the party protected; otherwise he will be held liable to make it good. Now in the case before us neither of these essential requisites are found; but on the contrary, the fund dedicated by the grantor to the payment of this debt was received (except a small part) in June 1861, in a sound currency, and so far from there being no hand to receive it, the appellees were pressing for payment at that very time.

Much stress is laid, in the argument of the learned counsel for the appellant, upon the fact that the order referred to, directing an investment, was not an ex parte order, but one made in a pending cause; and that therefore it is binding on the parties, and cannot now be reviewed.

303 Precisely the same question was raised *in Crickard's ex'or v. Crickard, supra, and decided by the unanimous opinion of this court. In that case, as in this, the trustee filed a bill asking for a settlement of his accounts and the advice of the court as to a distribution of the fund. There, as here, the account was settled under the supervision of the court and distribution directed under its decree. There, as here, in

1863 by a decree entered in the pending cause an investment in Confederate bonds was made. But in that case, as in this, it was shown that the fund received by the trustee was in a sound currency, and that he might have disposed of it at the time it came into his hands. And this court compelled the trustee to make good the investments thus made.

The difference between that case and this is against the appellant. As to these appellees, the order of the Circuit court of Floyd was *ex parte*. They were no parties to the suit. The Lane & Tompkins debt had been assigned to them, and notice of that assignment had been given to the trustee on the very day the assignment was made.

The order of April 1863, made in their absence, and without notice to them was purely *ex parte* and cannot bind them, even if valid as to others; which we have seen it was not.

The Circuit court was right in striking out the item of credit of \$1,000 allowed by the commissioner, and thus sustaining the exception of the appellees. Striking out this item the commissioner's report shows that there is in the hands of the trustee (after all debts of prior dignity under the deed have been fully paid) a sum amply sufficient to pay the appellees' debts. To this report there was no exception by the appellant except as to the war interest, which exception was sustained. If there

be any errors in the commissioner's
304 *report the appellant has failed to show it or even to object to it, except to the interest accrued between the 17th April 1861 and 10th April 1865.

Upon the whole case the court is clearly of opinion, that there is no error in the decree of the Circuit court of Floyd, and that the same should be affirmed.

Decree affirmed.

305

*Cox & als. v. Cox.

June Term, 1875, Wytheville.

Absent, ANDERSON J.

Facts—Contract to Devise.—In 1851 J marries and brings his wife to the house of his father E; and he lives there for years, under an understanding or agreement with E, that E will leave him the land by his will upon condition that J will support E and his wife during their lives. J lives on the land which he cultivates, and he supports E and his wife until 1863, when he goes into the army, and dies in 1865. After J went into the army his widow and E and wife do not agree, and E and wife leave the place, and are supported by another son of E until the death of E in 1868, when he gives the land to this son, except fifty acres which he had previously given to J's widow and children.
HELD:

1. Parol Wills—Specific Performance—Breach of Condition Precedent.*—The court will not decree specific execution of the agreement between J and E.

***Parol Wills—Specific Performance—Breach of Condition Precedent.**—As to the invalidity of a parol will,

2. Compensation—Proceeds of Land.—J having received from the proceeds of the land a full satisfaction for the support of E and his wife and any improvements he had made upon it, is not entitled to further compensation.

In May 1873 Anderson Cox and four others, children of Joseph Cox deceased, filed their bill in the Circuit court of Carroll county, against Solomon Cox, seeking to enforce a specific execution of an agreement between Joseph Cox and his father Enoch Cox, by which, as they alleged, in consideration that Joseph Cox would support the said Enoch Cox and his wife during their lives, the said Enoch would give to the said Joseph the tract of land on which they then lived. The plaintiffs alleged

306 that in pursuance of said *agreement the said Joseph did enter upon the land and support the said Enoch and his wife as long as the said Joseph lived, and that the mother of the plaintiffs and themselves were willing to do it afterwards; but through the false and calumnious charges made against the mother of the plaintiffs by the defendant Solomon Cox, the said Enoch, who was infirm and feeble, was induced to leave them, and to make his home with said Solomon, and either by deed or will gave the land to him. And they charge that Solomon Cox had notice of the agreement between the said Enoch and the said Joseph.

The prayer of the bill is for a specific execution of the contract; or if the court will not enforce the contract, that they may have compensation for the work and labor and valuable improvements made upon the land by their father.

Solomon Cox answered the bill, denying that there was any such agreement between Enoch Cox and Joseph Cox; denying that Joseph Cox entered upon the land under such agreement, averring that Joseph Cox was born and raised upon the land and never left it; that Joseph Cox went into the army in 1863 and continued therein until he died in February or March 1865, in no sense supporting the old people; and that after he went into the army his family, instead of supporting them, treated them so badly that Enoch Cox could not stand it, and left the place. He denies that he in any way induced Enoch Cox to make his will, and that he made any effort to get the land for himself, or that he made any calumnious charges against the mother of complainants.

It appears from the evidence, that Enoch Cox owned a tract of land in the county of Carroll, on which he lived; and that

Joseph Cox was married about the
307 *year 1850 or 1851, and brought his wife to his father's house, and they lived there until Joseph Cox went into the army in 1863, and his family lived there afterwards until 1866. About 1854 Enoch Cox divided

see *Sprinkle v. Hayworth*, 26 Gratt. 392; *Frame v. Frame*, 32 W. Va. 476, 9 S. E. 906. See *Burkholder v. Ludlam*, 30 Gratt. 255, and *note*, where the principal case is cited and distinguished. See also, as to specific performance, *Rice v. Hartman*, 84 Va. 257.

his land into three parts, conveying to his sons Solomon Cox and Hugh Cox each one part, and retaining the part on which he lived, which, owing to the improvements, he considered more valuable than the other part. This part it was agreed or understood between himself and Joseph Cox, that Joseph Cox was to have, on the condition that he was to support Enoch Cox and his wife during their lives. Enoch Cox, however, did not, nor did he intend to make a deed to Joseph Cox for the land. He made a will in — by which he gave this land to Joseph Cox upon the condition that Joseph Cox should support him and his wife during their lives.

Joseph Cox died in March 1865, and whilst he was in the army his family and Enoch Cox seem to have lived on bad terms; and soon after his death Enoch Cox and his wife left the place, and Enoch Cox brought an action of ejectment against Mrs. Joseph Cox to recover the land. This suit seems to have been compromised by Enoch Cox conveying to Mrs. Joseph Cox and her children fifty acres of the land; and some of the buildings which Joseph Cox had put upon the land were removed to the fifty acres part, and Mrs. Joseph Cox removed with her children to it.

In 1866 Enoch Cox entered into a written contract with Solomon Cox, to give him the remainder of the tract he had intended for Joseph, upon the condition that Solomon Cox should support him and his wife during their lives. He died in 1868, leaving his wife surviving him, and by his will gave the land to Solomon Cox.

308 *At the time Enoch Cox made his agreement with Joseph Cox he was a cripple, not able to do much work, though it is said he could hoe corn, and both he and his wife were old. At the death of Joseph Cox all his children were young, the oldest, Anderson Cox, being only about fourteen years of age.

Upon the question of compensation for improvements, &c., this court was of opinion that there were no grounds for it.

The cause came on to be finally heard on the 21st day of October 1873, when the court dismissed the bill with costs. And thereupon the plaintiffs applied to a judge of this court for an appeal from the decree; which was allowed.

Tipton and Brown, for the appellants.

Shelton and Tompkins, for the appellee.

Staples J. delivered the opinion of the court.

Every bill for the specific execution of a contract is an application to the sound discretion of the court. It is not a case requiring the interposition of the court *ex debito justitiæ*, but rests in their discretion upon all the circumstances. He who seeks the exercise of this extraordinary jurisdiction must show a contract certain and definite in its terms: that he himself is in no default, but has performed his part of the

agreement; or in the language of the judges, that he is "ready, desirous, prompt and eager" to do so. If the contract is conditional it must be shown that the conditions have been complied with. When the condition is subsequent and becomes impossible of performance, equity will sometimes relieve upon compensation being made. But the courts never dispense with

309 *conditions precedent, because in such case the estate does not vest until the condition is performed. When the party seeking performance, is himself in default, whether he can have it depends in a great measure upon how far the default goes to the essence of the contract.

The rule laid down by an eminent writer and supported by abundant authority, is, that when the substance of the agreement can be fully executed, and when a trifling adjustment only is needed to satisfy the equities of the case performance may be decreed with satisfaction. If, however, the default of the plaintiff goes to the substance of the agreement, or if there be some things which he is bound to do and cannot do, or has not done, and the court cannot compel him to do it, equity will not decree specific execution in his favor. 3 Parsons on Contracts 402, 407-'8; Harvey v. Banks, 1 Rand. 408; Pigg v. Corder, 12 Leigh 69.

These principles, as will be seen, have a direct application to the present controversy. Admitting for the present the existence of a valid contract between Enoch Cox and Joseph Cox, it is not denied that it was a conditional contract. By the express terms of the agreement Joseph Cox was to have the land upon condition that he supported Enoch Cox and wife during their respective lives. These were the terms imposed by the father and accepted by the son. The courts have no power to change them or to substitute others in their place. If it be conceded that Joseph Cox furnished the necessary support down to the year 1863, it is very clear that he failed to do so after that year, although Enoch Cox lived until 1867, nearly five years longer. Mrs. Nancy Cox the wife, for whose benefit the provision was made equally with that of the husband,

was alive when this suit was brought, **310** and is *said to be still living.

She has received no assistance from Joseph Cox or his family since 1863; but during all this time she has been dependent upon aid derived from other sources. Joseph Cox went into the army in 1863, and was killed or died in March, 1865. If he was prevented by these causes from complying with his contract, it was his misfortune. The courts cannot dispense with conditions which constitute the essence of the agreement. The default is in the very nature of things incapable of adequate compensation. The support to be furnished Enoch Cox and wife did not include meat and clothing merely, but services of a personal character, which the father and mother might well expect and exact from them, and which no doubt constituted one of the main inducements to the arrangement.

It is said, however, that the family of Joseph Cox, after he went into the army and even after his death, were willing and ready to render the necessary support; but they were prevented by Enoch Cox and his wife. At the time of Joseph Cox's death, in 1865, he had six children, the eldest about fourteen and the youngest about five years of age. It is impossible to believe that this boy of fourteen and his widowed mother, besides taking care of four small children, could have sustained the burden of furnishing a support for this infirm and aged couple. The proposition is too extravagant to be entertained for a moment. Indeed the case as presented by the record, is that of a father promising his son to make a devise in his favor upon certain conditions which have never been complied with. This court is asked to dispense with these conditions, although they constitute the substance of the contract. It is to be

remembered that Joseph Cox was never
311 under any obligation to furnish *the necessary support for his father and mother. He might have found it to his interest to do so, and had he lived it is possible he would have done so. But he made no contract which bound him to that duty. At least this record shows none such. The entire obligation was upon Enoch Cox's side. His promise was to devise the land to his son, provided the latter supported him and his wife during their respective lives. Here then is an agreement lacking the essential element of mutuality, binding upon one of the parties and not upon the other. It has been settled by repeated decisions, that in applications for specific performance the remedy must be mutual, and that where a bill will lie for one of the parties it will lie for the other. Courts of equity, as a general rule, will not decree in favor of a plaintiff who is himself not bound by the agreement. It is very true that if Joseph Cox had complied with all the terms and conditions upon which the land was to be devised to him, he or his representatives would be entitled to a decree for specific performance. The vendor having received the full consideration would of course be bound to convey. But where the vendee has not only not performed his part of the agreement, but cannot be compelled so to do upon a bill filed against him, he is clearly not entitled to the aid of a court of equity. He may be entitled to a decree for compensation for the services rendered; but not for specific execution of the contract. *Adams' Equity* top page 252, marg. 82; *Benedict v. Lynch*, 1 John. Ch. R. 370.

Thus far the case has been considered as if there was a valid contract between the parties. It may be doubted, however, whether this contract, or supposed contract, amounts to more than a voluntary promise, an inchoate gift, on the part of Enoch Cox the father. No writings were ever ex-
312 ecuted. The understanding, *what- ever it may have been, was merely verbal. There was no delivery of posses-

sion to Joseph Cox, but father and son remained in joint possession cultivating the land in common and together exercising control of the premises. Although frequently applied to, Enoch Cox always refused to make his son a title to the property, or even to surrender the control to the latter. It may be that in his will he devised the land to Joseph Cox upon the conditions already mentioned. But the fact that he adopted this form of disposition rather than a deed, shows very clearly that he reserved to himself the right of determining whether he would give the land to his son, and under what circumstances he would make the gift. It is very true that representations made by one party and acts done by another upon the faith of such representations may constitute a contract which will be specifically executed; but where the representation is merely of a future intention, as to which the party refuses to bind himself by contract, the engagement must be regarded rather as of an honorary character, and not enforceable as such in a court of equity. As has been well said, "such a promise or gift in the case of a parent, in its very nature leaves to the donor a locus penitentie, a right to change and revoke or modify the gift, a right which the exigencies of his fortune or his family may make it proper for him to exercise." *Taylor v. Staples*, 5 Am. R. 556; *Rucker v. Abell*, 8 B. Mon. R. 556; *Pinchard v. Pinchard's heirs &c.*, 23 Alab. R. 649; *Adamson v. Lamb*, 3 Blackf. R. 446.

This court has repeatedly expressed its disapprobation of those pretended contracts based upon declarations by parents of intentions to make certain specific provision for children, in consideration of supposed services rendered or sacrifices made by the latter. Such promises are generally
313 made in the freedom and *confidence of domestic intercourse, and without a suspicion that they constitute legal obligations. The efforts constantly made to enforce them fully vindicate the statute of frauds and perjuries. *Reed's heirs v. Vannorsdale & wife*, 2 Leigh 569; *Pigg v. Corder*, 12 Leigh 69.

I do not deem it necessary further to consider or discuss the evidence upon this point, as all of us agree it is insufficient to warrant a decree for specific execution. The only question is whether the complainants are entitled to a decree for compensation.

It is in proof that about ten acres of the land were cleared and enclosed by Joseph Cox; some inferior buildings erected by him, and some additions made to those already built. All the work done by him was for his own benefit, and was such as a tenant from year to year paying rent might have done without compensation. Joseph Cox was in the enjoyment of the farm for fifteen years without rent; he used without restraint his father's teams in cultivating the land, and it is no exaggeration to say that for every expense he incurred in improvements, or in the support of the father and mother, he was fully remunerated by the

rents and profits. This fact is established by complainant's own witnesses. It seems also that since the death of Joseph Cox, Enoch Cox has conveyed to the widow and children fifty acres, part of the land in controversy. To this tract the buildings erected by Joseph Cox have been removed, and are now in the possession of the family. This would seem to be conclusive upon the question of compensation. Upon the whole, in any view we may take of the case, it would seem that the decree of the Circuit court is clearly correct and must be affirmed.

Decree affirmed.

314 *Huffmans v. Walker.

June Term, 1875, Wytheville.

W brings debt on a bond against H, and H pleads payment and set-off, on which there is issue. He files with his plea a statement of the payment, which was the amount of a bond of W and J to L, and that W agreed with H, if H would pay the bond due to L, H should have credit for the amount as a payment on the bond sued on. HELD:

1. **Witnesses—Competency.***—H is a competent witness to prove what passed between himself and J in relation to the arrangement between him and J, for the procurement by H of the bond of L, though J is dead.
2. **Payment and Set-Off.**—If the plea is sustained by the evidence, the payment of the bond of L by H is a good payment *pro tanto* upon his bond to W.
3. **Same—When a Good Payment.**†—Payment of a debt is not necessarily a payment of money; but that is payment which the parties contract shall be accepted as payment.

This was an action of debt in the Circuit court of Craig county, in which Henry Walker was plaintiff and Daniel and Lloyd Huffman were defendants. There was a judgment for the plaintiff; and the defendants obtained a writ of error from a judge of this court. There were several questions made in the Circuit court which were not considered by this court. The only questions considered here were, first, whether the defendant Daniel Huffman was a competent witness to prove what passed be-

***Witnesses—Competency.**—The principal case is cited in *Raub v. Otterback*, 89 Va. 650, where *Knick v. Knick*, 75 Va. 12, and *Kelly v. Board of Public Works*, 75 Va. 264, are also cited by the court. See also, *Mutual Life Ins. Co. v. Oliver*, 95 Va. 448, where the principal case is cited as authority for the court's ruling, together with *Martz v. Martz*, 25 Gratt. 364; *Grigsby v. Simpson*, 28 Gratt. 348; *Grandstaff v. Ridgely*, 30 Gratt. 18, and *note*; *Simmons v. Simmons*, 33 Gratt. 461; *Hughes v. Harvey*, 75 Va. 207; *Wager v. Barbour*, 84 Va. 419; *Hall v. Rixey*, *Id.* 790. See V. C. § 3346. There is a valuable collection of the cases on this subject in 1 Va. L. R. 671.

†**Payment—When Good.**—The principal case is cited and followed in *Bantz v. Basnett*, 12 W. Va. 780, 781; *Wellsburg First Nat. Bank v. Kimberlands*, 16 W. Va. 574; *Hornbrooks v. Lucas*, 24 W. Va. 504.

tween him and a certain John H. Walker, since deceased, in relation to a bond
315 *of the plaintiff and said Walker, executed to John Leffle, which the defendants claim to have taken up at the instance of the plaintiff, and on which they relied as a payment upon the bond sued upon. The second is, whether the bond so taken up by the defendants could be relied on as a payment. The case is stated by Judge Christian in his opinion.

Kent, for the appellants.

Wade and Sullivan, for the appellees.

Christian J. delivered the opinion of the court.

This is a writ of error to a judgment of the Circuit court of Craig county. It was an action of debt brought by Henry Walker against Daniel Huffman and Lloyd Huffman as surviving obligors of themselves and Giles Huffman, upon a bond executed by them to the plaintiff for \$1,060, subject to two credits endorsed thereon, one for \$563.33, the other for \$144.23.

The defendants pleaded payment and set-off; to which the plaintiff replied generally. The defendants filed with their plea an account stating the nature of the payment and set-off on which they relied, which was in the following words and figures to-wit: "Major Walker to Daniel Huffman Dr. To this sum paid for your bond to John Leffle for \$354.18—due Dec. 17th 1847. Credit by \$145.20 paid March 1st 1856. This bond was discharged by me pursuant to an agreement with you that I should do so, on account of the debt which you hold against me, and now in suit, and which was to be taken as a payment thereon."

Upon the issue made up on this plea of payment, the parties went to trial, and
316 the jury found a verdict *for the plaintiff for the amount of the bond above described, subject to credits endorsed upon said bond, upon which judgment was entered. To which judgment the defendants obtained a writ of error from this court.

From the several bills of exception taken in the court below, it clearly appears that there was evidence, at least tending to prove that it was agreed between the plaintiff and defendants, that if defendants would take up a bond which the plaintiff owed to John Leffle that the bond of defendants should be credited by that amount; in other words, that the Leffle bond when paid, should be received as a payment *pro tanto* of the bond of defendants in the hands of the plaintiff.

After evidence had been offered tending to prove this agreement, the defendants moved the court (among other instructions) the following: "The court instructs the jury that if they believe from the evidence in this cause, that the defendants took up the bond executed to John Leffle by Henry Walker and John Walker at the instance and by agreement with Henry Walker, that the same should be allowed as a payment

on the bond upon which this suit is brought, then the jury should find for the defendants the amount of said bond executed to John Leffie."

This instruction the Circuit court refused to give.

This court is of opinion, that the said Circuit court erred in such refusal.

Payment of a debt is not necessarily a payment of money; but that is payment which the parties contract shall be accepted as payment. Whether under a simple plea of payment, (without notice to the plaintiff of how the payment claimed was made,) payment may be shown of any other thing than money, is a question that does not arise in this case; because here with

317 the *plea of payment was filed an account showing the nature of the payment relied upon by the defendants by special agreement with the plaintiff; and that was that if defendants would pay the bond which the plaintiff owed to Leffie, the amount thus paid should be a payment pro tanto of the defendants' bond held by the plaintiff. The instruction simply announced the proposition that if there was such an agreement to accept the Leffie bond as a payment pro tanto the defendants were entitled to a credit for the amount due on that bond as a payment. There was certainly evidence tending to prove such an agreement; and it was a question for the jury whether such agreement was established by the proof. If it was so established it was certainly a good defence to the extent of the amount due on the Leffie bond.

The court is further of opinion, that the court erred in not permitting the defendant Daniel Huffman to testify as to how he obtained the Leffie bond. It was proposed to prove by this witness that he had authorized one John H. Walker, who was the security of Henry Walker in the Leffie bond, to get said bond from said Leffie. But the court excluded his evidence upon the ground that John H. Walker was dead. Now it is clear that this ruling of the court was erroneous. John H. Walker was not a party to the suit. The parties to the suit were Henry Walker the plaintiff and Daniel Huffman and Lloyd Huffman defendants: these were all living. The subject of investigation, the transaction which was the subject of the suit and the distinct issue raised by the pleadings, was whether there was an agreement between Henry Walker and Daniel Huffman that the Leffie bond, if taken up by the Huffmans, should be received as a payment pro tanto of the bond due Henry Walker.

318 *The parties to this transaction were Henry Walker on the one side and Daniel Huffman on the other. Both were living, and both were competent witnesses.

The death of John H. Walker, not a party to the suit, could not affect the right of Daniel Huffman to testify in his own behalf.

The act of the general assembly allowing parties to testify in their own cases has already been construed by this court. In

Martz v. Martz's heirs, 25 Gratt. 361, Judge Anderson, speaking for the court, thus clearly lays down the rule which must govern in this case: "One party to a suit is incompetent as a witness on account of the disqualification of the other party only in a case where he was a party to the transaction which is the subject of the suit or proceeding, and the other party to it is dead, insane, or incompetent from some legal cause."

Applying this rule to the case before us, it is clear the court erred in refusing to permit the defendant to testify upon the subject to which he was interrogated, as set forth in the defendant's first bill of exceptions.

The court is therefore of opinion, that for the errors hereinbefore declared, the judgment of the said Circuit court be reversed, and the cause be remanded for a new trial to be had therein in accordance with the foregoing opinion.

The judgment was as follows:

This day came again the parties by their counsel; and the court having maturely considered the transcript of the record of the said judgment and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the said Circuit court erred in refusing to 319 permit the defendant *Daniel Huffman to testify upon the subject to which he was interrogated, as set forth in defendant's first bill of exceptions, notwithstanding it appeared that John H. Walker was dead; and that the said Circuit court further erred in refusing to give, on the defendant's motion, their instruction number one, evidence having been given tending to prove the state of facts therein supposed.

Therefore it is considered by the court that, for the errors aforesaid, the said judgment of the said Circuit court be reversed and annulled, and that the defendant in error do, out of the estate of his testator in his hands to be administered, pay to the plaintiffs in error their costs by them about the prosecution of their said writ in this behalf expended; and the cause is remanded to the said Circuit court of Craig county with instructions to set aside the verdict of the jury therein, and award the defendants a new trial to be conducted in conformity with the principles above declared.

Judgment reversed.

320 *Peery's Adm'r v. Peery.

June Term, 1875, Wytheville.

Absent, BOULDIN J.*

I. Practice—Exceptions—Time of Taking.—Though a plaintiff moves the court, before the jury retires

*JUDGE BOULDIN was prevented by sickness from being present in court at the decision of any of the cases decided during the remainder of the term at Wytheville.

†Practice—Exceptions—Time of Taking.—In Williams v. Commonwealth, 93 Va. 773, the principal case is cited and followed. See also, Whalen v. Com., 90 Va.

to consider of their verdict, to exclude certain evidence which had been given on the trial, which the court refuses to do, if notice of a purpose to except to the ruling of the court is not given until the jury come into court with their verdict, the exception is too late.

II. Facts.—H recovers a judgment against W and P. Afterwards W and H die, and K qualifies as the executor of W and the administrator of H. As administrator of H, K sues out a *scire facias* to revive the judgment against P the surviving obligor, and he appears and files a general plea of payment, without stating the nature of the payment. He proves that H in his lifetime assigned the judgment to D, who was a debtor of T, who was a debtor of W; and that under an agreement between T and D that T would take in payment of his debt, any debt on W which K would take in payment of T's debt to W, D obtained this judgment from H, and assigned it to K, who credited the amount on T's debt to W. There was a verdict for the defendant, and on motion for a new trial, **HELD:**

1. **Plea of Payment—Fallacy in.**—The evidence should have been excluded from the jury, the defendant's plea not describing the payment so as to give plaintiff notice of its nature, as required by the statute, Code of 1860, ch. 172, § 4.

2. **Assignment of Judgment—Assignee's Rights and Liabilities.**—K having taken the assignment to himself, and credited the amount upon the debt due from T to W, he made himself

321 *liable to his testator's estate for that amount; but having taken the assignment to himself, he was the owner of the judgment, and might as administrator of H maintain the *scire facias* to revive the judgment at law.

3. **Same—Effect—At Law—in Equity.**—The arrangement does not constitute a payment of the judgment at law, though it may constitute grounds of equities between W and P.

In June 1869 H. F. Peery recovered a judgment by confession in the County court of Tazewell, against John M. Witten and W. W. Peery, for twelve hundred and forty dollars, with interest from the 3d of January 1861 until paid and costs, \$5.38. Prior to June 1873 both the plaintiff H. F. Peery and John M. Witten had died, and James P. Kelly had qualified as administrator of H. F. Peery and as executor of Witten.

In June 1873 James P. Kelly, as administrator of H. F. Peery, sued out of the clerk's office of the County court of Tazewell county a *scire facias* to revive the said judgment against W. W. Peery the surviving obligor

therein, and the same having been executed upon him, he appeared and filed the plea of payment; upon which issue was taken. The cause was then removed to the Circuit court.

Upon the trial the defendant to sustain his defence, introduced a bond for \$4,000 executed by David Toomy to John M. Witten, bearing date the 15th of June 1869, and payable four years after date, and an endorsement thereon dated the 1st of June 1871, of a credit on the bond for \$2,084.23. And he then introduced a witness George W. Deskins, who proved that in the lifetime of Witten said Toomy purchased of Witten certain real estate to the amount of \$5,500, for which Toomy executed his note to Witten. That subsequently thereto the witness and his son-in-law John H. Owens, purchased real estate from Toomy, for

322 *which they executed their notes to him to the amount of \$6,450. That to settle the matter between himself and Toomy, it was agreed that Toomy would receive from witness on the indebtedness of Deskins and Owens, any paper that James P. Kelly the plaintiff, who was then the executor of Witten, would receive from Toomy on his indebtedness to Witten. That after three or four months negotiation, witness and Owens purchased and had assigned to him certain judgments against Witten, and among them the judgment in suit in this case, which was assigned by H. F. Peery. This assignment was for value to Deskins, describing the judgment, which is stated then to amount to \$2,032.78. That thereupon the witness, Toomy and Kelly the plaintiff met in conference, when witness assigned the judgment to Kelly. The assignment is as follows: For value received I assign the above judgment to James P. Kelly, amounting to \$2,032.78. Given under my hand, August 1st 1871. George W. Deskins. And that to the extent of his assignment to Kelly the witness received a credit upon his and Owens' indebtedness to Toomy, and Toomy was credited to a like extent upon his indebtedness to the estate of John M. Witten.

The witness further stated that some time during the negotiations, he did not remember when, something was said about taking a refunding bond, and that Kelly said he would not take such a bond, but would take an assignment.

After Deskins had deposed to the foregoing facts the plaintiff moved the court to exclude the testimony from the jury as improper, because there being only a general plea of payment by the defendant, the said general plea gives no notice to the plaintiff of the special and particular circum-

323 stances relied upon as proof *of payment, and that such testimony could only be introduced under a special plea of payment, as required by the 4th section of ch. 172, page 716, of the Code; and there being filed no description of the said matter of payment and no account giving notice of the nature of such payment. But the court overruled the motion to exclude the

549; Trumbo's Adm'r v. Street-Car Co., 80 Va. 780. The principal case was also cited by the court in the following cases: Lamberts v. Cooper, 29 Gratt. 64, and note; Page v. Clopton, 80 Gratt. 429, and note; Powell v. Tarry, 77 Va. 260; Danville Bank v. Waddill, 81 Gratt. 477, and note. See in West Virginia, Gilmer v. Sydenstricker, 42 W. Va. 52, 24 S. E. 566; Core v. Marple, 24 W. Va. 355; Dimmey v. R. R. Co., 27 W. Va. 51; Danks v. Rodeheaver, 26 W. Va. 294; Wickes v. B. & O. R. R. Co., 14 W. Va. 166.

*Plea of Payment—Fallacy in.—See the imperative language of the Code in § 3298; also, Barton's Law Pr. (2nd Ed.) 497; 1 Va. L. R. 780; Botetourt Co. v. Burger, 86 Va. 580.

testimony; to which opinion of the court the plaintiff excepted.

But it appears from the bill that no exception was made to the ruling of the court before the return of the jury with their verdict.

The jury having found a verdict in favor of the defendant, the plaintiff moved the court for a new trial, on the ground that the verdict was contrary to the law and the evidence; but the court overruled the motion and the plaintiff excepted. In addition to the facts hereinbefore given there was some other which went only to corroborate the statement of Deskins.

The court having entered a judgment on the verdict, the plaintiff applied to a judge of this court for a writ of error; which was awarded.

J. W. & J. P. Sheffey and Gilmore, for the appellant.

Terry & Pierce and Burns, for the appellee.

Anderson J. delivered the opinion of the court.

The court is of opinion, that the Circuit court erred in overruling plaintiff's motion to exclude from the jury the testimony of George Deskins, the plea not describing the payment, as the witnesses' testimony tended to prove, so as to give the plaintiff notice of its nature, as required by section 4, chap.

172, of Code of 1860. The motion to
324 exclude was made and overruled *before the cause was given to the jury; but it does not appear from the record, that the point was saved by the plaintiff, or any notification given that it would be saved, until after the verdict was rendered. The rule of practice, which is sanctioned by this court in Wash. & New Orl. Teleg. Co. v. Hobson & Son, 15 Gratt. 122, 138, and by a more recent decision, in the case of Martz's ex'or v. Martz's heirs, 25 Gratt. 361, is that notice must be given at the time of the ruling of the court, or at least before verdict, that the point will be saved, though the bill of exceptions may be drawn up and signed, any time during the term. This case may therefore be considered on its merits, and in connection with the testimony sought to be excluded, as presented by the first bill of exceptions.

And the court is of opinion that the facts proved, did not justify the verdict of the jury. James P. Kelly was executor of John M. Witten, and administrator of H. F. Peery. The latter in his lifetime obtained a judgment for debt, against the former, John M. Witten, and William W. Peery, the defendant here. John M. Witten and H. F. Peery having both died subsequent to the judgment, this proceeding was instituted by James P. Kelly administrator of the latter, to revive the judgment in his name, against Wm. W. Peery the survivor, who pleaded payment.

After the death of John M. Witten, a bond for \$4,000, which had been executed to him in his lifetime by one Toomy for land, came

into the hands of his executor, the said Kelly, which Toomy was desirous to pay. He held the bonds of George Deskins, and his son-in-law Owens, for \$5,500, and agreed that he would receive from Deskins, and credit on his and Owens' debt, any paper that J. P. Kelly, Witten's executor, would receive and credit upon his indebtedness *to Witten. Deskins obtained
325 an assignment from H. F. Peery for value, of his said judgment against Witten and Wm. W. Peery, amounting then to \$2,032.78 cents, which he assigned to Toomy, who, according to this testimony, gave credit on his and Owens' indebtedness to him for the amount thereof. It seems that Kelly as executor of Witten refused to make payment of said judgment; but as an accommodation to the parties, he was willing to credit Toomy's bond to Witten, with the amount of the judgment, whereby he became personally liable to the estate of Witten for that amount, and to take an assignment of the judgment for his indemnity. It does not appear that he was benefited to the amount of one cent by the transaction; his only object seeming to be to facilitate an adjustment between the parties. And to make himself safe, he required that the judgment should be assigned to himself. So that whilst he by crediting Toomy's indebtedness with the amount of the judgment, assumed a liability therefor to the estate of Witten, he held the unsatisfied judgment against J. M. Witten and W. W. Peery both, by the assignment of H. F. Peery, George Deskins, and Toomy, to make him safe.

The court is of opinion that said transaction was unquestionably legitimate, and from aught that appears, is not liable to objection on the ground of any unfairness. The said James P. Kelly thereby became invested with the beneficial interest in the joint judgment against both John M. Witten and Wm. W. Peery. It was therefore competent for him to maintain the writ of *scire facias* against Wm. W. Peery, survivor, to revive the judgment against him in his name as administrator of H. F. Peery, for whom the original judgment was rendered. And the court is of
326 *opinion that it was not competent for the defendant to rely upon the assignment of said judgment to James P. Kelly, in his defence to this proceeding, as a payment, and that the verdict of the jury is plainly and palpably contrary to the law, and the evidence. The court is therefore of opinion to reverse the judgment without prejudice to any equities between Witten and W. W. Peery, which may hereafter be asserted in a proper proceeding; and to remand the cause, with instructions to set aside the verdict, and to grant the plaintiff a new trial; which shall be proceeded with in conformity to the principles herein declared.

The judgment was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the said judgment and the arguments of coun-

ael, is of opinion, for reasons stated in writing and filed with the record, that the transaction on the part of the plaintiff in error set out in his bill of exceptions No. 1, was unquestionably legitimate, and, from aught that appears, is not liable to objection on the ground of unfairness; that the said James P. Kelly thereby became invested with the beneficial interest in the joint judgment against both John M. Witten and William W. Peery; that it was, therefore, competent for him to maintain the writ of scire facias against William W. Peery, survivor, to revive the judgment against him in his name of administrator of H. F. Peery, for whom the original judgment was rendered, and hence it was not competent for the defendant to rely upon the assignment of said judgment to James P. Kelly, in his defence to this proceeding, as a payment; and accordingly that the verdict of the jury is

327 plainly *contrary to the law and the evidence, and the said Circuit court erred in refusing to set the same aside on the motion of said plaintiff.

It is, therefore, considered, that for the error aforesaid, the said judgment of the said Circuit court be reversed and annulled, and that the defendant in error pay to the plaintiff in error his costs by him about his said writ in this behalf expended; and the cause is remanded to the said circuit court with instructions to set aside the said verdict and grant a new trial, to be conducted in conformity with the principles herein declared. But this judgment is to be without prejudice to any equities between Witten and William W. Peery, which may hereafter be asserted in a proper proceeding.

Judgment reversed.

328 *Va. & Tenn. R. R. Co. v. Sayers.

June Term, 1875, Wytheville.

Absent, STAPLES J.*

1. **Common Carriers—Contracts Relieving Them from Liability—As Insurer.**—It seems a railroad company may, by express contract or notice brought home to the employer, relieve itself from its liability as insurer of freight, or for money or valuable articles liable to be stolen or damaged, unless apprized of their character and value, or for articles liable to rapid decay, or for live animals liable to get unruly from fright and to injure themselves in that state, when such articles or animals become injured without the fault or negligence of the company or its agents.

2. **Same—Negligence.**—But a railroad company cannot by express contract, though upon the

consideration of a reduced charge upon the freight, relieve itself from its liability, as carrier of the freight, for injury to or loss of the freight resulting in any degree from the want of care or faithfulness of themselves or their agents.

3. **Facts.**—S, a cattle dealer, delivered on the 3d of January 1870, to the Va. & Ten. R. Co. at M, a station on said railroad, a lot of fat cattle, for transportation to Lynchburg, then the eastern terminus of the road. The cattle were received by the agent of the company, and a paper, in the usual form, signed by the agent, was delivered to and accepted by S. By this paper it was provided, that in consideration of the reduced charge for freight by the company, it was agreed, that S should release the company from all injury, loss and damage or depreciation which the animals, or either of them, may suffer in consequence, &c.—specifying several modes of injury—and from all other damage incidental to railroad transportation, which shall not be established to have been caused by the gross negligence or delinquency of any of the officers or agents of the said railroad company.

The cattle of S were all destroyed in consequence of the car in which they were carried being precipitated over the Otter bridge on said railroad, between M and Lynchburg. **Held: Railroads—Liability for Negligence.**—That notwithstanding the contract, the company is responsible if the damage was caused by any negligence of the company or its agents.

4. **Evidence—Res Gestæ—Hearsay.**—The statements of agents of a railroad company, as to the condition of the brakes on the cars, or as to the condition of the road at the place where the accident occurred, said statements having been made some time before, and some time after the accident, and at some miles from the place, are not a part of the *res gestæ*, and are not competent evidence for a plaintiff, in a suit against the company, to prove negligence in the company.

This was an action on the case in assumpsit in the circuit court of Wythe county, brought in April 1870, by John T. Sayers Jr. against the Virginia and Tennessee Railroad Company, to recover the value of a lot of fat cattle shipped by the plaintiff on the road of the defendants, and which were killed by the throwing off of the car in which they were carried from the track of the road at Big Otter bridge in the county of Bedford. The declaration contained five counts; and the defendant demurred to the whole declaration and to each count thereof, and also pleaded non assumpsit; on which plea issue was joined.

for negligence. See V. C. § 1296; also, Richmond, etc., Co. v. Payne (*supra*); Johnson's Adm'r v. Richmond, etc., Co., 86 Va. 975; Norfolk & Western R. R. Co. v. Harman & Crockett, 91 Va. 601; and C. & O. R. R. Co. v. Am. Exchange Bank, 92 Va. 495. The principal case was cited with approval by LUCAS, P., in the case of Zouch v. C. & O. R. R. Co., 36 W. Va. 528, 15 S. E. 193; Martin v. B. & O. R. R. Co., 14 W. Va. 193.

§ **Evidence—Res Gestæ—Hearsay.**—The decision in the principal case as to the distinction of *hearsay* evidence from part of the *res gestæ* is cited and followed in Reusch v. Roanoke, etc., Co., 91 Va. 537; also, in Norfolk & C. R. R. Co. v. Suffolk Lumber Co., 92 Va. 44; Coyle v. B. & O. R. R. Co., 11 W. Va. 108; Hawker v. B. & O. R. R. Co., 15 W. Va. 637.

*JUDGE STAPLES had been counsel in the cause.

†**Common Carriers—Contracts Relieving Them from Liability—As Insurers.**—The proposition here that the carrier may by contract limit its liability as insurer, is affirmed and the principal case cited in the later case of Richmond & Danville R. R. Co. v. Payne, 86 Va. 481, and is now settled law in Virginia. The principal case is also cited in 5 Am. & Eng. Enc. Law (2nd Ed.) 319.

‡**Same—Same—Negligence.**—No common carrier can now in this state contract itself out of liability

Upon the hearing on the demurrer, the court sustained the demurrer to the third count, but overruled it in all other respects: and on the trial there was a verdict and judgment in favor of the plaintiff for \$1,344; and the defendant applied to this court for a writ of error and supersedeas; which was awarded. The case is sufficiently stated by Judge Christian in his opinion.

Crockett and Blair, for the appellant.

Sheffey and Caldwell, for the appellee.

330 *Christian J. The important and interesting question we have to determine in this case is, whether a railroad company can by express contract limit its liability as a common carrier, so as to protect itself against all injuries received and losses incurred, except by the gross negligence of the company, its agents, servants and employees.

While there are other questions presented in the record which it becomes necessary to pass upon, the main question, which was argued with much ability and learning by the counsel on both sides, is the one above stated, and will be the question first considered.

The plaintiff in error, John T. Sayers, was a cattle dealer. He delivered, on the 3d January 1870, to the said railroad company, at Max Meadows, a station on said railroad, a lot of fat cattle for transportation to the city of Lynchburg, then the eastern terminus of said road. The cattle were received by the agent of said railroad company, and the following paper, signed by said agent, was delivered to and accepted by said Sayers:

"Form No. 38—Transportation Department, Virginia and Tennessee Railroad Company.

Notice.—Live Stock in car loads will not be taken at the special rates indicated by the tariff, but will be charged first class rates on 15,000 pounds per small car, and 20,000 per large car load, unless the shipper and agent execute the following live stock contract:

Received by the Va. and Tenn. Railroad of John T. Sayers, Jr., the following described live stock:

Consignee, Destination &c. J. T. Sayers, Richmond. Charges \$36.80.	Description of stock. 1 car load fat cattle	Weight. 18,000.
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Consigned as per margin to be transported by the *Va. and Tenn. Railroad Company to its freight station at Lynchburg, Va., ready to be delivered to, and unloaded by the consignee, or upon his order, or to such company or carrier of the same to be forwarded beyond said station whose line may be considered a part of the route to the destination of said stock, it being distinctly understood that the responsibility of the Va. & Tenn. railroad company and connecting lines, as common carriers, shall cease at destination, upon the following conditions, to wit:

That, whereas the Va. & Tenn. railroad and connecting lines transport live stock

only at first class rates, except when, on consideration of a reduced rate by the car load, the owner and shipper assumes certain risks specified below. Now, on consideration of the said railroad agreeing to transport the above described live stock at the reduced rate of thirty-six dollars and eighty cents per car load and a free passage to the owner or his agent on the train with the stock, the said owner and shipper do hereby assume and release the said railroad from all injury, loss and damage or depreciation which the animals or either of them may suffer in consequence of either of them being weak, or escaping or injuring themselves or each other, or in consequence of overloading, heat, suffocation, fright, viciousness, or of being injured by fire, or the burning of any material, while in the possession of the company; and from all other damage incidental to railroad or steamboat transportation, which shall not be established to have been caused by the gross negligence or delinquency of any of the officers or agents of the said railroad or steamboat companies.

* * * * And it is further agreed that the owners and shippers or persons in charge of stock assume and release said railroad company and connecting
332 *lines from all risk of personal injury while upon or about the train of the company.

And this agreement further witnesseth, that the said owner or shipper has this day delivered to said company the live stock described above to be transported on the conditions, stipulations and understandings above expressed, which have been explained to and fully understood and duly accepted by the said owner and shipper." Signed T. J. Hanson, station agent, and endorsed "live stock contract between Va. & Tenn. railroad and John T. Sayers, Jan. 3d, 1870."

The cattle of the plaintiff (the defendant in error) were all destroyed in consequence of the car in which they were placed for transportation being precipitated over the Otter bridge on said railroad between Max Meadows, where they were shipped, and Lynchburg, the point of destination. Suit was brought by Sayers against the railroad company in the Circuit court of Wythe, the declaration charging, in various forms in several counts, that the injury and loss sustained by the plaintiff, in the destruction of his cattle, was caused by negligence of the agents, employees and servants of said railroad company. In the defence to this action the railroad company mainly relied upon their contract with the plaintiff; and while denying all negligence, insisted that under their contract with the plaintiff they could only be held liable for gross negligence; which the evidence failed to establish.

The jury found a verdict for the plaintiff, and assessed his damages at one thousand three hundred and fifty-four dollars. Upon this verdict a judgment was entered for the plaintiff; and thereupon the defendant applied for and obtained a writ of error from

this court. The instructions offered by
 333 both plaintiff *and defendant, those refused and those given, raise the question whether a railroad company can limit its liability as a common carrier by express contract, so as to excuse itself for negligence, unless such negligence amounts to gross negligence; in other words, whether it can by contract excuse itself from negligence at all. The court below held that it could not; that if the loss was occasioned by the negligence of the company or its agents, no contract they could make with the shipper or consignee, however plainly expressed, could release the company. It is this judgment of the circuit court, thus expounding the law, we are first called upon to review.

This question is one of first impression in this state. While it has been the subject of much judicial discussion in England and many of the states of this Union, where the decisions have been to some extent conflicting, the precise question has never been decided by this court. We have, therefore, given to the subject a careful and candid investigation.

Railroad companies are invested with the powers and subject to the liabilities of common carriers. At common law persons and corporations exercising such public employment are, upon grounds of public policy, held to a stringent liability, which is not exacted of ordinary bailees. At common law, they are insurers, to a certain extent, of the goods entrusted to them, and are held responsible for all injuries thereto, except those caused by the act of God or the public enemies. The law which fixed these rights and obligations is of ancient origin and founded upon grounds of public policy. The exclusive possession of the property in the carrier, the ordinarily exclusive possession by him of the means of evidence, the facility of embezzlement, and of collusions with thieves and robbers, and
 334 *the entire separation of the owner from his property during the transit, are some of the leading grounds of public policy which gave rise to this extraordinary responsibility.

These rigorous rules of the common law have been modified, sometimes by legislation and more frequently by decisions of the courts, to the extent that the carrier may by express contract limit his liability as an insurer. Thus by an act of Congress passed in 1851 in relation to sea-going vessels, ship-owners are relieved from all responsibility for loss by fire, unless caused by their own design or neglect; and from responsibility for loss of money and other valuables named, unless notified of their character and value. And there is similar legislation in some of the states, as I am informed, but to whose statutes I have not access here. But the common law rules have been relaxed in most of the states by the decision of the courts, to the extent of granting by express contract, or notice brought home to the shipper, a limitation of their liabilities as insurers. Even the policy of such limitation

has been doubted by learned judges and eminent writers on this subject. "As the duties and responsibilities of public carriers are prescribed by public policy, it has been seriously doubted," says Mr. Justice Bradley, (17 Wall. U. S. R. 359,) "whether the courts did wisely in allowing that policy to be departed from without legislative interference, by which needed modifications could have been introduced into the law."

It would be an instructive and interesting investigation to trace the causes which led to the relaxation of the rigorous rules of the common law, and to note how strenuously the courts for a long time resisted all attempts of common carriers to limit

335 their common *law liabilities. It is easy to perceive that the modification of the common law grew out of the great hardship incurred by the carrier in certain special cases; for instance, cases where goods of great value, or subject to extra risk, were delivered to him without notice of their character, or where losses happened by sheer accident without any possibility of fraud or collusion on his part, such as accidental fire, collision at sea, &c. Such cases as these led to a relaxation of the rule to the extent of authorizing certain exemption from liability in such cases, to be secured either by public notice brought home to the owner of the goods, or by inserting exemptions from liability in the bill of lading or other contract of carriage.

That a common carrier may limit his common law liability to the extent above indicated, may now be considered as well settled.

But the important question is, how far can he go beyond that? Can he secure by contract an exemption from liability for acts arising out of his own negligence or that of his agents? Can he by contract limit his responsibility only to a case of gross negligence, as is attempted in this case?

In this state, as before observed, these questions have never been the subject of judicial investigation. We must, therefore, look for authority to the works of eminent authors which are the recognized textbooks of the law on this subject, and to the decisions of the Supreme court of the United States and of our sister states, as well as the decisions of the English courts, and from these sources of high authority settle the law upon this important question for this state.

Mr. Justice Story in his work on bailments, § 571, says: "But an inquiry may be made whether the carrier will not be liable also for ordinary negligence,
 336 *as well as for gross negligence, notwithstanding such notices—(i. e., such notices as are brought home to the party, and thereby constituting an express contract. There are dicta by various judges indicating that the common rule of ordinary diligence, in common cases of hire, is applicable to the case of carriers under notice. On the other hand there are declarations of judges at nisi prius, as well as their opinions in banc, which seem to put it as a question of gross negligence or not. The

question may now be considered at rest, by an adjudication entirely satisfactory in its reasoning, and turning upon the very point, in which it was held that in case of such notice the carrier is liable for losses and injuries occasioned not only by gross negligence, but by ordinary negligence; or in other words, the carrier is bound to ordinary diligence." The author, to sustain this view, refers to *Wyld v. Pickford*, 8 Mees. & Welb. 442, 461. Referring to that case, I find that Mr. Baron Parke uses the following language: "Upon reviewing the cases on this subject, the decisions and dicta will not be found altogether uniform, and some uncertainty still remains as to the ground on which cases are taken out of the operation of these notices." After reference to a number of cases he says: "The weight of authority, however, seems to be in favor of the doctrine, that in order to render a carrier liable after such notice, it is not necessary to prove a total abandonment of that character, or an act of willful misconduct, but that it is enough to prove an act of ordinary negligence, which is gross negligence in the sense in which it has been understood in the last mentioned cases."

Judge Redfield, in his valuable work on *Carriers and other Bailees*, § 156, 337 says: "There is certainly *something very incongruous and not little revolting to the moral sense that a bailee for hire should be allowed to stipulate for exemption from the consequences of his own negligence, ordinary or extraordinary. A laborer, domestic, or mechanic, who should propose such a stipulation, would be regarded as altogether unworthy of confidence in any respect, and the employee who should submit to such a condition must be reduced to extreme necessity, one would suppose." After an interesting review of the cases on the subject, and after quoting the general rule of law upon this point as stated by Baron Parke in *Wyld v. Pickford* (supra), the learned author remarks, § 163: "This seems to be placing the effect of such notices upon a reasonable basis, and most of the American cases will be found to have adopted in the main similar views."

With this reference to, and extracts from, the works of Story and Redfield, I come now to consider the cases decided by the Supreme Court of the United States and of the other states.

The question we are now considering has been more than once determined by the Supreme Court of the United States. The first case to be noticed is the case of *The New Jersey Steam Navigation Company v. Merchants Bank of Boston*, reported in 6 Howard 344, and decided in 1848. The case was this, and grew out of the burning of the steamer *Lexington*. Certain money belonging to the bank had been intrusted to Harden's express to be carried to Boston, and was on board the steamer when she was destroyed. By agreement between the steamboat company and Harden, the crate of the latter and its contents were to be at his sole risk. The court held this agree-

ment valid so far as to exonerate the steamboat company from the *responsibility imposed by law, but not to excuse them from misconduct or negligence. Mr. Justice Nelson, delivering the opinion of the court, said: "Although he, the carrier, was allowed to exempt himself from losses arising out of events and accidents against which he was a sort of insurer; yet inasmuch as he had undertaken to carry the goods from one place to another, he was deemed to have incurred the same degree of responsibility as that which attaches to a private person engaged casually in the like occupation, and was therefore bound to use ordinary care in the custody of the goods."

The next case which came before the Supreme Court of the United States was *Philadelphia & Reading Railroad Company v. Derby*. That was the case of a free passenger—a stockholder of the company taken over the road by the president to examine its condition—and it was contended in argument that as to him nothing but "gross negligence" would make the company liable. Mr. Justice Grier, delivering the opinion of the court, said: "When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety requires that they be held to the greatest possible care and diligence; and whether the consideration for such transportation be pecuniary or otherwise, the personal safety of passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence in such cases may well deserve the epithet of 'gross.'" 14 How. U. S. R. 486. In a subsequent case this doctrine was reaffirmed, "as resting not only on public policy, but on sound principles of law." *Steamboat New World v. King*, 16 How. U. S. R. 469-494. In *York Company v. Cen'l R. R.*, 3 Wall. U. S. R. 113, the same court, after conceding that the responsibility *imposed on the carrier of goods by the common law may be restricted and qualified by express stipulation, adds: Where such stipulation is made, and it does not cover losses from negligence and misconduct, we can see no just reason for refusing its recognition and enforcement.

In the case of *Express Company v. Ronnledge Brothers*, the carriers were sued for the value of gold dust delivered to them on a bill of lading, excluding liability for any loss or damage by fire, act of God, enemies of the government, or dangers incidental to a time of war. The company was held liable for a robbery by a predatory band of armed men (which was one of the excepted risks), because they negligently and needlessly took a route which was exposed to such incursions. The judge at the trial charged the jury that although the contract was legally sufficient to restrict the liability of the defendants as common carriers, yet if they were guilty of actual negligence, they were responsible; and that they were chargeable with negligence, unless they exercised the care and prudence of a prudent

man in his own affairs. The Supreme Court held this to be a correct statement of the law. 8 Wall. U. S. R. 342, 352.

The most recent case decided by the Supreme Court of the United States is the case of *Railroad Company v. Lockwood*, 17 Wall. U. S. R. 357. This case would seem to be exactly in point. It was a case of injury to a cattle drover traveling on a stock train upon a free pass, and when there was an express contract that he should take all risks of injury to the stock and of personal injury to himself. The unanimous judgment of the court in that case established the following propositions, as laid down by Mr. Justice Bradley: 1. A common carrier cannot lawfully stipulate

340 for exemption *from responsibility, when such exemption is not just and reasonable in the eye of the law. 2. It is not just and reasonable in the eye of the law to stipulate for exemption from responsibility for the negligence of himself or his servants. 3. These rules apply both to common carriers of goods and common carriers of passengers. 4. They apply to a case of a drover traveling on a stock train to look after his cattle, and having a free pass for that purpose.

I have thus far given the adjudications of the Supreme court of the United States upon the question under consideration, as well as the opinions of authors of recognized authority, to show that a common carrier cannot by express contract limit his common law liability to the extent of exemption from responsibility for the negligence of himself or his servants.

I come now to notice the course of decision in the different states of the Union.

First, as to the decisions in the state of New York. Up to the year 1858, the course of decision in that state had been in conformity with the principles announced in the cases decided by the Supreme Court of the United States above referred to. But in a case decided in 1858—*Wells v. N. Y. Central Railroad Company*, 26 Barb. R. 641—the Supreme Court of that state seems to have given its assent, for the first time, to the proposition that a common carrier may stipulate against responsibility for the negligence of his servants; and this, contrary to the decisions before that time, may now be taken as the settled law of New York. See opinion of Mr. Justice Bradley, 17 Wall. U. S. R. 369. But this conclusion was reached against the earnest protest of some of the ablest judges of that state. And Judge Davis, in *Stimson v. N. Y. Central R. Co.*, 32 New York R. 333, 337,

341 *significantly remarks, in commenting on the recent decisions in that state: "The fruits of this rule are already being gathered in increasing accidents through the decreasing care and negligence on the part of these corporations, and they will continue to be reaped until a just sense of public policy shall lead to legislative restriction upon the power to make this kind of contracts."

In Pennsylvania a long course of decisions settles the doctrine that a common carrier cannot, by notice or express contract, limit his liability so as to exonerate him from responsibility for his own negligence or that of his servants.

In *Farnham v. Camden R. R. Co.*, 55 Penn. St. R. 53, Chief Justice Thompson, delivering the opinion of the court, says: The doctrine is firmly settled in this state, that a common carrier cannot limit his liability so as to cover his own or his servants' negligence. In *Penn. R. R. Co. v. Henderson*, 51 Penn. R. 315, a drover's pass stipulated for immunity of the company in case of injury from negligence of its agents or otherwise. Judge Read, after a careful review of the Pennsylvania decisions, says: This endorsement releases the company from all liability, for any cause whatever, for any loss or injury to the person or property, however it may have been occasioned; and our doctrine, settled by the above decisions, made upon grave deliberation, declares that such a release is no excuse for negligence. See also 8 Penn. R. 479; 16 Id. 67; 30 Id. 242; 63 Id. 14.

In Ohio the cases are very decided on this subject, and reject all attempts of the carrier to stipulate against his own negligence or that of his servants. In *Davidson v. Graham*, 2 Ohio St. R. 131, the court, after conceding the right of the carrier to 342 make special *contracts to a certain extent, says: "He cannot, however, protect himself from losses occasioned by his own fault. He exercises a public employment, and diligence and good faith in the discharge of his duties are essential to his public duties. * * *

And public policy forbids that he should be relieved by special agreement from that degree of diligence and fidelity that the law has exacted in the discharge of his duties." See also *Welsh v. Pittsburgh, Ft. Wayne & Chicago R. R.*, 10 Ohio St. R. 65; *Jones v. Vorhees*, 10 Ohio R. 145; 21 Id. 722; 19 Id. 1, 221, 260.

The decisions of the Supreme courts of Maine and Massachusetts are to the same effect, by one unbroken current. To the same purport are the decisions of many of the other states, which time and space only permit me to mention passim, but which are well worthy of attentive perusal and more particular notice. See 31 Ind. 394; 2 Rich'd (Sou. Ca.) 286; 28 Georgia 543; 37 Alabama 247; 39 Miss. 822; 20 Louisiana Annual 302.

After this hasty review of the decisions of the American courts on the question before us, I will now make brief reference to the English cases.

Up to the year 1832, the course of the English decisions had been uniformly against permitting a common carrier to contract for exemption of responsibility for loss or injury resulting from his own negligence or that of his servants. And consequently, in Mr. Justice Story's work on Bailments, published in 1832, he correctly gives the state of the English law as stated

supra. But between that time and the passage of the railway and canal traffic act, passed in 1854, there was a change of opinion on the subject; and it was held in several

cases that carriers could stipulate for exemption *from liability, even for their own gross negligence. See *Carr v. Lancashire & Yorkshire R. R. Co.*, 7 Exch. R. 707; *Peck v. North Staffordshire Railway Co.*, 10 Ho. Lord Cases 473.

In the last named case, decided in 1862, Mr. Justice Blackburn, after an able and interesting review of the course of decision in England on this subject, and referring to Mr. Justice Story's work on Bailments, published in 1832, quoted in the opinion (*supra*), says: "In my opinion, the weight of authority was in 1832 in favor of this view of the law; but the cases decided in our courts between 1832 and 1854 establish that this was not the law, and that a carrier might by a special notice make a contract limiting his responsibility even in the cases here mentioned of gross negligence, misconduct, or fraud on the part of his servants; and, as it seems to me, the reason why the legislature intervened, in the railway and canal traffic act of 1854, was because it thought that the companies took advantage of these decisions (in Story's language) "to evade altogether the salutary policy of the common law."

In the same case, Lord Chief Justice Cockburn, referring to the case of *Carr v. Lancashire & Yorkshire Railroad Co.* (*supra*), in which it was held that a common carrier might by express contract release himself from liability even for gross negligence, says: "In a very short time after the decision of this case was pronounced, the act of Parliament was passed," (known as the railroad and canal act). "It cannot be doubted that the object of the legislature in passing it was to prevent these contracts, in which any liability for negligence is either entirely excluded or made conditional on the payment of a premium."

The railway and canal traffic act, 344 passed in 1864, *adopted in consequence of these decisions, provides: "§ 7. Every such company shall be liable for the loss of, or any injury done to, any horses, cattle or other animals, or to any article, goods or things, in the receiving, forwarding or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition or declaration made or given by such company contrary thereto, or in any wise limiting such liability, every such notice, condition or a declaration, being thereby declared to be null and void."

It will thus be seen by this act of Parliament, the salutary rule of public policy, which prohibits a common carrier from limiting his liability so as to exonerate him from the consequences of his own negligence, has been in effect reinstated in England; and the evils growing out of the change in the course of decisions, and the departure from those wise and salutary decisions which had prevailed in the English courts for

more than half a century, had at last to be corrected by an act of Parliament, restoring the older and better rule of law.

From this review of the American and English decisions, I am constrained to conclude that the great weight of authority is in favor of declaring that the salutary rule of law and public policy, which forbids a common carrier from exempting himself from liability by express contract or otherwise for his own negligence, whether gross or ordinary, should be firmly adhered to and maintained by the courts of this state.

But it is argued with much force by the learned counsel for the appellants, that parties have a right to make their own contracts; that it is no concern of the public on what terms an individual has his goods

345 carried; *that if he chooses to accept all the risks by paying less for the carriage, how does it concern the public, and what public policy does it violate, how are public morals or public interests affected? Is it not a restriction upon trade and commerce, and an invasion of personal rights, for the courts to interfere and to declare such agreements, voluntarily and deliberately made, null and void? Such arguments as these were also urged in the case of *Railroad Company v. Lockwood* (*supra*) 378, and were thus conclusively answered by Mr. Justice Bradley; and I cannot do better than to adopt his answer: "Is it true," he says, "that the public interests are not affected by individual contracts of the kind referred to? Is not the whole business community affected by holding such contracts valid? If held valid, the advantageous position of the companies exercising the business of common carriers is such that it places it in their power to change the law of common carriers in effect by introducing new rules of obligation. The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgler or stand out and seek redress in a court. His business does not admit such a course. He prefers rather to accept every bill of lading or to sign every paper the carrier presents, often, indeed, without knowing what the one or the other contains. In most cases he has no alternative but to do this or abandon his business." These cogent and just views of Mr. Justice Bradley are as strongly illustrated by the case we have before us as the one he was considering. In this case the railroad company require the drover to pay on his cattle as first class freight, unless he signed the contract. He therefore

would have had to pay the enormous 346 sum of \$6.60 per head for each *animal, or \$113 per car load, instead of \$36. No drover could afford to pay these rates; and this case is a strong illustration of how completely parties are in the power of the railroad companies, and how necessary it is to stand firmly by those principles of law by which the public interests are protected. The inequality of the parties, the compulsion under which the customer is placed, and the obligations of the carrier to the

public, operate with full force to divest such transaction of validity. The business of the common carrier is mostly concentrated in the hands of powerful corporations whose position in the body politic enables them to control it. They do in fact control it, and impose such conditions upon travel and transportation as they see fit, which the public is compelled to accept. These circumstances furnish an additional argument, if any were needed, to show that the conditions imposed by common carriers ought not to be adverse (to say the least) to the dictates of public policy and morality. Contracts of common carriers, like those of fiduciaries, giving them a position in which they can take an undue advantage of the persons with whom they contract, must rest upon their fairness and reasonableness. It was for the reason that the limitations of liability, first introduced by common carriers into these notices and bills of lading, were just and reasonable, that the courts sustained them.

It was just and reasonable that they should not be responsible for losses happening by sheer accident, or the dangers of navigation, that no human skill could guard against; it was just and reasonable that they should not be not be chargeable for money or other valuable articles liable to be stolen or damaged, unless apprized of their character or value; it was just and reasonable that they should not be responsible for articles
347 liable *to rapid decay, or for live animals liable to get unruly from fright, and to injure themselves in that state, when such articles or animals became injured without their fault or negligence. And when any of these just and reasonable excuses were incorporated into notices or special contracts assented to by their customers, the law might well give effect to these without the violation of any important principle, although modifying the strict rules of responsibility imposed by the common law. The improved state of society and the better administration of the laws had diminished the opportunities of collusion and bad faith on the part of the carrier, and rendered less imperative the application of the iron rule that he must be responsible at all events. Hence the exemptions referred to were deemed reasonable and proper to be allowed; but the proposition to allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions that are unreasonable and improper, amounting to an abdication of the essential duties of his employment, ought never to be entertained."

I think, therefore, "that," to use the language of Chief Justice Redfield, "every attempt of carriers by general notices or special contract to excuse themselves from responsibility for losses or damage resulting in any degree from their own want of care and faithfulness is against that good faith which the law requires as the basis of all contracts or employments, and therefore based upon principles and a policy which the law will not uphold."

But the learned counsel for the appellant, in his able argument in behalf of the company, insisted that the law recognized different degrees of negligence, and it was legitimate for a common carrier to limit his liability to losses or damage from all
348 causes, except gross *negligence, as was done in this case by express contract. I think an examination of the authorities will show that the distinctions between "gross" negligence and ordinary negligence are too vague and shadowy to be of any practical importance in the adjudication of questions of this sort.

The tendency of judicial opinion is adverse to any distinction between gross and ordinary negligence. In each case the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands, and hence it is more strictly accurate to call it simply "negligence." The decided preponderance of authority is in favor of abolishing the vague and uncertain distinctions between the different degrees of negligence, and to hold the public carrier bound whenever it is shown that the loss or damage is occasioned by negligence at all, whether gross or ordinary; or, in other words, the carrier is bound to ordinary diligence. See 1 Smith Lead. Cases (7th Am. ed.) 453; Story on Bailments, § 571; Wyld v. Pickford, 8 M. & W. 442; 11 Id. 115; 2 Queen's Bench 661; 14 Howard 486; 17 Wall. 383.

I am, therefore, of opinion that the circuit court of Wythe county did not err in giving the instructions which it gave the jury, or in refusing those which it refused to give, both sets of instructions presenting in different forms the question we have been discussing, and the said court having decided that the railroad company cannot by express contract exonerate itself from liability for loss or damage occasioned by the negligence (whether gross or ordinary) of its agents, servants or employees.

There are now two other grounds of error assigned which remain to be noticed. First, as to the demurrer to the declaration; second, as to the admissibility of
349 *certain evidence offered by the plaintiff and admitted by the court.

As to the first, it is sufficient to remark that a careful inspection of the declaration shows that each count is a count in assumpsit, and no one of them in tort; so that in fact there is no misjoinder of counts as claimed by the counsel for the plaintiff in error, and the circuit court was right in overruling the demurrer.

The next ground of error assigned presents a more serious question, and requires a more particular notice. It is raised by the third, fourth and fifth bills of exception taken by the defendants, and presents the question whether the evidence therein set forth was competent to go to the jury.

It was proposed by the plaintiff to prove by the witness, Parish, that he heard a negro brakeman, who was on the train with plaintiff's cattle, say, "That had it not been for the brake on the East Tennessee car the

train would have run off with them coming down the Alleghany mountains." This remark of the brakeman was made before the accident, and at Salem, a distance of forty-two miles from the scene of the disaster. It was further proposed, on the part of the plaintiff, to prove by the witness Crockett that he heard one Burroughs, who was a section-master on defendants' road, embracing the point where the accident occurred, say that "he (Burroughs) expected an accident on that part of the road where said accident did take place." This conversation took place sometime after the accident happened, and when Crockett and the plaintiff were coming from Lynchburg on a special train back to the point of the accident, the said section-master, Burroughs, being on said special train with them.

The question is, whether these declarations of the *brakeman and section-master were competent to go to the jury. The court below admitted the evidence. Was this error? It is insisted that these declarations were admissible (though hearsay) as the declarations of agents. It is true that where the acts of the agent will bind the principal, there, his declarations, representations, and admissions, respecting the subject-matter, will also bind him, if made at the same time and constituting part of the *res gestae*. They are of the nature of original evidence and not of hearsay, the representation or statement in such cases being the ultimate fact to be proved, and not an admission of some other fact. The parties own admission, whenever made, may be given in evidence against him; but the admission or declaration of his agent, binds him only when it is made during the continuance of his agency in regard to a transaction then depending *et dum fervet opus*. It is because it is a verbal act and part of the *res gestae* that it is admissible at all. It is to be observed that the rule admitting the declarations of the agent is founded upon the legal identity of the agent and the principal, and the declaration of the agent to be admissible, must be part of the *res gestae*. 1 Greenleaf, Redfield's edition, § 113, 114; Story on Agency, § 134, 137.

But it is argued with some force, that these general rules do not apply to corporations which do their business entirely through agents, and that companies engaged in the transportation of freight and passengers are responsible for the declarations of their agents and employees, through whose instrumentality their whole business is transacted. This is a striking view of the subject, and some few cases it is admitted may be found adopting this view. But Chief Justice Redfield, in his edition of 1 Greenleaf, p. 135, § 114 (a) and

351 *notes, has collected the authorities, and says: "In general such companies are not responsible for the declarations or admissions of any of their servants beyond the immediate sphere of their agency and during the transaction of the business in which they are employed. Thus the decla-

rations of the conductor of a railway train, as to the mode in which an accident occurred, made after its occurrence, or those of an engineer, made under similar circumstances, are not admissible." This is authority exactly in point. See also Griffin v. Montgomery &c. R. R. Co., 26 Geo. R. 111; Robinson v. Fichburg &c. R. R. Co., 7 Gray's R. 92. In Lucy v. Hudson River R. Co., 17 New York Court of Appeals R. 131, it was held that the declaration of the driver of a car, after the car had stopped, assigning the reason why he did not stop the car and thus prevent the injury to the plaintiff while crossing the street, that he could not stop the car because the brakes were out of order, being made after the injury was inflicted and the transaction terminated, is not admissible against the company, in whose employ such driver was, it being mere hearsay. See also to this same effect the Bellefontaine Railway Co. v. Hunter, 5 American R.; Moore v. Meacham, 10 N. Y. R. 207; Lane v. Bryant, 9 Gray's R. 245.

I think, therefore, upon principle and authority, that the declarations of the brakeman and section-master made at the time, and under the circumstances when made, were not a part of the *res gestae*, but mere hearsay, and ought to have been excluded. There was no reason why the brakeman and section-master should not have been examined as witnesses, and their declarations not being made at such time and under such circumstance as make them a part of the *res gestae* were mere hearsay.

352 *It is argued, however, that the evidence, if excluded, would not have changed the verdict of the jury, as the case was clearly made out without it. It is impossible for this court to estimate the effect which this evidence had on the minds of the jury, and it would be going beyond our legitimate function to enter upon any such vain speculation.

The court erred in admitting the evidence, and it is our province, without speculating how the evidence might have affected the minds of the jury, simply to declare it inadmissible, and for this error of the court to reverse the judgment, and to remand the cause to the said Circuit court for a new trial, to be had therein in accordance with the principles declared in the foregoing opinion.

The judgment was as follows:

This day came again the parties by their counsel; and the court, having maturely considered the transcript of the record of the said judgment and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the judgment of the said Circuit court in giving the instructions given, or in refusing those refused; this court being of the opinion that the said Circuit court correctly expounded the law of the case, and that there was no error in overruling the demurrer, this court being

of opinion that all the counts were counts in assumpsit and none in tort, and consequently there was no misjoinder of counts; but that the said Circuit court erred in admitting the evidence of the witnesses Crockett and Parish as to the declarations made by the brakesman and section master, those declarations not being made at such times and under such circumstances as would 353 have made them *part of the *res gestae*, but mere hearsay, which ought to have been excluded. Therefore it is considered by the court, that for this error the said judgment of the said Circuit court be reversed and annulled, and that the defendant in error pay to the plaintiffs in error their costs by them about the prosecution of their said writ of error in this behalf expended; and the cause is remanded to the said Circuit court, with instructions to set aside the verdict of the jury and try the cause anew, excluding the aforesaid evidence if again offered.

Judgment reversed.

354 *Sayers & als. v. Wall & als.

[21 Am. Rep. 303.]

June Term, 1875, Wytheville.

Absent, STAPLES J.*

I. Real Estate—Conveyance to Wife.—In November 1855 S made a deed by which he conveyed in fee to his wife E his entire real estate lying in the county of P, his then residence, of about 700 acres, and seven days afterwards acknowledged the deed in the clerk's office of the county. At the time he owed no debts, and had personal property, including slaves, amounting to ten or twelve thousand dollars. He afterwards in the course of business contracted debts; and losing his slaves by the results of the war, his personal property was not sufficient to pay his debts. His wife died in 1864, leaving children. **HELD:**

1. **Same—Same—Effect—Curtesy.**†—The conveyance, though void at law, is valid in equity, and vests in the wife both the legal and equitable title to the land, as of her separate estate, in which the husband, the wife being dead, is not entitled to curtesy.
2. **Same—Same—Descent of Land.**—Upon the death of the wife, her heirs were entitled to the immediate possession of the land.
3. **Same—Same—Liability for Grantor's Debts.**‡—There being no charge or proof of fraud by S in

*JUDGE STAPLES had been counsel in the cause.

†**Wife's Separate Estate.**—The decision in the principal case, to the effect that a conveyance from husband to wife creates a separate estate in the wife even though there be no words expressing such intention, is cited and followed in *Irvine v. Greever*, 32 Gratt. 419, and in *Leake v. Benson*, 29 Gratt. 156. These cases also hold with the principal case, that the husband is not entitled to curtesy in an estate thus created. See also, where the principal case was followed in West Virginia in *Humphrey v. Spencer*, 36 W. Va. 11; *McKenzie v. R. R. Co.*, 27 W. Va. 306. The principal case is cited in 21 Am. Rep. 303.

‡**Liability for Husband's (Grantor's) Debts.**—That an estate thus conveyed from husband to wife is not

making the deed, the subsequent creditors of S have no equity against E and her children to entitle them to subject the land to the payment of the debts of S subsequently contracted.

4. **Same—Same—Meritorious Consideration.**§—Though the conveyance is not founded on a valuable but only on a meritorious consideration in favor of a wife and children, a court of equity will give effect to it against subsequent creditors of S.

II. Creditors' Bills—Parties.—A bill having been filed by the creditors of S to subject the land to the payment of their debts, without alluding to the deed from S to his wife, her children present 355 their petition to the court setting out *the deed and their rights under it, and ask that they may be made defendants in the suit, that they may defend their rights under it; and they are permitted, without objection by the plaintiffs, to file their answers. **HELD:**

1. **Same—Same—Proper Parties.**—If they were not necessary parties, they were certainly proper parties; and having been permitted to appear and set up their claim, the plaintiffs cannot afterwards object that they were made parties.
2. **Same—Cross-Bill—Petition Treated as Such.**—If it would have been more proper to assert their rights by a cross-bill, their petition may be treated as such.

In June 1871 William J. Wall and William J. Jordan, late merchants and partners, who sued for the benefit of William J. Wall, filed their bill in the County court of Pulaski county, in which they alleged that in 1867 they had recovered a judgment against Reuben Sayers for \$1,266.52, with interest, &c. That said Sayers had no personal property liable to execution, but that he was seized in fee simple of a tract of land in the county of Pulaski containing seven hundred and fifty acres; and that the rent of this land would not pay their debt in five years. And making Reuben Sayers a party defendant, they pray that so much of the land as is necessary to pay off their judgment may be sold, and for general relief.

In July 1872 two other judgment creditors of Reuben Sayers were, upon their petitions, permitted to come in as plaintiffs, to have satisfaction of their judgments out of the same land.

In January 1871 the court made a decree directing S. W. Poage, one of the commissioners of the court, to ascertain and report the amounts of judgments against the defendant Reuben Sayers, and the priorities of the liens of the said judgments, and the

liable for debts of the former subsequently contracted, see *Miller v. Blase*, 30 Gratt. 761, and *Keffer v. Grayson*, 76 Va. 523. In *Silverman v. Greaser*, 27 W. Va. 553, the principal case is cited, but distinguished; and in *Robinson v. Woodford*, 37 W. Va. 384, 16 S. E. 604, it is also cited and followed.

§**Meritorious Consideration.**—See *Riggan v. Riggan*, 93 Va. 90; *Keffer v. Grayson*, 76 Va. 523; 2 *Minor's Inst.* 883. In *Wood v. Harmison*, 41 W. Va. 377, 23 S. E. 560, an important distinction is made between the effect of a meritorious, and an inadequate consideration.

real estate owned by said Sayers, its location, the number *of acres and the condition of the title to it, with any special matter, &c.

In March 1872 Sayers answered the bill. He admits the judgment of Hall & Jordan; but says, that whilst he was at one time the owner of the land mentioned in the bill, he is not now, and has not been the owner thereof for some sixteen years: that he has no right or interest in said property; that the same is in the possession of and under the control of James H. Comer and Margaret M. his wife, A. C. Dunn and Angeletta his wife, J. Howe Sayers and James C. Deaderick and Lizzie his wife, who claim and are entitled to the said property in fee simple as heirs at law of Eleanor A. Sayers deceased.

At the same term of the court Comer and wife, Dunn and wife, and J. Howe Sayers, asked for and obtained leave to file their petition in the cause. In their petition they say that the said Margaret M., Angelletta and J. Howe Sayers with Elizabeth J. the wife of James Deaderick, are the children and heirs at law of Mrs. Eleanor Ann Sayers deceased, and inherited from her at her death, a fee simple estate in a tract of land containing about seven hundred acres, situate near Dublin depot in the county of Pulaski. That the petitioners are owners of three-fourths of said land, and are now and have been for several years, in the possession and enjoyment of the same. That Hall & Jordan who claim as judgment creditors of Reuben Sayers, have filed their bill in this court seeking to subject said land of the petitioners to satisfy their said judgment.

That Reuben Sayers has no title to said land, but the fee simple thereto is vested in the petitioners and said Deaderick and wife; and that the petitioners have not in any manner parted with or conveyed away the title to or interest in said land.

357 They are informed *that a commissioner of the court has filed with his report in the cause, a paper purporting to be the deed of your petitioners for their interest in said land to Reuben Sayers; and they aver that said paper is not their deed, and is wholly inoperative and void. The petitioners are therefore interested in the subject-matter of said suit, and ask that they be made parties defendants in the cause, and that their rights may be protected.

At the May term of the court the plaintiffs amended their bill, and made Deaderick and wife defendants in the suit. In their bill they say they have been informed that these persons claim an interest in the land in the original bill mentioned. Plaintiffs do not admit that they have any interest, and insist; that if they assert any right to the said land or any part thereof, they may be required to make full and satisfactory proof of their title.

At the August term of the court J. Howe Sayers, Comer & wife and Deaderick & wife, by leave of the court, filed their an-

swers, to which the plaintiff replied generally. They aver that the land which the plaintiff seeks to subject to the payment of his debt, was in November 1855 conveyed by Reuben Sayers to his wife Eleanor A. Sayers, and the deed was immediately put upon record. That at that time Reuben Sayers owed very little, and retained property ample to pay his debts. That not more than fifty dollars of the plaintiff's debt was then due. That Mrs. Sayers died in 1864, leaving J. Howe Sayers, Mrs. Comer, Mrs. Dunn and Mrs. Deaderick her children and heirs at law. That soon after the war the said heirs agreed to sell the land if \$30,000 could be gotten for it; and A. C. Dunn was authorized to make the sale if he could do it at that price. That as the parties were

358 scattered, *it was agreed among them that they would make a deed conveying the land to Reuben Sayers, to be held by a third person as an escrow, to be delivered to Reuben Sayers when the sale was made, that he might convey the land to the purchaser, and thus prevent delay, and remove any cloud upon the title from the fact that Reuben Sayers had conveyed the land directly to his wife. That accordingly a deed was prepared and was executed by J. Howe Sayers, Comer & wife and Dunn & wife; and it was expected that Lizzie, the youngest child who was not quite of age, would execute a like deed on her coming of age. That the deed when executed, was intended to be deposited with Isaac Hudson, their attorney; but remained with the justice who took the acknowledgment of the parties; and Lizzie, on coming of age, declining to execute a deed, and Dunn having failed to sell the land, defendants regarded the deed as of no effect, and supposed it had been destroyed, as instructions to that effect had been given to said attorney. That said deed never was delivered to Reuben Sayers, but remained with the justice who took the acknowledgment of the parties, until about the commencement of this suit, when the plaintiff Wall, with a full knowledge of these facts, obtained said deed from the said justice by paying him his price therefor, and then procured the recordation of the same by affixing the necessary U. S. revenue stamps, and paying the clerk his recording fee and the state tax.

The answer of Deaderick and wife is to the same effect, except as to the deed executed by the other defendants: They were no parties to that deed.

The deed from Reuben Sayers to his wife is as follows: This deed made this the 15th day of November in the year one thousand eight hundred and fifty-five, *between Reuben Sayers and Eleanor Ann Sayers, his wife: Witnesseth, that whereas the said Reuben Sayers intending shortly to visit the Western country, and knowing the uncertainty of life, and to provide a permanent home and a future residence for his family, in case he should not be permitted to return in safety home, and seeking to provide against confusion at all events, now this indenture wit-

nesseth, that for and in consideration of the premises, and for the natural love and affection he has for his wife, the said Reuben Sayers doth grant unto the said Eleanor Ann Sayers his entire real estate lying in the county of Pulaski, his present residence, containing seven hundred acres, more or less. Witness the following signature and seal.

Reuben Sayers, [Seal.]

This deed was acknowledged by Reuben Sayers in the clerk's office, on the 21st day of November 1855, and admitted to record.

The deed from Comer & wife and others to Reuben Sayers bears date 22d of November 1867, and says, in consideration of the natural love and affection they have for their father, the said Reuben Sayers, they do grant unto the said Reuben Sayers all their right, title and interest whatsoever, both at law and in equity, to all the land embraced in and conveyed by a deed executed by the said Reuben Sayers to his wife Eleanor A. Sayers on the 15th of November 1855; and the same grantors release all their claims as heirs at law of the said Eleanor A. Sayers to the said grantee, to the said land.

This deed was acknowledged before a justice by Comer and J. Howe Sayers on the day of its date, and by Mrs.

Comer before two justices on the 360 same *day, and it was acknowledged by Dunn before the same justices on the — day of February 1868, and by Mrs. Dunn on the 2d of May 1868. And it was presented in the clerk's office on the 27th of April, 1871, and admitted to record on that day.

The evidence shows very clearly, that at the date of the deed from Reuben Sayers to his wife, all the debts he owed did not amount to one hundred dollars, and that he then owned personal property, including eight valuable negroes, worth from ten to twelve thousand dollars. He continued to live on the land, with his wife and children, doing apparently a prosperous business; and at the end of the war he owned thirteen slaves, which were then lost to him. This evidence is sufficiently stated by Judge Anderson in his opinion.

It also clearly appeared from the evidence that the deed from Comer and wife, Dunn, and wife, and J. Howe Sayers, to Reuben Sayers, was made for the purposes stated in their answer; that it had never been delivered to Reuben Sayers, but had been retained by the justice who took the acknowledgments of the grantors until his fees should be paid, and that Wall, the plaintiff, obtained it from him by paying the fees, without authority from any party to the deed, and that he had it put to record.

The commissioner to whom the case was referred made his report in February 1872, in which he stated the judgments against Reuben Sayers as amounting to, of principal \$5,028.38, of interest up to the 1st of February 1872 \$3,275.35, costs, \$68.28, equal to \$8,372.01. The interest on all of these debts commenced after the date and record

of the deed from Reuben Sayers to his wife.

The cause came on to be finally heard on the 8th day of January 1873, when the 361 court decreed that the *deed from

Reuben Sayers to his wife was fraudulent and void as to his creditors; and it appearing from the evidence that the judgments, which were liens upon the land, could not be paid out of the rents in five years, it was further decreed that unless Reuben Sayers, or some one for him, should pay off said debts before the 1st day of the next February, a commissioner named, after advertising, &c., should proceed to sell at public auction upon the premises the said land, or so much thereof as would be sufficient to pay off said debts, &c., upon a credit of one, two and three years, in equal instalments, except as to a sum sufficient to pay the costs of suit and expenses of sale, which should be for cash. From this decree Comer and wife and the other heirs of Mrs. Sayers obtained an appeal to the Circuit court of Pulaski county, where the said decree was affirmed; and they then obtained an appeal to this court.

Wade and J. A. Campbell, for the appellants.

This is a bill to subject land to the payment of debts.

1. Nothing is said in the bill about the conveyance from Sayers to his wife, and no charge of fraud is made; but by the decree said conveyance is adjudged to be fraudulent and void, and is set aside and made void. Fraud must be charged specifically. *Steed v. Baker*, 13 Gratt. 380.

2. The decree is not warranted by the bill. *Fowler & wife v. Saunders*, 4 Call 361; *Sheppard's ex'or v. Starke & wife*, 3 Munf. 29 and 40.

The plaintiff will not be permitted to prove, or require proof of, any fact not set forth in his bill. 1 *Dan'l Ch. Pra.* 424; *Sto. Eq. Pl.*, sections 27, 28 and 257; *Crockett v. Lee*, 7 *Wheat. R.* 522.

362 *The admissions in the answer cannot supply the want of a specific averment in the bill. *Jackson v. Ashton*, 11 *Pet. R.* 229, 248.

3. The facts disclosed by the record did not warrant the court in subjecting the lands of appellants to the payment of R. Sayers' debts. He was free from debt when he executed the deed to his wife, and had the right to determine upon the reasonableness and propriety of such settlement. See *Sexton v. Wheaton*, 8 *Wheat. R.* 229; *Sims v. Rickets*, 35 *Ind. R.* 181; *Peck v. Brummagin*, 31 *Cal. R.* 440; *Townsend v. Maynard*, 45 *Penn. R.* 198.

Subsequent creditors will not be allowed to defeat a settlement made on the wife. *Cord on the L. and Eq. Rights of Married Women*, sections 54 and 75; *Schouler on D. R.*, page 277, and note on 283.

4. The deed from Sayers to his wife, although void at law, is good in a court of equity. *Jones & wife v. Obenchain*, 10 *Gratt.* 259; *Fox v. Jones*, 1 *West Virginia R.* 205; *Mews v. Mews*, 21 *L. and Eq. R.*

(Eng.) 556; Hunt v. Johnston, 4 Amer. R. 632; Sims v. Rickets, supra; Peck v. Brown, 2 Rob. R. (N. Y.) 120.

It is an executed and not an executory contract. Hunt v. Johnson, supra.

The meritorious consideration set out in the deed is sufficient to support it where there are no existing creditors. 1 Lead. Cas. in Eq. 228 and 230; Sheppard v. Sheppard, 7 John. Ch. R. 57; Darlington v. McCoole, 1 Leigh 36; Hunt v. Johnston, and Jones v. Obenchain.

5. The intervention of a trustee is not indispensable. The husband will be treated as a trustee, for his wife. Bishop on Husband & Wife, sections 117 and 800; 1 Perry on Trusts, sections 95 and 240; 1 Lead.

Cases in Eq., pp. 307 and 309; Story's 363 Eq. Jus. 1380; Wallingsford v. Allen, 10 Pet. R. 583; Peck v. Brown, and Fox v. Jones, supra.

If Sayers could have conveyed his lands in trust for the benefit of his wife, by a deed which would have been valid in law under the circumstances, then his deed will be sustained in a court of equity. Sims v. Rickets, 35 Ind. R. 181, 183; Schouler on D. R., page 286.

If the deed is insufficient to pass the legal title, because of the relations which existed between the grantor and grantee, this defect should be aided by a court of equity. 1 Lead. Cases in Eq., 330 and 288.

6. A conveyance by husband to his wife creates a separate estate in favor of the wife. 1 Lead. Cases in Eq. 539, 540 and 541; Tyler on Inf. and Cov., pp. 491, 492 and 493; Hill on Trustees, 653, 654, and note; Sims v. Rickets, (supra).

7. The possession by the husband after the conveyance is no badge of fraud. Schouler on D. R., 283 note; 2 Perry on Trusts, page 277, section 678.

It is not pretended that the deed was made with any fraudulent intent, and there is nothing in the case which impeaches the fairness of the transaction, or raises a doubt as to good faith of the grantor in seeking to provide a permanent home for his family against the possible misfortunes of a future day.

Gilmore and Walker, for the appellees.

1. The deed in this cause is a conditional one, and the condition is a condition precedent. The grantor "returning in safety home," no estate ever vested in the grantee. 2 Bl. Comm. 154; Co. Litt. 217; 4 Kent's Comm. 125; 2 Rob. Prac. p. 59; 5 Rob. Prac. p. 679, and note.

2. If the deed be not a conditional 364 one, yet, being a *deed directly from husband to wife, it is void at law, and will only be enforced in a court of equity where it is made on valuable consideration or is a suitable provision for a wife or child; and where it is made as a suitable provision for a wife or child, the court of equity will not enforce the deed if the rights of creditors are interfered with. Sheppard v. Sheppard, 7 John. Ch. R. 57; White v. Wager, 25 N. Y. 328; Winans v. Peebles, 332 N. Y. 423; Sexton v. Wheaton, 8 Wheat. R. 224;

Jones & wife v. Obenchain, 10 Gratt. 269; Ellison v. Ellison, 1 Lead. Cas. in Eq. p. 199; Spence's Eq. Juris. 852; Wright v. Wright, 1 Ves. Sr. R. 409.

3. The deed in this case is not a suitable provision for the wife. It gives to her all his real estate, worth, according to the testimony, \$30,000. All the property retained by the grantor, according to his own testimony, did not exceed ten or twelve thousand dollars.

4. A court of equity will not enforce a deed from husband to wife if there is any unfairness in it. Sims v. Rickets, 35 Ind. R. 181; Thompson v. Mills, 39 Ind. R. 528.

5. The deed in this case hindered, delayed and defrauded creditors to the extent of the debts contracted prior to the date of the deed; and for that reason ought not to be upheld in a court of equity. The question in such a case is not whether the debtor retained property enough in his hands to pay his then debts, but the question is were those debts paid, and, if the debts were not paid, it is the same as if he had conveyed away all his property. Spirett v. Willons, 3 De Gex, Jones & Smith, p. 302; approved in Freeman v. Pope, Eng. Law. Rep. 9 Eq. Cases 206.

Anderson J. This controversy is in 365 relation to the *deed executed by Reuben Sayers to his wife, Eleanor Ann Sayers, on the 15th day of November 1855; whether the real estate conveyed by it vested in Mrs. Sayers, and descended to her children and heirs at her death; and whether they can hold it against subsequent creditors of Reuben Sayers.

Before proceeding with this inquiry, it will be well to dispose of a question raised by the record, whether the appellants, or any of them, have, by their deed, reinvested Reuben Sayers with any interest or estate, which he may have passed to his wife by said deed? No such reconveyance or release to Reuben Sayers is alleged by the plaintiffs in their pleadings. But a paper, purporting to be a deed of conveyance or release from three of the four heirs of Mrs. Sayers to Reuben Sayers, having been brought to the notice of the court by the master, and a certified copy of it from the records of the register's office exhibited with his report, it was very properly noticed by the appellants in their petitions to be made parties defendants and in their answers. They aver in their petitions, and in their answers, that said paper was never delivered as their deed. That it was never intended to be delivered as a deed, except only upon a certain contingency which never arose, and that it never was delivered. That one of the plaintiffs got possession of it from the magistrate before whom it had been acknowledged, without the knowledge or consent of either of them, or of Reuben Sayers, to whom it had not been delivered, by paying the magistrate's fees, who delivered it to him without authority. And that the plaintiff, after thus getting unlawful possession of it, without authority, and without their or Reuben Sayers' knowledge

or consent, lodged it with the clerk to be recorded, and paid the tax on it and the clerk's fees for recording. These allegations are fully sustained by evidence.

I am clearly of opinion that said paper cannot operate as a conveyance or release of anything to Reuben Sayers; and that if there was any estate vested in the appellants by the death of Mrs. Eleanor H. Sayers, under the conveyance of November 15th, 1855, it is not divested or impaired by that paper.

I proceed now to inquire, whether any rights vested in Mrs. Sayers, under the said conveyance of her husband, which have descended to her children, and which are not liable to the judgments of subsequent creditors of the grantor against him? This is the important, the main question in the cause.

"There is nothing inequitable or unjust (Mr. Justice Story remarks) in a man's making a voluntary conveyance or gift, either to a wife or to a child, or even to a stranger, if it is not at the time prejudicial to the rights of any other persons, or in furtherance of any meditated design of future fraud or injury to other persons." Stor. Eq. Jur., § 356.

In *Sexton v. Wheaton*, 8 Wheat. R. 229, Marshall, Chief Justice, in delivering the opinion of the court, assumes that the conveyance in that case "must be considered as a voluntary settlement made on his wife by a man who was indebted at the time." And he inquires, "Can it be sustained against subsequent creditors?" In his answer to that question he says: "It would seem to be a consequence of that absolute power which a man possesses over his own property, that he may make any disposition of it which does not interfere with the existing rights of others; and such disposition, if it be fair and real, will be valid. 'In these few words, that great judge enunciates

a principle, upon which all cases of this class may be determined, and upon which their decision may rest. It is the absolute right of a man to dispose of his own property as he pleases, so that he does no injury to the existing rights of others. The question is, in every case, did the voluntary conveyance interfere with the existing rights of others? If it did not, and was real and bona fide, the grantor having an absolute right to part with his own property, and to bestow it on whom he pleases, his conveyance is valid. There are none who can gainsay it. By his deed of conveyance his grantee is absolutely invested with the title; and the subsequent dealings of the grantor with others, or the liabilities which he may subsequently come under to others, cannot impair or affect the rights which had vested in his grantee. The property which vested in his grantee by a fair and bona fide conveyance, is no longer his, and cannot be made liable for his debts subsequently contracted. 'The limitations to this power (the Chief Justice further says) are those only which

are prescribed by law." He then proceeds to consider the statute against fraudulent conveyances. "In construing this statute (he says) the courts have considered every conveyance, not made on consideration deemed valuable in law, as void against previous creditors. With regard to subsequent creditors the application of this statute appears to have admitted of some doubt." After a lucid and extensive review of the cases, he thus concludes: "From these cases it appears that the construction of this statute is completely settled in England. We believe that the same construction has been maintained in the United States. A voluntary settlement in favor of a wife and children is not to be impeached by subsequent creditors on the ground of its being voluntary." I think, in this conclusion, he is sustained by the current of decisions in England and America.

But it may be impeached on the ground that it is fraudulent. The plaintiffs do not charge fraud in their original or amended bill. They take no notice of this deed of conveyance in any way. They altogether ignore it, although they had actual knowledge of its existence before they brought this suit. They did not bring the suit until after they got possession of the paper purporting to be the deed of three of the children and heirs of Eleanor A. Sayers to Reuben Sayers. Mr. Cecil, the justice, testifies that they got possession of it in the spring of 1871, and he thinks before the 1st of June 1871, the date of the institution of this suit; and the certificate of its recordation is dated 27th April 1871. They must have had possession of it prior to that date. This paper refers expressly to the deed from Reuben Sayers, to his wife Eleanor A. Sayers, of the 15th of November 1855, and purports to release all their claims as heirs at law of said Eleanor. The plaintiffs certainly had actual knowledge of the existence of the said deed at that time, if they had not before. The presumption is, they had knowledge of it before. There was no concealment of it. It was written by the clerk, the printed copy states, on the 15th of November. On the 21st of November it was acknowledged before him in his office after it had been delivered to Mrs. Sayers, and was admitted to record. No doubt it was a subject of remark, and was known generally by his neighbors. But the registration was constructive notice to the world, and the presumption is, that these plaintiffs were apprized of it when they afterwards credited him. The only allegation of fraud is made by Hudson, administrator of Hamilton Sayers, in his petition for a rehearing. Yet the final decree for the sale of the lands is founded only upon the ground that the conveyance is fraudulent and void as to creditors. If fraud had been alleged in the pleadings, (and it might have been by an amended bill or by answer to the appellant's petitions to be admitted defendants, if the plaintiffs believed there was any ground for the allegation,) what proof is there to support such a

charge, or the assumption of the decree? Mr. Justice Story adds to what I have heretofore quoted from him, and in the same section: "If, indeed, there is any design of fraud or collusion, or intent to deceive third persons in such conveyances, although the party be not then indebted, the conveyance will be held entirely void as to subsequent as well as to present creditors; for it is not bona fide." Cord's Legal and Equitable rights of Married Women, § 54, 75, citing *Ld. Townsend v. Windham*, 2 Ves. Sen. R. 1; 12 Ves. R. 155. Let the rule, as thus clearly laid down, be applied to the case in hand.

At the date of said deed, Reuben Sayers, the grantor, was the owner of a large personal property, in addition to the real estate he conveyed to his wife, consisting of slaves, horses, cattle, sheep, hogs, wagons, farming implements, house furniture, &c., of the value of from ten to twelve thousand dollars. His indebtedness did not exceed \$100. After the execution of said deed, he continued to live upon the farm, and had the management of it, supporting his wife, and educating and maintaining their children. He purchased and paid for another tract of land, which he sold again. He dealt liberally in cattle, buying and selling, which seems to have been a source of considerable income; he seems to have been a man of thrift and good credit, and his per-

370 sonal estate was augmented *rather than diminished, until the end of the war. The trifling debt he owed prior to the execution of the deed in question, seems to have been satisfied, and the debts which he now owes, and which are proved in this case, were contracted by him subsequent to said conveyance. The precise date at which they were severally contracted does not appear, but none of them earlier than 1857 or the latter part of 1856, except two small notes amounting to about \$51, which he owed prior to the conveyance, and which were transferred to the plaintiffs, it does not appear when. These notes were incorporated with the debt, subsequently contracted with the debt, subsequently contracted with Wall & Jordan, and embraced in the new obligation, which they took for the whole—upon which he afterwards paid, as appears from the judgment, \$75. Whether he had made any payment to those parties upon his indebtedness to them, before the execution of the bond or note upon which the judgment was rendered, does not appear. I think, whether the evidence shows the novation of that small pre-existing debt, or not, it may be assumed, so far as it concerns the question now involved, that it has been satisfied. And I think it may be fairly inferred from the evidence in the record, that there was not a point of time, from the 15th of November 1855 until the close of the war, that a moiety of the personal estate owned by Reuben Sayers, would not have been ample, and more than sufficient, to have paid every debt he owed in the world. The conduct of his creditors shows that they regarded it ample to secure them. It was upon

the faith of that they credited him, and forbore to collect their debts—for they must be presumed to have known that the real estate did not belong to him, but was the property of his wife. (It does not ap-

371 pear that they thought of suing *until after they got possession of the supposed deed of release.) And we have seen that his personal estate was ample to give him the credit he had.

What fraudulent motive could he have had to make said conveyance to his wife? He still retained ample property in his own hands to satisfy all the debts which he actually subsequently contracted. It could not, therefore, have been in anticipation of contracting those debts and avoiding the payment of them that he conveyed his real estate to his wife; for they had ample property left to satisfy them. The same fact is a complete answer to the argument of appellee's counsel, that he made the conveyance in contemplation of incurring a debt of \$3,000 for the building of a residence on the farm. Why would he have made a conveyance for such a purpose, when he knew that he retained property out of which the cost of the building he contemplated erecting could be made, if it were even threefold or fourfold the actual cost. I am satisfied from the proofs in the cause, that Reuben Sayers, in contracting the subsequent debts, was conscious of his ability to pay them, and had no thought or purpose of not paying them; and that his creditors credited him, and forebore with him, upon the faith of his personal property, which was ample to pay his debts; and that he and they were disappointed by the result of the war, which wrested from him, by the power of the sword, the property which he relied on in the main as affording him the means of paying his debts, and upon the faith of which his creditors credited him. It does not appear that he was sued by any creditor before the close of the war. If all of them had sued and obtained judgments before its termination, he had ample property to have satisfied every dollar he owed; and 372 *if their debts are lost, it is the misfortune of both, rather than the wrong of either.

But it was argued by appellee's counsel, that the conveyance of the whole of his real estate to his wife—so large a proportion of all he was worth—is a badge of fraud. The same argument was urged in *Sexton v. Wheaton*. It was contended that the house and lot contained in the deed to his wife was the bulk of Wheaton's estate. The chief justice said: "If the fact were proved, it does not follow that the conveyance must be fraudulent. If a man, entirely unincumbered, has a right to make a voluntary settlement of a part of his estate, it is difficult to say how much of it he may settle. In *Stephens v. Olive*, 2 Bro. Ch. R. 90, the whole real estate appears to have been settled, subject to a mortgage of a debt of \$500; but that settlement was sustained.

* * A man who makes such a conveyance necessarily impairs his credit (unless he has

large personal property, as in this case); and, if openly done, warns those with whom he deals not to trust him too far; but this is not fraud." Nor is the possession by the husband after the conveyance a badge of fraud. Schouler D. R. 283, note; 2 Perry on Trusts p. 277, § 678. I can see no evidence of fraud in this case. On the contrary, I think the circumstances disclosed by the evidence in the record show that Reuben Sayers, in executing the conveyance to his wife, of the 15th of November 1855, acted fairly and in good faith, and that there is no ground even for the suspicion of fraud.

The question now arises as to the validity of the deed to vest the real estate in Eleanor A. Sayers. It is a conveyance directly from a husband to his wife. It seems to be well settled that at law it has no validity,

373 *because of the legal unity between husband and wife, the latter having no legal existence separate from her husband. As a consequence of this old common law doctrine, it is held by courts of law, that a deed directly from a husband to his wife must be inoperative and void; whilst if it had been made to a third person, for the benefit and separate use of the wife, the same courts hold that it is valid, and vests the beneficial estate in the wife. Equity, which looks more to the substance than the form, holds that the conveyance directly from the husband to the wife, if fair and free from the taint of fraud, is just as valid as if the conveyance had been made to a trustee for the benefit of the wife. Equity will interpose a trustee to hold the estate for the benefit of the wife, or will treat the husband as a trustee for the wife, and will give the same effect to the conveyance, as if it had been made to a third person, for the sole and separate use of the wife. *Huber v. Huber's adm'ors*, 10 Ohio R. 371; *Wallingsford v. Allen*, 10 Peters R. 583; 24 Verm. R. 375; *Deming v. Williams*, 26 Conn. R. 226; *Putnam v. Bickwell*, 18 Wis. R. 333; *Sims v. Rickets*, 9 Amer. Rep. 681; *Shepard v. Shepard*, 7 John. C. R. 57; *Jones & wife v. Obenchain & als.*, 10 Gratt. 259. These cases fully sustain the doctrine as I have laid it down. In *Deming v. Williams*, 26 Conn., supra, the judge, in a very lucid opinion, says the cases found in the books from *Slanning v. Style*, decided in 1734, 3 P. Wms 334, to the present time, sustain the principle, "that so far as the form and substance of the gift or alienation are important, that which would be good if made to a third person, is good in a court of equity if made by the husband to his wife." That is sensible.

In the same case it was held, that in order to give the wife a separate use, words **374** indicating such intention *are necessary in a conveyance from a stranger to the wife; but that it seemed to be "well settled that they are not necessary in a conveyance direct from the husband to the wife. The law attaches to absolute deeds, and transfers (says the court) a full alienation of the entire interest or property, so far as

the alienation is permitted by the principles of law and equity." *Whitten v. Whitten*, 3 Cush. R. 191, supports the same doctrine. It is treated as the settled doctrine; and, according to this authority, the deed from Reuben Sayers to his wife, if absolute, vested in his wife a separate estate, though such words are not used; and consequently he is not entitled to curtesy.

As a corollary of the foregoing, whilst as held by the courts of law, the deed of the 15th of November 1855 passed nothing from Reuben Sayers to his wife, and divested from him nothing of his title; by the rules and principles of equity, if the deed, according to its intent and effect, is absolute, it immediately divested the grantor of all title in his own right, legal or equitable, in the property conveyed, and vested an absolute separate estate in it in his wife. The legal, as well as the equitable estate, was vested in her by the terms of the deed, which could not take effect by reason of the legal fiction, that the wife and the husband are one, and she can have no legal existence separate from him; but equity regards the title of the husband in his own right as having passed from him to the wife, vesting in her a separate estate, in which the husband has no interest in his own right, legal or equitable. And courts of equity will exert their powers when necessary, and in a proper care, to give full effect to such conveyances. In order to give the deed of conveyance in question such effect, nothing further is necessary to be done by the

grantor. He signed, sealed and delivered **375** *the deed, and acknowledged it to be his act and deed in the mode prescribed by law; and the same has been registered according to the requirements of the statute. Nothing farther is necessary to be done by the husband, or can be done by him, in order to complete and perfect the conveyance. As done, upon the principles and doctrines of equity, the title of the husband is divested, and is vested in the wife, and that, I take it, without any action by a court of equity. Thus, though there had been no action by the court of equity, an absolute separate estate was vested in Eleanor A. Sayers, upon the principles and doctrines of equity, immediately upon the execution of said conveyance. She remained invested with such separate estate until her death, when it descended to her children, just as if it had been an estate recognized at law. And now when it is sought to divest that estate from them, and subject it to the payment of the subsequent debts of the grantor, though courts of law will not recognize the conveyance made to her, under whom they claim, it being a valid conveyance upon the principles of equity, it is competent for them to invoke the aid of equity, to give effect to the deed, and to protect them in their rights; and it is proper for them to invoke that protection in this suit, which seeks, by a court of equity, to subject their property to the payment of the grantor's debts.

It was contended for the appellees, that

the appellants were not properly before the court, and ought not to be allowed to assert their claims in this suit: or at least they could only do so, by a cross-bill. James Deaderick and his wife were made defendants by the amended bill, and the other appellants were made defendants upon their petitions, and had leave to file their answers, without objection by the appellees.

376 I *am not sure that they were not necessary parties. They were in the actual enjoyment of the subject-matter of the suit, and had an interest in it which was likely to be defeated or diminished by the plaintiffs' claim; and had an immediate interest in resisting the plaintiffs' demand; and all persons who have such immediate interests are necessary parties to the suit. 1 Daniel's Chy. Plead. & Prac., chap. 5, § 2, p. 246. It is the constant aim of courts of equity to do complete justice, by deciding upon and settling the rights of all persons interested in the subject matter of the suit, that further litigation may be prevented. And courts of equity delight to do justice, and not by halves. Stor. Equ. Plead., § 72. If it is true, as contended by the learned counsel, the plaintiffs might have proceeded to enforce their judgment liens, ignoring the appellants' claim of title, subjected the property to sale, and proceeded by ejectment at law to dispossess the appellants, in which they must have succeeded, as the appellants could not have asserted their title in a court of law, and that the decree in this suit for the sale would not be binding on them if they were not parties, the appellants would thereby have been driven to the necessity of bringing a suit in equity to join the plaintiffs, and to assert their rights, which might have been litigated and determined in this suit. Why thus multiply suits? The plaintiffs were proceeding in a court of equity to enforce their judgment liens against lands which they knew the appellants claimed to be their property, and denied to be chargeable with their judgments; that their defence could only be made in a court of equity, and that complete justice could be done in this suit, by deciding upon and settling the rights of all persons interested in the subject matter of the suit. It seems to me they ought to have been made

377 *parties. How could there have been a fair sale of the lands to satisfy their judgments until the rights of the appellants were determined? They would have of course asserted their claim, and forbid the sale, and who would have felt safe in purchasing until the validity of their claim was determined? It was necessary to make them parties in order to remove a cloud which rested on the title, before a decree for the sale. I am inclined to think they were necessary parties in this suit. But it is not necessary to decide that question now, as they have been made parties, and in many cases a person may be made a party though he is not an indispensable party. Story's Eq. Plead., § 153. In this case they were made parties on their motion, and I think properly so. And although it perhaps would

have been more proper to have asserted their claim by cross-bill, I think their claim was a defence to the proceeding by the plaintiffs, and might be made by answer, in which the affirmative matter of defence was set out. But their petition might be treated as a cross-bill. It seems that they were properly before the court, and that the case was before the court, by admitting them parties defendant, in such form as to enable it to decide and settle the rights of all parties interested in the subject, and to do complete justice, and prevent a multiplicity of suits.

But it is contended for the appellees, that a court of equity will not give effect to a conveyance from husband to wife against creditors, though subsequent to the conveyance, upon any consideration which is not valuable. I can perceive no good reason why subsequent creditors should have any superior equity to that of the heir of the grantor, where he had given the property to a second wife, who was not the mother of the heir claiming it. If his deed of

378 gift divested *him of the lands and vested them in another, and the transaction was open and fair and untainted with fraud, the property ceased to be his from the date of the conveyance, and became the property of his wife, to her separate use; and I cannot perceive what equity his subsequent creditors would have, who credited him upon the faith of his own property, to charge his wife's property with the payment of his debts. "It is true," Mr. Justice Story says, "that in regard to the defective execution of powers, &c., courts of equity do not always interfere and grant relief, but grant it only in favor of persons in a moral sense entitled to the same, and viewed with peculiar favor, and where there are no opposing equities on the other side." (1 Stor. Eq. Juris. § 95, cited by appellee's counsel in brief.) Here the author says, the relief will be granted in favor of a person who is in a moral sense entitled to the same; and none are more so than a wife or children. But the author adds, "where there are no opposing equities on the other side." I have said that I cannot perceive the ground of an equity in the subsequent creditor to charge the wife's separate estate with the debt of her husband, for which he obtained credit upon the faith of his own property. I think the circumstances of this case, which I have already detailed, are peculiarly strong against any such claim on the part of these creditors of the husband. Having by their forbearance lost their debts, in consequence of their debtor's losing his property by the result of the war, upon the faith of which their debts were contracted, it seems to me they would have no equity to charge the property of the wife, which was openly and fairly settled upon her as her separate estate long before those debts were contracted. So that in this case there are no opposing equities; and

379 *the authority cited seems to be strongly in support of the interference of a court of equity to give the aid sought.

But will a court of equity give effect to

the conveyance which is founded not upon valuable, but only meritorious consideration, in favor of a wife or children? Upon this point I will refer to *Stor. Eq. Jur.*, § 169, where he expressly states the assistance will be given to a person standing upon a valuable or meritorious consideration. The authorities upon this point are somewhat conflicting, and as this opinion is already too much extended, I will not undertake to review them, but will content myself with a reference to the opinion of Allen, Judge, in *Jones & wife v. Obenchain & als.*, 10 Gratt. 261, in which he reviews the decisions on the subject. It was held by Judge Allen, and all the judges concurred in his opinion—that where there was a meritorious consideration, meaning thereby a provision for a wife or child, equity would enforce a defective conveyance. In support of that opinion he cites *Shepard v. Shepard*, 7 John. Ch. R.; and *Kekewich v. Manning*, 12 Eng. L. & E. R. 120. He refers to the opinions of Lord Thurlow and Lord Eldon as favoring the doctrine, and the remarks of Brooke, J., in *Darlington v. McCoolle*, 1 Leigh 36. He cites two decisions by the Court of Appeals of Kentucky, and the remarks of Chief Justice Gibson in *Dennison v. Gochring*, 4 Barr Pa. R. 175. He also cites and relies on the opinion of Lord Chancellor Sugden in *Ellis v. Nimmo*; and reviews the decisions, which it is said overrules that decision of the Lord Chancellor, which he was of opinion were decided on other grounds. But suppose he had regarded those subsequent cases as overruling *Nimmo & Ellis*, would it have changed his opinion and the decision of this court in *Jones* 380 *v. Obenchain*? I can *hardly think it would. The opinion of Lord Chancellor Sugden was not, nor were the decisions of the courts of Great Britain, authority with this court; but the Lord Chancellor's opinion was regarded with the consideration that its intrinsic merit and the respect due to his great learning entitled it to receive. And the cases which are said to have overruled him were before this court and reviewed by Judge Allen, and did not change the decision. I must regard that case therefore as a decision of this question by the Court of Appeals of Virginia in which all the judges concurred, and am not disposed to disturb it, whether *Nimmo & Ellis* has been overruled or not. And I find it is sustained by other American decisions, which are entitled to very great respect. I will only refer to a recent decision of the Court of Appeals of Indiana, in *Sims v. Rickets*, *supra*, which I think is in point.

It remains now only to inquire whether the deed in question is a real bona fide conveyance, and whether it is absolute or only conditional. We have seen that it was fair and unassailable even upon the suspicion of fraud as to the creditors of the grantor or other persons: was it a real and bona fide conveyance as between the husband and wife? The terms of the deed, and the deliberation and solemnity of the act, the lapse of time for reflection from the writing

of the deed until its acknowledgment and recordation, the continued acquiescence of the husband during the lifetime of his wife, for a period of nearly ten years after the execution of the deed, without even an attempt to obtain a release from her (which may be regarded as a confirmation of the conveyance to her), leave no room for doubt that the transaction was real and bona fide between them, and was intended to divest the grantor of his title, and to vest it 381 in his wife, according to the *terms of the deed. Is the conveyance absolute, or only conditional?

This inquiry can only be answered by recurring to the instrument itself. It recites, "that whereas the said Reuben Sayers, intending shortly to visit the western country, and knowing the uncertainty of life, and to provide a permanent home and a future residence for his family, in case he should not be permitted to return in safety home, and seeking to provide against confusion at all events, now this indenture witnesseth, that for and in consideration of the premises, and for the natural love and affection he has for his wife, the said Reuben Sayers doth grant unto the said Eleanor Ann Sayers his entire real estate lying in the county of Pulaski, his present residence, containing seven hundred acres, more or less. Witness the following signature and seal." Signed, "Reuben Sayers. Seal."

There are two considerations set out in this deed, which moved the grantor to its execution: first, the providing a permanent home and future residence for his family; second, the love and affection he had for his wife.

Let it be conceded that one consideration of the conveyance was to provide a home for his family in case he did not safely return from the western country, which he expected shortly to visit. If he did return safely, then the conveyance was unnecessary to provide a home for his family on that contingency. But when he executed the deed he did not know that it would so happen, and in consideration of the uncertainty of his safe return he makes an absolute conveyance to his wife. It is not a conveyance to take effect only upon condition that he does not safely return. But the contingency that he may not return

382 is the *consideration which moves him to make the conveyance. Is that a conditional conveyance? I think not. The title has passed from him by his own act, upon a consideration which is in part contingent. And the contingency not happening the deed is not void; for it was not made to depend upon the happening of that contingency. It was just because of the uncertainty, the possibility that it might happen, he made an absolute conveyance to his wife.

But the consideration of the conveyance was not merely to provide a home for his family in case he had not a safe return. If he had stopped then it might have been so understood. But seeking to remove all confusion (uncertainty) on that point, he adds, "and" "at all events." That is, as I understand it to comprehend, whether he

visited the western country and was not permitted safely to return or not—whether he lived or died, “at all events” he would make the conveyance. And his indenture witnessed that for and in consideration of the premises, and for the love and affection he had for his wife, he granted to her the land in controversy. This latter was a sufficient consideration to support the deed, even if the contingent consideration had failed. *Skipwith v. Cabell*, 19 Gratt. How could he claim a defeasance? I think it is an absolute conveyance, and not conditional. Upon the whole I am of opinion to reverse the decree of the court below, and to enter here such decree as ought to have been entered by the Circuit court, reversing the decree of the County court, and dismissing the plaintiffs’ bill with costs.

The other judges concurred in the opinion of Anderson J.

The decree was as follows:

383 *This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the said decree and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the said Circuit court erred in affirming the said decree of the said County court, instead of reversing the same and dismissing the bill in this cause, as it should have done. Therefore, it is decreed and ordered, that for the said error the said decree of the said Circuit court be reversed and annulled, and that the appellees pay to the appellants their costs by them about the prosecution of their appeal here expended: and this court proceeding to render such decree in the premises as the Circuit court ought to have rendered, it is further decreed and ordered, that the said decree of the said County court be also reversed and annulled, and that the appellees pay to the appellants their costs by them in this cause expended as well in the said County court as in the said Circuit court.

Decree reversed.

384 *Sprinkle & als. v. Hayworth & als.

June Term, 1875, Wytheville.

Absent, ANDERSON, J.

I. Wills—Parol Trusts Contrary to.—S and his wife P had no children, and it was understood and agreed between them that the survivor should have all his property during the life of the survivor, and at his or her death it should be equally divided between his and her heirs and next of kin. S made his will, by which he gave all his property, real and personal, to his wife P absolutely. He died in her lifetime, and she was so shocked at his death, that she was immediately paralyzed, and remained unconscious, until she died the day after he did. She died without having made a will. **Held:**

1. **Same—Same—Effect.**—A court of equity will not enforce the agreement at the suit of the heirs

***Parol Wills.**—That wills by *parol* are invalid under

and next of kin of S against the heirs and next of kin of P.

2. **Same—Same—Same.**—In the absence of fraud on the part of a legatee, a court of equity will not enforce a *parol* charge upon his legacy.

3. **Same—Written Trusts—Effect.**—If it appeared from the evidence in the case, that S intended P should have entire control of the whole property during her life, and use as much of it as she chose to use, and that only what remained of it at her death was to be divided between his and her heirs and next of kin, the trust would not be enforced even if it had been in writing.

This was a suit in equity in the Circuit court of Smyth county, and afterwards transferred to the Circuit court of Wythe, brought in May 1870 by John T. Sprinkle and others, the heirs at law and next of kin of Archibald B. Sprinkle, deceased, against Nathaniel Hayworth and others, the heirs at law and next of kin of Phoebe Sprinkle, deceased, late wife of Archibald *B.

385 Sprinkle, to set up and establish an alleged *parol* agreement between said Archibald B. Sprinkle and Phoebe his wife, that at the death of the survivor of the two, the property of said Archibald should be equally divided between his and her family.

The cause came on to be finally heard on the 4th of March 1874, when the court held that the plaintiffs were not entitled to recover anything by reason of the matters set out in their bill; but retained the cause to have the rents collected, the property having been rented out under the order of the court during the progress of the cause. From this decree the plaintiffs obtained an appeal to this court. The case is stated by Judge Moncure in his opinion.

Richardson and J. W. & J. P. Sheffey, for the appellants.

Referred to Perry on Trusts, §§ 74, 75, 77, 82, 96; Sanders on Uses 14, 218, (2 Amer. ed.) Fleming v. Donahoe, 5 Ohio R. 255; Bank of United States v. Carrington, 7 Leigh 566; Walraven v. Lock, 2 Pat. & Heath R. 547; 2 Story’s Eq. Jur., §§ 20, 32, 44, 57, 781; 1 Black. Com. 92; 3 Greenl. Ev., § 365; Oldhum v. Litchfield, 2 Vern. R. 506; Drakeford v. Wilks, 3 Atk. R. 539; Podmore v. Gunning, 2 Sim. R. 644; Barrell v. Hanrick, 42 Alab. R. 60.

Gilmore and J. W. Johnston, for the appellees.

1st. This is simply on its face a bill to enforce a *parol* agreement between a man and his wife, and two agreements are set forth in bill. One is that he was to devise his whole estate to his wife, and that she at her death would divide the estate equally

the Virginia Statute of Wills, see *Borst v. Nalle*, 28 Gratt. 436, and *note*; *Sims v. Sims*, 24 Va. 584. As to whether a trust may be created by *parol* the *dictum* of JUDGE MONCURE in the principal case has been cited by the West Virginia Supreme Court of Appeals in *Troll v. Carter*, 15 W. Va. 581; *Murry v. Sell*, 23 W. Va. 480; *Titchnell v. Jackson*, 26 W. Va. 468.

between his family and her family; the other is, that his wife was *to have all the property for life, and then it was to be equally divided between the two families, except that the children of Mahlon Sprinkle—one of the testator's brothers—were to have nothing.

Such a contract cannot be enforced in any court. If it could, this contract or agreement is not set forth in such certain and definite terms as is required by the courts. See *Wright v. Puckett*, 22 Gratt. 370; *Pierce's heirs v. Catron's heirs*, 23 Gratt. 589; and the authorities cited in the former case.

2d. In such a case parol testimony is not admissible to contradict the written will.

See *Perry on Trusts*, p. 65, section 94, and cases cited. *Gilbert's Forum Romanum*, by Tyler, p. 328, foot, and top of 329; *Hare v. Shearwood*, 1 Ves., Jr. 241.

3d. To enable the appellants to avail themselves of parol testimony, fraud must be charged and proven. See *McCormick v. Grogan*, 4th English and Irish Appeals, 1869-'70, p. 82; *Devenish v. Baines*, Finch's Prec. in Chancery, case 3, p. 5; *Browne on the Statute of Frauds*, sec. 94.

4th. The declarations of the testator are not admissible in such a case. See *Redfield on Wills*, part 1, sec. 39, pl. 6, letter d, top of page 546-7; *Ibid.*, sec. 38, pl. 39, p. 527, 528; *Greenleaf on Evidence*, vol. 1, sections 289, 290.

5th. If the language of the agreement claimed had been inserted in the will itself, the court would not enforce it against the absolute devise to the wife. See *Perry on Trusts*, sec. 115, pp. 88-9; *May v. Joynes*, 20 Gratt. 692.

Moncure P. delivered the opinion of the court.

On the 19th of November 1835, A. B. Sprinkle, of *the county of Smyth, Virginia, intermarried with Phoebe Hayworth, of the county of Green, Tennessee. They lived together in great happiness during their whole married life, which lasted about thirty-five years, the whole of which was spent in the county of Smyth, and nearly all of it in the town of Marion, in that county. By their joint industry, frugality and economy, they amassed quite a large fortune; and never having had any children, it was their wish and intention, often expressed, that whatever of their property might be left unexpended and undisposed of at the death of the survivor of them, should be divided into moieties, one of which should go to the family or collateral heirs of the husband, and the other to the family or collateral heirs of the wife. The husband died on the 19th day of January 1870. The wife survived him, but only day or two, having died on the 21st of January 1870. She appears to have been in usual health at the time of his death; but was so shocked at that event, she almost at once became wholly paralyzed, and remained so, and generally unconscious, until her death. They were

which bears date on the 29th day of January 1869, and was duly admitted to probate in buried in the same grave. He left a will, the County court of Smyth county on the 28th day of March 1870. The will contains three items. The first provides for the payment of his debts, if any. The second and third are in these words:

"Item 2d. I will and bequeath to my beloved wife, Phoebe, all my estate of which I may die possessed, both real and personal, of every description whatsoever, she having aided me in making all that I have. My desire is, that she shall own absolutely everything that I may die possessed of.

"Lastly. As my wife is hereby 388 made my heir and *sole devisee, I hereby constitute and appoint her the executrix of this my last will and testament, and desire that she shall not be required to give any official bond."

The wife died without leaving a will, not having been in a condition to make one in the short interval between his death and hers.

On the 20th day of April 1870, John T. Sprinkle and others, heirs at law and next of kin of the husband A. B. Sprinkle, brought this suit in the Circuit court of Smyth county, against Nathaniel Hayworth and others, heirs at law and next of kin of the wife Phoebe Sprinkle, for the purpose of setting up and enforcing an alleged parol understanding and agreement between the said husband and wife, for the equal division of the estate of the husband, left at the death of the wife, between their two families as aforesaid. In their bill the plaintiffs set out the particulars of their claim.

Some of the defendants filed their answers to the bill; in which they denied that there was any such understanding and agreement between said Sprinkle and wife in regard to the disposition of the property owned by said Sprinkle, as was claimed in the bill; and the said defendants claimed that they and the other heirs at law and next of kin of the said wife held and were entitled to hold the said property as such heirs at law and next of kin.

Sundry depositions were taken in the suit on both sides; and on the 4th day of March 1874 the cause came on to be heard upon the bill of complainants, the demurrer (which had been filed), and answer of N. Hayworth and others, the replication thereto, the exhibits filed, and the depositions of witnesses; and was argued by counsel. On consideration whereof, the *court overruled the 389 demurrer; and proceeding to decide the cause on its merits, decreed that the plaintiffs were not entitled to recover anything by reason of the matters set forth in their bill, and would then have dismissed the bill; but it appearing that the property had been rented out under the order of court, and that the transaction on that account remained unsettled, the cause was retained for the purpose of such settlement.

The plaintiffs applied to a judge of this court for an appeal and supersedeas to the said decree; which were accordingly allowed

and awarded. And that is the case which we now have to dispose of.

There never was a will more plainly written, or one on the face of which there was less room for doubt or difficulty in the construction of it, than the one we now have before us. The language of the second clause, as before stated, is: "I will and bequeath to my beloved wife Phoebe all my estate, of which I may die possessed, both real and personal, of every description whatsoever, she having aided me in making all that I have. My desire and will is, that she shall own, absolutely, everything that I may die possessed of." Could language be more comprehensive or emphatic to invest the wife with the largest possible interest in, and power over, the estate of the husband? But to make it still more plain, if possible, the testator proceeds in the last clause to say: "As my wife is hereby made my heir and sole devisee, I hereby constitute and appoint her the executrix of this my last will and testament, and desire that she shall not be required to give any official bond."

And yet, plain as is this written will, the plaintiffs contend that it ought not to be carried into effect as it is written; that there was a parol understanding and 390 *agreement between the husband and wife, in virtue of which the plaintiffs, his heirs at law and next of kin, are entitled to one moiety of the estate left at her death.

There could be no valid and binding agreement between husband and wife, as she was not a competent contracting party. Suppose there was in fact such an understanding between them as the plaintiffs contend for, could effect be given to it, contrary to the plain and express language of the written will?

To give it such effect, would seem to be clearly inadmissible for several reasons: First, because by the common law it is a general rule that a written instrument cannot be varied or contradicted by parol evidence; and there is nothing in this case to make it an exception to the general rule. Secondly, because such an effect would be contrary to the spirit and true intent and meaning of the statute of frauds. Code, p. 985, ch. 140, section 1. And thirdly, because it would be contrary to the statute of wills. Code, p. 887, ch. 112, section 1; Id., p. 910, ch. 118, section 4, which declares, that "no will shall be valid unless it be in writing, and signed by the testator, or some other person in his presence and by his direction, in such manner as to make it manifest that the name is intended as a signature; and moreover, unless it be wholly written by the testator, the signature shall be made, or the will acknowledged, by him in the presence of at least two competent witnesses, present at the same time; and such witnesses shall subscribe the will in the presence of the testator; but no form of attestation shall be necessary"—And section 8, which declares, that "No will or codicil, or any part thereof, shall be revoked, unless under the preceding section

(in regard to revocation by marriage,) 391 or by a subsequent will or *codicil, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is required to be executed; or by the testator, or some person in his presence and by his direction, cutting, tearing, burning, obliterating, canceling or destroying the same, or the signature thereto, with the intent to revoke." It would be strange if, after all this care taken by the legislature to prevent fraud in the making and revocation of wills, a will, solemnly made, in strict and literal pursuance of all the requisitions of the statute, could be annulled and destroyed by loose declarations of the testator, testified to chiefly by interested parties.

A great deal was said in the argument about the omission in our statute of the seventh section of the English statute of frauds, which declares, that all declarations or creations of trust and confidence of any lands, &c., shall be manifested and proved by some writing signed by the party, &c.; and it was argued that, while under the English statute, such a trust as is attempted to be set up in this case would be invalid, it is valid in this state for the reason aforesaid.

Certainly a resulting trust is not even within the English statute of frauds, and, of course, is not within ours. Indeed, the eighth section of the English statute, which is also omitted in ours, expressly excludes resulting trusts from the operation of the statute. The case of the Bank of the United States v. Carrington &c., 7 Leigh 566, referred to in the argument, was a case of resulting trust. There are other trusts not strictly coming under the denomination of resulting trusts, which are not within the statute. Tucker, P. enumerates many of them in his opinion in the case just cited; and in 1 Lomax's Dig., top page 233, all these trusts are considered under the 392 denomination *of "implied, resulting and constructive trusts." For peculiar reasons they are excluded from the operation of the statute.

But without attempting to define these several trusts, or to give the reason why they are not embraced within the statute of frauds, or to state the effect, if any, of the omission in our statute of the 7th section of the English statute of frauds, we think we can safely say that under our statute of frauds, if there were no other statute or law to prevent it, such a parol understanding or agreement as is set up in the bill, however well proved it may have been, would be insufficient to contradict or invalidate a will so plainly written as the will in this case. It could not have that effect as a parol declaration or creation of trust, for to give it that effect would be to subvert the statute. The most solemn wills and deeds could then be annulled by loose parol declarations under the name of trust. The danger of admitting such declarations, for such a purpose, was demonstrated in Cox, &c., v. Cox, decided by this court a few

days ago. Even in the case of a resulting trust the proofs ought to be very clear if the trust does not arise on the face of the deed itself. Opinion of Brockenbrough, J., in the *Bank of U. S. v. Carrington, &c.*, 7 Leigh 576, and the cases cited by him. We do not mean to admit, however, that there is any difference in effect between the English statute of frauds and ours arising from the omission in the latter of the seventh and eighth sections of the former. That is a question which is unnecessary, and not intended to be discussed in this case.

However that may be, we think the statute of wills, as before shown, plainly forbids that a parol will, whether in the form of a trust or otherwise, shall be set up and established, especially when there is a
 393 written *will to the contrary which has been executed and established in strict pursuance of the statute.

To be sure fraud may have the effect of setting aside a deed or will, or converting a grantee or devisee into a trustee for the benefit of others. "The fraud which suffices to lay a foundation for such a trust is not simply that fraud which is involved in every deliberate breach of contract. The true rule seems to be that there must have been an original misrepresentation, by means of which the legal title was obtained; an original intention to circumvent, and get a better bargain by the confidence reposed. Thus, as has been held in many cases, if a man procure a certain devise to be made to himself by representing to the testator that he will see it applied to the trust purposes contemplated by the latter, he will be held a trustee for those purposes." Brown on the Statute of Frauds, § 94. See also Gilbert's *Forum Romanum*, p. 328, 329. There is a very recent case of the very highest authority, in the English books, which was referred to in the argument of this case by the counsel for the appellees, and which very strongly illustrates the law on the branch of the subject we are now considering. We mean *McCormick v. Grogar*, decided by the House of Lords in 1869, and reported in the law reports, English and Irish Appeal Cases, vol. 4, p. 82. The court of appeal in Ireland had reversed a decretal order of the Lord Chancellor there, and the House of Lords affirmed the decision of the court of appeal. It does not appear that there was any dissent to that decision of the House of Lords. Lord Chancellor Hatherley and Lord Westbury delivered seriatim opinions in the case, and Lord Cairns expressed his entire concurrence in their opinions. We will have occa-
 394 sion to refer to that case *again.

We will now notice only so much of it as relates to the branch of the subject we are now considering. Lord Chancellor Hatherley, after stating several cases in which a devisee had been held to be a trustee upon parol proof of a fraud committed by him in procuring the devise, thus proceeds: "But this doctrine evidently requires to be carefully restricted within proper limits. It is in

itself a doctrine which involves a wide departure from the policy which induced the legislature to pass the statute of frauds, and it is only in clear cases of fraud that this doctrine has been applied—cases in which the court has been persuaded that there has been a fraudulent inducement held out by the apparent beneficiary, in order to lead the testator to confide to him the duty which he so undertook to perform." And Lord Westbury said: "The jurisdiction which is invoked here by the appellant is founded altogether on personal fraud. It is a jurisdiction by which a court of equity, proceeding on the ground of fraud, converts the party who has committed it into a trustee for the party who is injured by that fraud. Now being a jurisdiction founded on personal fraud, it is incumbent on the court to see that a fraud, a *malus animus* is proved by the clearest and most indisputable evidence." Much more was said by his lordship which bears upon the subject under consideration, but for the present we will quote no more from the case.

In this case, certainly, then, there is not a particle of proof, nor is it pretended that there was any fraud on the part of the devisee to induce the devise; nor that she would not, if she had lived long enough, have made such a disposition of the property as is now claimed by the appellants; not in discharge of an obligation which could
 395 be enforced in a court of *law or equity, but as a voluntary act in pursuance of what she no doubt believed were the wishes of her husband.

We are therefore of opinion that the parol evidence in this case was inadmissible to alter or contradict the will, or set up a trust under the same.

We are also of opinion, 'that even if the evidence were admissible, it would be insufficient to prove such a trust as is claimed in this cause. The will itself certainly shows the intention of the testator more plainly than the parol declarations made by the testator and his wife, testified to, as they chiefly are, by interested parties. The will, as we have seen, is very plainly expressed, as if the testator was careful to exclude the idea that his wife should be considered as holding the property for the benefit, ultimately, of the heirs of the two families respectively, according to the claim set up in this suit, and not for her own exclusive and absolute use. If really the testator had intended to give those two families, or either of them, any interest in remainder in his estate, he would have done so expressly in his will. He would, for example, have given a moiety of his estate to his wife absolutely, and the other moiety to her for life, with remainder to his own right heirs and next of kin. That he did not plainly do so, which he could so easily have done, is strong, if not conclusive evidence to show that he did not intend to do so. He was not taken by surprise by death. His will was well and carefully prepared, obviously by a lawyer, more than a year before his death, and is, in substance, the same with a will which he

executed seventeen or eighteen years before. It was his deliberate and cherished purpose to make it as he did; and he meant what he said, whatever may have been his wishes in regard to the distribution of any of 396 the *property which might remain unexpended or undisposed of at her death. Those wishes were altogether subordinate to his main intention to leave all his estate of which he might die possessed, both real and personal, of every description whatsoever, to his wife; and that she should own absolutely everything that he might die possessed of. Though sometimes advised to name in his will his wishes in regard to the ultimate distribution of the property which might be left at his wife's death, he carefully avoided doing so, lest his wife might thereby be restrained in some degree in the use and enjoyment of the property. If he had survived her, the property would certainly have been his absolutely, to dispose of as he pleased, and he could not have been restrained in such disposition by his heirs at law or those of his wife, upon the ground of any trust in their favor, arising from the loose conversations between him and his wife, or otherwise. As she survived him, he intended to leave her in his place, and to give her the property and all power over it to the same absolute extent as he would have held and enjoyed it had he been the survivor. He did not know how long she would live, nor what occasion she might have for the use of the property after his death; and therefore he gave it to her absolutely. He had perfect confidence in her, and was willing to give it to her absolutely, trusting and believing that she would do what was right when she came to dispose of what property might remain undisposed of at her death. George W. Jones, a witness for the plaintiffs, says, that it was the understanding between A. B. Sprinkle and wife, "that whichever outlived the other was to have the benefit of the whole property during their life; and then the property was to be divided, whatever may be left, equally between his family 397 and the family of *his wife." Wade

D. Strother, another witness for the plaintiffs, says: "I suggested to him the propriety of putting this specific arrangement (for the ultimate division of the property between the two families) beyond any contingency. He replied that he did not desire to do so, as he had the fullest confidence in Mrs. Sprinkle; that as soon as he was laid away, and it was proper to do so, she would make a will that would carry out certainly this agreement; furthermore, that he desired it to be in her power to use as much of his property as would be necessary to her comfort, should she be afflicted." This witness is a lawyer, had written the testator's will, and he would no doubt have been called on to write the declaration of trust, if the testator had taken his advice and been willing to make one; but he was not, obviously for the reasons above stated. Mrs. Strother, another witness for the plaintiffs, says: "I heard Mr. Sprinkle say once that

he had perfect confidence in his wife, that she would carry out their agreement; that he did not want to tie his property up. My impression was, that he did not want to leave his property to his wife for life and then to others, so that she would feel that any one else had any claim to it. He said that in so many words. He said he had perfect confidence in his wife, that if she survived him, she would make a will and divide the property according to their agreement; that he would give it to her absolutely with that agreement."

Now if the testator intended to give his wife the right to dispose of the property, or any part of it at her pleasure, to her own use, he gave her the absolute estate; and even if he had engrafted on the will an express limitation over of the property which might remain undisposed of at her death, the absolute devise would have been good, and the limitation over repugnant 398 *thereto and void. A fortiori, a parol limitation over of such residue, directly contrary to such an absolute devise on the face of the will as exists in this case, would be void, even supposing that a parol limitation could be engrafted on a will in any case, except in a case of fraud as before mentioned.

That the testator did intend to give his wife the right to dispose of the property at her pleasure during her life, is, we think, perfectly certain, even according to the parol evidence itself.

We will refer to two cases only on this last branch of the case, both of which were referred to in the argument of the case, one an English and the other a Virginia case, although many other cases might be cited to the same effect.

The English case is the one from which we have already quoted so largely in another branch of this case. *McCormick v. Grogan*, supra. There, as here, the will was absolute in form. But there the testator gave his instructions to his devisee and legatee, not by parol declarations, but in a letter addressed to the latter. The marginal abstract of the case is as follows: "C. made a will, leaving his whole property, real and personal, to G., whom he also appointed his executor. When about to die, C. sent for G., and in a private interview told him of the will, and on G.'s asking whether that was right, said he would not have it otherwise. C. then told G. where the will was to be found, and that with it would be found a letter. This was all that was known to have passed between the parties. The letter named a great many persons, to whom C. wished sums of money to be given, and annuities to be paid; but it contained several expressions as to G. carrying into effect the intentions of the testator as he might think best;" and this sentence: "I do not 399 wish you to act strictly on the *foregoing instructions, but leave it entirely to your own good judgment, to do as you think I would if living, and as the parties are deserving, and as it is not my wish that you should say anything about this document,

there cannot be any fault found with you by any of the parties, should you not act in strict accordance with it.' G. paid money to some of the persons mentioned in the letter, but not to all: Held, that in this case there was not any trust created binding on G." Lord Chancellor Hatherley in his opinion said: "The instructions on their very face appear to bear this interpretation, that it was the testator's intention to leave Mr. Grogar sole and complete master of his property. Now, in the first place, what other theory is there that can give any account of his taking this singular mode of disposing of his property, except that he did not intend the instructions to have legal effect? There was no charitable trust concealed, nor any other trust of any sort which the testator was desirous of keeping back, because either the trust might be illegal or he might have doubts of its legality. There was no question of perpetuity, or anything else which could render it in any way more desirable for him, instead of effecting his intentions in a proper and legal manner, by expressing them in a regular instrument, to do it in this strange and circuitous mode of giving the whole property to one man, and leaving an instrument utterly inoperative in law for carrying his intentions into effect."

Now, for the very same reason, we may enquire in this case, why the testator did not expressly limit his wife's estate to her life, and give it in remainder to his heirs and her heirs in equal moieties, if he had so intended? Why did he give the estate to her absolutely, and carefully abstain
400 from making any allusion *to any of those heirs in his will, though advised by his counsel to do so? There is, in truth, but one reasonable answer; and that is, he intended what he said in his will.

There are expressions of a like kind in the opinion of Lord Westbury, but it is unnecessary to quote them.

The Virginia case to which I refer is that of *May v. Joynes &c.*, 20 Gratt. 692, decided by this court in 1857, but not reported until 1871. The following is the marginal abstract of the case by the reporter: "Testator says, I give to my beloved and excellent wife, subject to the provisions hereafter declared, my whole estate, real and personal, and especially all real estate which I may hereafter acquire, to have during her life, but with full power to make sale of any part of the said estate, and to convey absolute title to the purchasers, and use the purchase money for investment, or any purpose that she pleases, with only this restriction, that whatever remains at her death shall, after paying any debts she may owe, or any legacies she may leave, be divided as follows: There are then limitations to his children and grand children—Held: The wife takes a fee simple in the real, and an absolute property in the personal, estate; and the limitation over, of whatever remains at her death, is inconsistent with, and repugnant to, such fee simple, and absolute property

in said real and personal estate, and fails for uncertainty." Allen, P. delivered the opinion of the court, in which all the other judges, but Samuels, J. concurred. The case was very ably argued by distinguished counsel, and their arguments are fully reported. They refer to all the material authorities bearing on the interesting question involved in the case, which was, whether a remainder over, limited on an express estate for life, was rendered invalid by a
401 power of disposition given *to the tenant for life for her own use over the principal of the estate, or any part of it.

We think that case was a much stronger one in favor of the limitation over than this case is, for there the estate, on which the limitation depended, was an express estate for life, while here it is a fee simple and absolute estate. There, the limitation over was expressed in the will. Here, there is no allusion whatever to it in the will. If the limitation over in that case was repugnant to the estate given to the wife, a fortiori, the limitation over in this case was repugnant to the estate given to the wife.

If the testator had foreseen the death of his wife so soon after his own death, without having time or opportunity, or being in a condition to make a will, or had thought of such a contingency as likely to take place, he would no doubt have provided for it by his will, and disposed of the property among the heirs of both parties, according to what he knew to be the wishes of both in such an event. But he made no such provision, and whatever may have been the cause of the omission, this court cannot supply it. To do so would be to make a will for the testator, and not to construe and give effect to the will as made by himself. The latter is our only legitimate office. The former is beyond our power.

In every view of the case, therefore, we are of opinion that there is no error in the decree appealed from, and that it ought to be affirmed.

Staples, J. I understand the president's opinion as holding that in order to establish the trust, it is necessary to show a fraudulent intent on the part of the devisee or legatee in obtaining the will. I am not prepared to concur in that view.

402 *If, for example (in the familiar instance), the testator communicates his intention to the devisee of charging a legacy on his estate, and the devisee should tell him it is unnecessary, and he will pay it, the legacy being thus prevented, the devisee will be required to make it good. In such case it does not matter whether the devisee made the representation fraudulently or not. The fraud is in the refusal to pay the legacy; not in the promise, but in the breach.

I concur fully in the rest of the opinion.

Decree affirmed.

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***Bush v. Campbell.**

June Term, 1875, Wytheville.

1. **Pleading—Non-Joiner of Parties—Failure to Make Objection—Waiver.**—In an action of debt upon a bond against five persons, the plaintiff indorses on the process, "Not to be served on G," who was one of the five; and he is not brought before the court. There having been two continuances of the cause, and a verdict and judgment for plaintiff against B, one of the defendants, and he having moved for a new trial, and also in arrest of judgment, without at any time objecting to the failure of plaintiff to make G a party; and it appearing further from the motion in arrest of judgment, that G had absconded and left the state before the suit was brought, B must be held in the appellate court, to have waived the objection; and it is too late to make it in that court.
2. **Practice—Judgment for Some and against Other of the Defendants.**—In an action of debt upon a bond against five persons, upon one of whom the process is not served by direction of the plaintiff, the four plead usury in the bond, and three of them plead severally *non est factum*. On the trial the jury find in favor of the three defendants, on the plea of *non est factum*; but cannot agree on the plea of usury. There is a judgment in favor of the three, and the case is continued as to the fourth. Afterwards there is a verdict against the fourth; and he moves in arrest of judgment. **Held:** Under the statute, Code of 1849, ch. 177, § 19, there may be judgment in favor of the three at one time, and a judgment in favor of the plaintiff against the fourth defendant at another time.
3. **Same—Under Code of 1849.**—The act, Code of 1849, ch. 177, § 19, applies to actions on contract against two or more defendants, where the defense of some of the defendants is personal to themselves, though that defense is, that they never were parties to the contract sued on, as *non est factum*.
4. **Same—Plaintiff's Right to Proceed against Non-Resident Defendants, after Judgment Rendered in Favor of Other Defendants.**—Though in such action the parties sued live in different counties, and the only parties who live in the county where the suit is brought, have a verdict and judgment in their favor on their plea of *non est factum*, the plaintiff

***Pleading.**—The principal case at p. 431 is cited in *Kimball & als. v. Borden*, 95 Va. 208, as sustaining the rule that all pleadings must be certain and clear. See also, 4 Min. Inst. 690; *Shrewsbury v. Miller*, 10 W. Va. 121.

†**Practice.**—For the proposition that there may be a judgment in favor of some of the defendants at one time and against others at another time, see *Beazley v. Sims*, 81 Va. 646; *Muse v. Farmers' Bank*, 27 Gratt. 264, following the construction of the Code of 1849, ch. 177, § 19, in the principal case. See also, *Moffett v. Bickle*, 21 Gratt. 280; *Steptoe v. Read*, 19 Gratt. 2. The section referred to in Code of 1849 is re-enacted in Code of 1887, § 3396. See its application in *Cahoon v. McCulloch*, 92 Va. 177. These statutes alter the common-law rule. The principal case is cited in West Virginia, (which has precisely the same statutory enactment as Virginia) in *Choen v. Guthrie*, 16 W. Va. 107; *Enos v. Stansbury*, 18 W. Va. 480; *Hoffman v. Bircher*, 22 W. Va. 552. See *Barton's Law Pr. (2d Ed.)* 428; 4 Min. Inst. (3d Ed.) 669, 968. For the non-application of the above referred to statute, see *Gibson v. Beveridge*, 90 Va. 606.

may still proceed in that suit against the other parties who do not reside in the county.

- 404 *5. **Same—Fraudulent Attempt of Plaintiff to Give Jurisdiction to the Court.**—If a plaintiff, in order to give jurisdiction to the court, in a case where defendants live in another county unites in the action, a party who he knows is no party to the contract, the court will on motion dismiss the suit with costs.

On the 24th of April 1858 Leroy Campbell sued out of the clerk's office of the Circuit court of Roanoke county summons against Wm. Gish, George Gish, Wm. H. Fleshman, David H. Gish and Robert Bush, jointly in debt for \$3,000, which were directed severally to the sheriffs of the counties of Roanoke, Bedford and Franklin; that directed to Roanoke was endorsed, "Serve only on George Gish and David H. Gish," and was returned executed; that directed to Bedford was endorsed, "Serve only on William H. Fleshman," and was returned executed on him; that directed to Franklin was endorsed, "Serve only on Robert Bush," and not being executed, an alias summons was directed to the sheriff of Franklin, endorsed in the same way, and returned executed on Bush. There was no other summons issued in the case; none was served on William Gish; nor was any return of any kind made as to him on any process. The declaration filed in the case avers that the said William Gish, George Gish, William H. Fleshman, David H. Gish, and Robert Bush had, by their writing obligatory, sealed with their seals, and dated the 22d of November 1857, bound themselves, &c., to pay the plaintiff, one day after date, the sum of \$3,000; and the paper of which profort is made, purports to be the writing obligatory of said parties, sealed with their seals, and is in the form of what is commonly called a single bill. Office judgments were entered and confirmed at rules against all the parties on whom process had been executed; but no order was ever made as to William Gish, or any further step taken against him.

- 405 *At the subsequent term of the court, after the office judgment was confirmed, George Gish, William H. Fleshman and David H. Gish, severally filed pleas of *non est factum*; and they jointly with Bush filed a plea of usury; to which several pleas the plaintiff replied generally; and issues were joined. At the ensuing term of the court a jury was empanelled to try all the issues joined in the case; and, after retiring, returned into court with a verdict for the defendants, George Gish, William H. Fleshman and David H. Gish, on their pleas of *non est factum*; which was received and entered by the court; and the jury declaring their inability to agree upon a verdict on the plea of usury, a juror was withdrawn, the jury discharged, and the case continued as to Bush; and a judgment was rendered for George Gish, William H. Fleshman and David H. Gish, on the verdict in their favor on the plea of *non est factum*.

At the August term 1859, on the motion of the defendant Bush, the cause was con-

tinued, and at the March term 1860 it was continued generally. At the August term 1860 another jury was empanelled to try the "issue joined," which returned a general verdict for the plaintiff for \$3,000, the debt in the declaration mentioned, with interest from the 23d of November 1860. Bush thereupon moved to set aside this verdict; which motion was overruled. He then assigned errors in arrest of judgment, and moved to arrest the judgment on the said verdict, on the following grounds:

1st. The action is joint against William Gish, George Gish, William H. Fleshman, Robert Bush and David H. Gish; and upon pleas of non est factum, filed by George Gish, William H. Fleshman and David H.

406 Gish, by the verdict of the jury, it has been established *that it is not the bond of said defendants; and as the declaration alleges a joint contract, no judgment can be given against the defendant, Robert Bush.

2d. Neither Robert Bush or William Gish, at the time of the institution of the suit, were residents of the county of Roanoke, or since have been residents of said county; but at that time William Gish had fled from the country, having previously to his flight resided in the county of Bedford; and Robert Bush then was, and still is, a resident of the county of Franklin. And the process was not served on Robert Bush, in the county of Roanoke; so that the court has no jurisdiction of the action on the bond, since it has been ascertained that it is not the bond of the other defendants; and this objection could not have been taken by plea in abatement, as George Gish and David H. Gish, who were sued along with the other parties, were, at the time of the institution of the suit, residents of the county of Roanoke.

But the court overruled the motion to arrest the judgment, and rendered a judgment according to the verdict. Bush thereupon applied to a judge of this court for a supersedeas; which was allowed.

Early, for the appellant.

I maintain that the judgment in this case was erroneous: First, because it was error in the court to have received a verdict as to a portion of the defendants, on a part of the issues joined. The general rule is, that the verdict must respond to all the issues. This rule is laid down very clearly in Robinson's old Practice, vol. 1, page 355, and the cases there cited; and it results from the very theory of jury trials. As is said

407 by Judge Green, in the case of Gardner's adm'r v. *Vidal, 6 Rand. 106, "there is no example of a verdict being set aside as to one issue, and suffered to stand as to others, and trying a cause by piecemeal;" and the converse of this proposition is equally true: there is no example of a jury being allowed to render a verdict on one issue when they cannot agree as to the others, and thus trying the case by piecemeal. This holds good, whether the several issues are made on different pleas by the same party, or separate pleas by

different parties. I defy the production of a solitary case in which a jury has been allowed to render a verdict on the issues joined on the part of a portion of the defendants, when they could not agree as to the issues joined on the part of the other defendants in a civil case. Even in criminal cases it required the special enactment, to be found in sec. 35, chap. 208, of the Code of 1849, page 778, to authorize a verdict as to one or more of several parties charged and tried jointly, and a trial as to the others by another jury, though it was never the law that, in criminal prosecutions, when several parties were jointly charged and tried, the acquittal of one was good cause to arrest judgment against the others who were found guilty. Suppose that in this case there had been a verdict against the three parties who pleaded non est factum, on that plea, would that verdict have been received, or, if received, have been allowed to stand, if there was no verdict on the issue joined on the plea of usury? Yet, if the jury could have rendered a separate verdict for the said defendants on the plea of non est factum, why could they not have rendered it against them on that plea as well?

The position taken by the counsel for the defendant in error, that the plaintiff in error gave his assent to the withdrawal 408 of a juror, after the partial *verdict was rendered, is no answer to the point above made. The verdict had been received and entered, and when the jury declared their inability to agree on the other issue, the withdrawal was agreed to in order to relieve the jury from a useless and harrassing confinement until the adjournment of the court. That did not amount to an assent to or release of the error committed in receiving a partial verdict, nor did the subsequent continuance, on the motion of the plaintiff in error, amount to such assent or release, any more than a motion for a continuance after an erroneous ruling of a court in a case would amount to a release of the error. It may be contended with far greater force, that the withdrawal of a juror and the discharge of the rest with the consent of the plaintiff in the court below, without insisting upon a verdict upon all the issues joined, when he had the undoubted right to resist the reception of a partial verdict against him, amounted to such a sanction of the error committed as to waive all right to a judgment upon any subsequent verdict that might be rendered on the other issue. He had a right to a writ of error on the judgment on that verdict, while the defendant, Bush, had no such right, and he is now asking for a new trial as to his codefendants, Fleshman and the two Gishes, but he insists that such an error was committed in the reception of that verdict by the court, with the sanction of the plaintiff below, as to debar him from any judgment on the subsequent verdict. His remedy, if any, after submitting to the first verdict, was to dismiss his suit as to Bush and bring a new suit against him individually, or against him and William Gish jointly. The

cases of *Boswell & al. v. Jones*, 1 Wash. 322, and *Guerrant v. Tinder*, Gilm. 36, cited by counsel for the defendant in error, are not at all in *point. In each of those cases there was a verdict on all the issues joined, and as to all the parties, and they were actions for tort. If they had been actions on contract, unquestionably, as the law then stood, the defendants against whom the verdicts were rendered would have had a certain and sure remedy, by motion in arrest of judgment.

I maintain that, according to the description of the writing obligatory on which suit was brought contained in the declaration, it was a joint obligation, and not joint and several. Without, however, entering into the learning on that subject, it is sufficient to say that the legal consequences are the same in this case as if the obligation sued on were purely a joint obligation. The plaintiff in the court below has thought proper to treat it as a joint obligation, and has brought a joint suit on it, and not several suits against each of the parties whose names appear to be signed to the obligation. In *Parson on Contracts*, vol. ii, page 12, it is said that "when the obligation is joint and several, an ancient and familiar rule of law forbids it to be treated as several as to some of the obligors, and joint as to the rest. The obligee has the right of choice between the two methods of proceeding; but he must resort to one or the other exclusively, and cannot combine both; he must proceed either severally against each, or jointly against all." The same doctrine is laid down in *Chitty on Contracts*, vol. ii, page 1352, 11th American edition, in the following words: "On a joint and several covenant or contract the plaintiff must elect to proceed, either as if the contract or obligatory part of the instrument were joint, or as if it were several; so that the parties chargeable must be sued jointly or individually." See also *Bacon's Abridgment*, Obligation D.

410 *Now the plaintiff below undertook to treat the obligation sued on as the joint obligation of the parties whose names were signed thereto, and yet on each one of the summons which issued, an endorsement was made which forbade its service on *William Gish*, whose name appears as signed first in order to the obligation. This, I maintain, was a fatal error, and would have afforded sufficient ground for arresting the judgment, even if the verdict had been against all the defendants who appeared and pleaded. In the case of *Shields v. Oney*, 5 Munf. 550, which was the case of an action against two partners, but the writ was directed to be served on one alone, it was held that the judgment must be arrested, though there had been no plea in abatement. See the opinion of Judge Roane in the case. It is submitted that this is a similar case, and that the same rule should hold in it that was applied in that case.

There it was held that no plea in abatement was necessary, because the plaintiff

showed by his declaration that he knew who the parties were, and it was held that as the writ was against two, but was served on one only, and the declaration was against both, the judgment must be arrested, though the Court of Appeals was inclined to the opinion that the evidence was sufficient to support the action. So here, where the summons was against five, and the declaration against all, but by the direction of the plaintiff the summons was served on four alone, it is submitted that the judgment ought also to have been arrested. If this is not so, then, notwithstanding the ancient and well established rule of law, that suit on a joint and several obligation must be jointly against all, or severally against each, a plaintiff might treat such an obligation as joint as to some, and several as to 411 others, by simply endorsing *on the summons that it should not be served on a part of the obligors.

The portions of the statute of Jeofails bearing on this question are as old certainly as the Code of 1792. See that Code, chap. 76, section 26, page 111, and the Revised Code of 1819, page 511, section 104. The other provisions incorporated into the Code, since the decision in *Shields v. Oney*, have no bearing whatever on the question. Nor does the provision, contained in the Code of 1849, chap. 172, sec. 49, page 653, affect it. That section is intended merely to give the plaintiff the right to proceed to judgment against one or more of several defendants jointly sued, when the process has not been served on a portion for causes beyond the control of the plaintiff. It could not have been intended to permit him to select which of several parties jointly bound he should proceed against, for such a permission to him would, in many cases, enable him to perpetrate the grossest injustice.

I come now to the consideration of another question arising in the case, and that is as to the effect of the verdict on the plea of non est factum, as to a portion of the defendants, on the right of the plaintiff to a judgment against one of the defendants, sued along with the others. I presume it is useless to refer to the well established doctrine, as the law unquestionably stood before the provisions contained in the Code of 1849, chap. 177, sec. 19, page 674, were adopted; but I propose to consider how far that law has been modified by the said section. That section has never been construed by our Court of Appeals, though it has been referred to in the cases of *Steptoe v. Read*, 19 Gratt. 1, and *Moffett v. Bickle*, 21 Gratt. 280. In the first case the question was raised in the argument, but not decided, as it was not necessary to do so. It was contended in the 412

*argument, that in an action of assumpsit against two, under the provisions of sec. 19, chap. 177 of the Code, a separate judgment might be rendered against one only on proof that the other did not assume; and hence that the defendant, who was willing to withdraw his plea or confess judgment, was a competent

witness to prove that he alone assumed the debt, and that the other did not assume. In his opinion Judge Joynes, to meet this view, undertook to show that when a witness was admitted for one purpose, he was competent for all purposes, and that he might be examined, to show that the debt was illegal and void for reasons going to the foundation of the action; and that thus a party might be admitted to give testimony which would defeat the action, not only as to his co-defendant, but as to himself. His doctrines on that point were entirely sound, and sustained by abundant authority, and if in delivering his opinion he seemed to admit that, in an action on contract against two, there might be a judgment on a contract made by one only, it was merely a concession for the sake of the argument. The sole question in the case was as to the admissibility of the testimony of the co-defendant of Steptoe, and Judge Joynes demonstrated the inadmissibility of the witness by showing that, if admitted for one purpose, he was admitted for all purposes. This left the question, arising under the section of the Code referred to, untouched.

The case of *Moffett v. Bickle* was a joint action, under section 11, chapter 144 of the Code of 1849, page 582, against the maker and indorsers of a negotiable instrument, in which the undertaking of each party was several; and the court very properly held that there might be a judgment in favor of the holder against the endorser to him
413 for a *valuable and legal consideration, though the other parties might be

discharged for an illegal consideration that applied to them alone. Before the passage of the act of 1838, containing provisions similar to those of section 19, chapter 177, of the Code of 1849, it had been held that, in such actions, the well established rule that, in joint actions on contract a failure as to one was a failure as to all, was applicable; and it cannot be questioned that the case of *Moffett v. Bickle* came within the mischief intended to be remedied by the provisions of the act of 1838, as well of section 19 of chapter 177 of the Code of 1849; for the application of those provisions to such a case involves no departure from the well established rule that, in all actions the allegata and probata must agree. In delivering the opinion of the court in the case of *Moffett v. Bickle*, Judge Moncure, referring to the opinion of Judge Joynes in the case of *Steptoe v. Read*, said: "That view of the case seems to concede that if it had been proved by competent evidence that Steptoe was not a party to the contract, there might have been a judgment in his favor and against the other defendant; which certainly would have been going further than it is necessary to go in this case to maintain the correctness of the judgment of the County court. In that case there would have been an apparent difficulty, though it may have been merely technical, on the ground of variance. A judgment would have been rendered against one of the defendants upon a several contract, in an

action upon a joint contract. But here there is no room even for such a technical objection. There is no variance in the case. The case proved is precisely the case stated in the declaration. The note was in fact drawn and endorsed as therein charged."

If Judge Joynes does appear to con-
414 cede the proposition *that there might be a judgment for one defendant and against another on proof of a several contract in an action on a joint contract, it was a mere concession in the argument, and not a judicial settlement of the proposition as a rule of practice. So far then as the two cases mentioned are concerned, the construction of the section of the Code referred to as applicable to this case is not settled, and I know of no other case in which the subject has been discussed or referred to; and the question comes up now to be settled whether, in a joint action on a contract averred to have been made by several, there can be a judgment against one on proof of a contract made by him alone. To hold that there can be such a judgment would not only set aside the decisions made in a number of cases, of which the cases of *Rohr v. Davis*, 9 Leigh 30, and *Baber v. Cook*, 11 Leigh 606, are conspicuous, but would involve a departure from rules of pleading and practice which have not only the sanction of the sages of the law, but are of daily application in our courts. One of those rules is that whatever is alleged in pleading must be alleged with certainty, and another is that the proof must correspond with the case made in the pleadings.

What degree of certainty is required in the pleadings, and of conformity of the proofs to the pleadings, it is not necessary to discuss, it being sufficient to say, that in all cases the certainty must be to a reasonable intentment, and that in no case is a variance in any material particular admissible; and that in pleadings setting forth written contracts or agreements (especially if under seal), the highest degree of certainty is required in their description, and the most accurate correspondence of the documents offered in evidence with those set forth in the pleadings is necessary. Hence, in an action on a sealed obligation, a vari-
415 ance *in the names of the parties, the sums specified, the date, and other particulars, may be objected. It is to be presumed that no court would hold that, in an action of debt against John Smith, in which it was alleged that he had signed and sealed his individual bond for \$1,000, dated on the 1st of January, the plaintiff could introduce a bond or single bill signed with the name of John Jones alone, or by John Smith and John Jones jointly, or one signed by him for \$100, or one dated the 1st day of July; and neither in a suit against John Smith and John Jones jointly, averring a joint obligation by them, would it be admissible to introduce in evidence the individual obligation of either.

The reason of these rules is very obvious. When party is sued he must be informed

of the character of the claim against him, so that he may come prepared to make his defence; and so a plaintiff must be informed of the defence, in order that he may be prepared to meet it. If, when a party is sued on one contract, judgment can be obtained against him on another, the grossest injustice may be perpetrated. Lord Coke has said that the law is the perfection of reason. This, of course, is to be understood as applicable to the common law, and not to the multifarious forms which the statute law has assumed in these days, for certainly the maxim "*Ratio est anima legis*" is not applicable to that, or if it is, our present statute law must have many souls. In the construction of section 19 of chapter 177, we must take into consideration the mischief which was intended to be remedied; for it is to be presumed that the object of the enactment was to remedy and not create mischief.

In the application of the old common law rule, that in a joint action on a contract there must be a recovery **416** *against all, and that a failure as to one was a failure as to all, much wrong was done in many cases, as for instance where one of the parties sued proved to be an infant, a bankrupt, or laboring under some disability to contract, or was entitled to a discharge for reasons personal to himself. This rule came to be modified very considerably by the courts, especially in cases where one of the parties proved to be an infant or a bankrupt, and no violence was done to the rules of pleading and practice mentioned above. These decisions proceeded on sound principles, but there was not uniformity in them, and in our court they were very indefinite; and it is to be presumed that the object of the legislature was to confirm the modifications in the rule made by the courts and to extend them to cases where the reason was the same, without, however, doing violence to the general principle that the plaintiff must prove a joint contract when he brings a joint suit. If it was the purpose of the legislature to go farther, and permit a plaintiff to obtain judgment on a several contract, when he had brought a joint action averring a joint contract, and the language used is sufficient to accomplish that object, then indeed has it opened wide the door to innumerable mischiefs.

The court should not presume that it was the intention of the legislature to abolish the rule of pleading requiring certainty in the allegations and a conformity of the evidence to those allegations. The language used in the act of 1838, or in the Code of 1849, does not necessarily import an intention to extend their provisions beyond the principle adopted by the courts in making the exceptions, where the discharge of one defendant is on some ground personal to himself and not applicable to the others. In the first (the act of 1838) the language is, "acquitted or discharged," and **417** *in the Code it is, "may be barred."

The courts, in making the exceptions, had used the words "discharged" and

"barred" as importing the same idea—that is, when one defendant was discharged, the plaintiff was said to be barred as to him. Mr. Robinson, in citing the case of *Hartness &c. v. Thompson and others*, 5 John. R. 160, on page 401, vol. 1, of his old Practice, says: "It seemed to the court that where a suit is commenced against several joint debtors upon a joint contract, and one of them pleads or gives in evidence a matter which is a bar to the action as against him only, and of which the others could not take advantage as it respected them, there could be no good reason why the plaintiff should not be at liberty to take judgment against them." In a further notice of the same case, on the same page and volume, Mr. Robinson says: "The general principle that the plaintiff must prove a joint contract when he brings a joint suit, the court remark, is not intended to be shaken by the rule laid down in that case. The operation of that rule, the court say, is to be confined exclusively to the case of a defence insisted on by one of several joint debtors, which is personal to him, and which does not go to the discharge of all." The italics in these citations are my own, and are intended to call attention to the language of the court in laying down the rule as to the exceptions of the general principle.

Can it be presumed that the legislature, in establishing the rule it adopted, used the same language in a broader sense than was given to it by the courts? It is well known that Mr. Robinson bore a very conspicuous part in the compilation of the Code of 1849, and he was probably the author of the section in that Code referred to. Having cited the cases on the subject in his Practice, it is to be inferred that in using **418** the word "barred" he used it in no broader sense than was given to it in the cases he cites.

It is admitted that it is proper to apply the principle to all cases where the reasons are similar, and its application in the case of *Moffett v. Bickle* was just, and does not violate any established rule of pleading or practice; but it cannot be admitted that it is a legitimate construction of the enactment, to so extend its provisions as to enable a plaintiff to sue on one contract and recover on another. What must be the consequence of such a construction? If applicable to actions on sealed instruments, it must be applicable, of course, to actions on simple contract. A defendant may be sued with another on a joint assumpsit which he knows he has made, but from which he has been discharged by payment or otherwise, and he has also assumed individually another debt to the same plaintiff which he has likewise discharged—he goes to trial prepared to prove his defence in the case on which he is sued, but the plaintiff proves the individual assumpsit against him, as to which he is not prepared. Again, as the law stood when the enactment was made, no party could testify in his own case. A person to whom another has assumed a debt, knowing that it had been

paid or discharged, and that the payment or discharge can be proved by certain witnesses, to cut off their testimony, sues them along with the party who has been his debtor, and is thus enabled to obtain judgment against him on a satisfied debt. Again, a person having a claim against a resident in a distant county, and wishing to give jurisdiction to the courts of his own county in the case, sues his debtor along with some neighbor or friend of his own, and is thus enabled to draw the jurisdiction to the court at his own home;

419 *for when the plea to the jurisdiction is put in, if the distant party is able to get to the clerk's office in time, the reply is that one of the defendants sued along with him is a resident within the jurisdiction of the court.

Is it possible that the legislature ever passed a law from which such consequences might result, or that the court will so construe the enactment in question as to permit such consequences? It will not do to say that it is impossible or improbable that any such cases can occur. I have actually had a case of the latter kind to occur against a client of mine in a chancery suit before the war, in which suit was brought against him and another party in a city sixty or seventy miles distant from his residence, when there was no privity whatever between them. I was put to a demurrer for misjoinder of parties and multifariousness, and when my demurrer was sustained, the plaintiffs were permitted to dismiss the bill as to the resident defendant, and I immediately tendered a plea to the jurisdiction, but it was not received, because not filed at the rule day. Again, a man signs a bond as surety because the names of other parties are on it whom he knows are entirely solvent, and he signs with the understanding that other parties are also to unite in it, and their names are forged. When suit is brought against all the parties, he cannot plead non est factum as to them, because that is a plea which they alone can put in. He does not know whether it is really their bond or not, and cannot know until the question is settled by a jury. He therefore either puts in a formal plea of payment or permits the office judgment to stand against him; but the other parties, however, do plead non est factum; and upon the trial the issue is found

420 for them on that plea, and against *him on the plea of payment, if he has put it in. What remedy has he if not on motion in arrest of judgment? Does the act of the legislature permit such flagrant wrongs? If there had been a verdict against Bush in the first trial on the plea of usury, his case would have borne precisely that aspect. It will not do to say that, by consenting to the withdrawal of a juror and subsequently moving for a continuance, he waived all objections. The decisions go to the effect that the motion in arrest of judgment will lie, even where one defendant has confessed judgment, and there is a subsequent judgment for the others. And if it lies in any case, it lies in this, for the court can make

no exceptions but those authorized by the legitimate import of the language of the Code. In Bush's case, also, by joining him with parties resident in Roanoke, who were really not bound by the obligation sued on, the court of that county has taken jurisdiction against him when he was resident in another county, to which process against him was sent to be served; and it is respectfully submitted whether the court ought not to have arrested the judgment because of this abuse of its process.

I have thus submitted some views in regard to the proper construction of section 19 of chapter 177 of the Code of 1849, and given some instances of the very great mischiefs which may result if such a construction is given to that section as the counsel for the defendant in error asks may be given to it. There are many other views which might be taken, and other mischiefs depicted, but, I think, those given are sufficient to warrant the construction for which I contend. It is to be hoped that the court will definitely decide the three main questions raised:

1st. Whether, in a civil action, there 421 can be a verdict *as to a portion of the parties on one of the issues joined, without a verdict as to the other issues and parties.

2d. Whether, in a joint action against several, where the plaintiff endorses summons so as to require service on a portion of the parties only, there can be a judgment against those on whom the summons is served. And here I will say that the case of Moss v. Moss's adm'or, 4 Hen. & Mun. 293, referred to by counsel for the defendant in error, has no application to this question. There being no appearance or plea by William Gish, and his name appearing in the declaration as one of the defendants, the court had a right to look at the orders at rules and the process in the case, to see what steps had been taken as to him. That was done in the case of Shields v. Oney, before cited.

3d. Whether, under section 19 of chapter 177 of the Code of 1849, there can be a judgment against one on a several contract who is sued along with others on a joint and several contract.

These questions are of great importance, and should be judicially settled.

Edmonson & Blair, for the appellee.

Staples J. delivered the opinion of the court.

This is an action of debt brought in the Circuit court of Roanoke county, upon a writing obligatory. The instrument is joint and several, and purports to have been executed by five persons; process was issued against all the parties; but by direction of the plaintiff it was not served upon William Gish, whose name is first upon the bond as obligee. The declaration was filed, common order entered, and regularly confirmed 422 *at rules. At the next term thereafter, all the defendants pleaded usury, and three of them severally filed pleas of non

est factum. Upon these latter pleas verdict and judgment were rendered for the three defendants. The jury not agreeing upon the issue made upon the plea of usury, were discharged, and the cause was continued as to the defendant Bush. At a subsequent term of the court a verdict was rendered for the plaintiff against Bush, upon the plea of usury, for the entire debt claimed in the declaration. A motion was thereupon made by him for a new trial, which was overruled. He then moved in arrest of judgment, which motion was also overruled, and judgment given upon the verdict.

The correctness of that judgment is now to be considered. The errors assigned will be examined in the order in which they are presented in the proceedings. And first, it is insisted that upon a joint and several obligation the plaintiff may proceed jointly against all the parties, or severally against each. If he elects to sue more than one, he must proceed against all, and not any intermediate number. That here the plaintiff having elected to sue more than one, was bound to proceed against all; and yet by his direction one of the defendants was not served with process; and it is claimed that this precludes a judgment against any.

In support of this objection the case of *Shields v. Oney*, 5 Munf. 550, is much relied on. That was a suit against two partners, and by the direction of the plaintiff process was served upon one only. On the trial the defendant demurred to the evidence; and his demurrer being overruled he moved in arrest of judgment, upon the ground of the non-joinder; which motion was also overruled. This court held that the proceedings were all erroneous; that the plaintiff
423 himself *having directed the writ not to be served upon one of the defendants, a plea in abatement by the other was unnecessary.

This is a very strong authority, and if the facts in the two cases were the same, it would, of course, be conclusive of this. In the present case, it appears, however, that the defendant, Bush, appeared and pleaded in bar at the August term—the jury not agreeing, the case was continued as to him. At the next succeeding term it was continued on his motion, and at the next term it was again continued. During all this time the defendant was as well aware of the alleged irregularity as he is now; for it plainly appeared on the face of the proceedings. He did not move to remand the case to the rules; he did not complain of the defect in any form. After the rendition of the verdict against him, he moved in arrest of judgment, assigning various grounds of error; but this objection was not made or even distantly intimated. It was first suggested in the petition for an appeal, when the defect was without remedy by the plaintiff, or by the court which tried the case.

According to a well settled rule of pleading, an objection for the non-joinder of a co-obligor must be taken by plea in abatement. If not so taken, the objection is considered as waived. Such a plea is unnecessary

where the plaintiff directs the process not to be served upon one of the parties; but the defendant may, if he pleases, waive all objection to this irregularity. He may for good reasons prefer to waive it; and I think he should be held to have done so when he wholly fails to raise the point in the court in which the error can be explained or corrected. Had this objection been made in the Circuit court, the plaintiff might readily have answered it. The de-

424 fendant has *himself furnished the answer. In his motion in arrest of judgment, entered upon the record, he states that "neither he nor William Gish, at the time of the institution of the suit, were residents of the county of Roanoke, or since have been residents of said county; but at that time William Gish had fled from the country, having previously to his flight resided in the county of Bedford."

This fact was no doubt well known to the court, to the counsel, and to all the parties. It fully explains why the direction was given by the plaintiff not to serve the process upon William Gish, and why the objection was not taken at the time by the defendant. If no such direction had been given, the process would have been returned, "No inhabitant" as to Gish, and the suit would have abated as to him. And this perhaps would have been the more regular course: but we are now considering the question in an appellate court. We are now asked to reverse the judgment and all the proceedings, because, by the direction of the plaintiff, process was not served upon one of the defendants, when it appears by the defendant's own showing that this direction was wholly immaterial, and no such service could by possibility have been had. Three of the defendants were discharged upon the pleas of non est factum. This occurred fifteen years ago. Where these parties now are, whether living or dead, it is impossible to tell. If we sustain this objection, we cannot enter judgment for the defendant Bush, as is contended. All that we could do under the circumstances would be to set aside all the proceedings as to all the defendants, and remand the cause, in order to afford the plaintiff an opportunity of issuing new process against William Gish, or of showing why the original process was not served upon him. That he

425 *would show this very clearly, that he would make it appear that Gish had fled the country, and was not an inhabitant of the state when the suit was instituted, it is impossible for a moment to doubt. And after all this further expense and litigation the case would be in the precise condition it is now with respect to the pleadings, and was in fifteen years ago.

These considerations serve abundantly to show the wisdom of the rule requiring objections of this character to be taken certainly at some stage of the proceedings in the court below. And if no such rule existed, we are fortunately furnished by the defendant himself with the facts as they doubtless appeared in the court below, and

which remove all objections to the alleged irregularity.

The next assignment of error to be considered presents the main question in the case. It is, whether in a joint action ex contractu against several defendants, some of whom are discharged by the verdict of the jury, upon grounds which show they were not parties to the contract, the plaintiff can have judgment against those who are parties. It is conceded that such a recovery is not authorized by the rules of the common law. The almost universally recognized doctrine is, that in an action against several defendants on a joint contract plaintiff cannot recover judgment against part of them; he must have a joint judgment against all, or he cannot have it against any. If the contract be several as well as joint, the action must be against all the obligees jointly or against one of them singly, and not against any intermediate number. If the plaintiff elects to proceed against all, the same consequences ensue as in an action on a joint contract; he must have judgment against all or none. *Taylor v. Beck*, 426 3 *Rand. 316; *Baber v. Cook*, 11 Leigh 606; 3 Rob. Prac. 100.

If these rules of the common law are in force in Virginia, it is conceded that the plaintiffs cannot have judgment in this case against the defendant. It is claimed however, that they have been changed by statute. The provision relied upon is the following: "In an action founded on contract, against two or more defendants, although the plaintiff may be barred as to one or more of them, yet he may have judgment against any other or others of the defendants against whom he would have been entitled to recover if he had sued them only." Code of 1860, chap. 177, sec. 19.

This section was first enacted at the revision of 1849-'50. It is claimed by the counsel for the plaintiff, that under the operation of this provision, the plaintiff in a joint action on contract against several defendants, may have judgment against part of them although the others are acquitted upon grounds which go to the denial of the joint contract stated in the declaration.

On the other hand, it is insisted for the defendant that the statute does not apply to a case in which the right of action never existed as to a part of the defendants; that the legislature could never have intended to authorize the plaintiff to declare upon one contract and recover upon another; that the sole design of the enactment was to reach those cases in which the contract is proved as laid, but by reason of some personal disability, such as infancy, or some subsequent discharge, such as bankruptcy, personal to him who pleads it, the plaintiff's action is barred as to part of the defendants. In these and like cases it is said that the statute applies, and although the 427 action *is barred as to part, judgment may be rendered against the others.

The provision now under consideration has been before this court in two cases; and although the precise question arising

here was not decided in either of them, the language of the judges indicates a manifest disposition to give the statute an enlarged and liberal interpretation. The first case is that of *Stephoe v. Read*, 19 Gratt. 1. That was an action of assumpsit against two as partners, alleging a joint contract. One of the defendants, Quarles, was offered as a witness to prove that he alone was liable, and that Steptoe, the other defendant, was no party to the contract. It was very clear that at common law Quarles was incompetent, because, in defeating a recovery as to Steptoe, he defeated it as to himself, upon the plain principle that in a joint action against several there can be but one final judgment, which must be for or against all the defendants. It was insisted, however, that the statute removed this difficulty in authorizing a judgment against some of the defendants, although the plaintiffs may be barred as to others. Judge Joynes conceded that under the statute Quarles was competent to prove that Steptoe was no party to the contract, "which was a defense personal to him," Steptoe. The learned counsel says this was a mere concession made by Judge Joynes for the sake of the argument. This may be so. But if, as contended by the learned counsel, the rule of the common law which requires the joint contract to be proved as laid is not changed by the statute, it is very clear that Quarles was not a competent witness, even under the statute, to prove that Steptoe was no party to the contract, and the learned judge would have so said, without taking a circuitous route to 428 *prove that Quarles was incompetent upon other grounds.

However this may be, the opinion in that case shows the distinction between a defense which goes to the foundation of the entire contract, and a defense which is merely personal to him who pleads it, and does not touch the liability of the other defendants. The former necessarily defeats the action as to all, and is therefore not within the influence of the statute. Such is the defense of illegality or failure of consideration, or a release to one of several joint contractors, and the like.

On the other hand, the latter bars the action only as to him who pleads it; as for example the plea of infancy, bankruptcy, non est factum, and the like. These pleas operate to the discharge of the party pleading them; but do not necessarily affect the liability of the other defendants. Whenever the defence of one of several defendants is of such a character that the plaintiff might recover against the other, if the suit was against that other only, there the statute applies. In other words, if notwithstanding the discharge or acquittal of one of the defendants, the plaintiff might at common law commence a new action and recover against him who is liable, he is entitled under the statute to a judgment against that defendant in the pending action. As, in the present case, three of the defendants were discharged upon grounds personal to them;

and as the plaintiff might thereupon discontinue and commence a new action against the defendant Bush, he is entitled under the statute to proceed against the latter in the present action without a discontinuance and a new suit. This, I think, is substantially the construction given to the

429 statute in *Stephoe v. Read*. This construction is not only just and sound, but it would seem to furnish a very reasonable test for determining what cases are within the influence of the statute.

In *Moffett v. Bickle*, 21 Gratt. 280, the action was upon a negotiable note against the maker and four endorsers. The jury found that the note and all the endorsements but the last were usurious, but that the last was free from usury. The question was whether judgment could be given against this last endorser; and this depended solely upon the statute; for it was clear that no such judgment could be rendered at common law. The president of this court speaking for all the judges said: "If the statute does not apply to such a case, it is difficult to conceive of one to which it will apply, and the statute will be of no value. There is no need to apply it to the case of a joint action or contract against several defendants, one of whom is entitled to his personal discharge on the ground of infancy, bankruptcy, &c. Cases of this sort we have seen, constitute exceptions to the general rule requiring judgment to be rendered against all or none in joint actions *ex contractu*." It will thus be seen that this case does not decide the precise question now before us, because in point of fact, all the defendants did make the contract as averred, while it was valid as to part of them only. The case is only mentioned as showing the leaning of this court to give to the statute a liberal interpretation.

A careful examination of the statute will show there is nothing in its language warranting the construction given it by the learned counsel for the defendant. It has been already quoted, but it may with advantage be repeated. "In an action founded on contract against two or more de-

430 fendants, although the plaintiff *may be barred as to one or more of them, yet he may have judgment against any other or others of the defendants against whom he would have been entitled to recover if he had sued them only."

Upon what principle are these words to be confined to cases in which the plea of the defendant admits the contract alleged, but sets up some matter in discharge of the obligation. The word "barred" gives countenance to no such idea. Non assumpsit is a plea "in bar" of the action; so is non est factum. If the defendant makes good his defence under either of these pleas, plaintiff is "barred of his action" as to him. If the defence does not affect the obligation of the other defendants—if the plaintiff would be entitled to recover against such other defendants had he sued them only—he is by the express terms of the stat-

ute entitled to judgment against them in the pending action.

The counsel for the defendant, in a very elaborate note of argument, presents very strongly some of the mischiefs which he supposes will result from this construction of the statute. For example, he suggests that the same rule must apply to actions on simple contract. A defendant may be sued with another on a joint assumpsit, which he knows he has made, but from which he has been discharged by payment or otherwise, and he has also assumed individually another debt to the same plaintiff, which he has likewise discharged; he goes to trial prepared to prove his defence on the joint contract, but the plaintiff proves his individual assumpsit as to which he is not prepared.

This argument, it must be admitted, assumes the existence of a very unusual transaction. It assumes the defendant has made two simple contracts with the plaintiff, one joint and the other several; that both have been performed; that the

431 plaintiff brings his suit *on the joint contract; and with a fraudulent intent he and his counsel on the trial abandon the joint contract, and elect to proceed for that which is several.

Now, conceding that this may sometimes happen, the same difficulty may occur in an action of trespass, trover, assault and battery, false imprisonment against several: the defendant may come prepared to defend himself on the joint charge, and the plaintiff may elect to proceed for a several trespass. And yet it is well settled that in actions of tort against several, one of the defendants may be convicted by the jury, while others are acquitted.

But it is difficult to see how a case, such as that suggested, can ever occur, if the parties observe the ordinary rules of pleading. The declaration must always so state the cause of action, as to give the defendant notice of the precise nature of the complaint. In assumpsit the plaintiff is required to file an account setting forth the several items, unless they are plainly described in the declaration. The defendant thus plainly sees what he is charged with. He knows what he is required to defend, whether he is sued singly or jointly with others. The rule in question authorizes the plaintiff to declare against several as upon a joint contract, and to recover against a part of the defendants. But this is the only variance. The proofs must correspond with the allegations in every other respect, and the plaintiff must prove his case as laid. Unless therefore the defendant has made two contracts with the same plaintiff, one joint and the other several, both identically the same in all the essential elements of consideration, subject-matter and promise of performance, it is impossible that the plaintiff can surprise the defendant by abandoning the contract laid in the declaration, and proving another on the trial.

432 *The learned counsel further insists, that under this construction of the

statute a person may be joined as a defendant, merely to exclude him as a witness, or for the purpose of giving jurisdiction to the court of a particular county against a non-resident defendant.

It is sufficient to say, that conduct of this kind would be treated as a fraud upon the non-resident, and an abuse of the process of the court. The exposure would be easy, and the punishment immediate, in the dismissal of the suit as to such non-resident, or in the prompt discharge of the defendant, whose testimony is thus sought to be excluded. Laws are passed, and rules of practice adopted by the courts, suited to the general convenience of parties and the due administration of justice among men. Any rule that may be adopted will sometimes lead to abuse and injustice. The remedy is not in the repeal of the rule or statute, but in the corrective power of the courts.

Again, the counsel argues that the defendant may have set-offs against the debt, but he is not allowed to file them, because they are due him individually, whereas the debt claimed is sued as a joint obligation; or the defendant may have signed the bond sued on with express condition that the other parties were also to sign,—how can he avail himself of this plea until it is ascertained whether the other parties are bound?

The difficulty last mentioned would equally occur if the defendants relying upon the pleas of non est factum, should die before suit brought, or even afterwards and before the pleas were tried. The action being against the survivor only, how could he plead that his contract was conditional. In this very case, the bond being several as well as joint, the suit might have been first against the defendant Bush, omitting the others; and thus, according to the

433 argument of the learned counsel, *his client would have been precluded from pleading that his contract was conditional. The argument unfortunately proves too much.

But the answer to all this reasoning is, that the defendant knows at least the tenor of his own contract. When he sees his co-defendants thus denying the execution of the bond, if he meant to rely upon the fact that he signed the instrument conditionally upon their executing it also, he ought to put that matter in issue by proper averments, and he clearly has the right to do so. His success will depend in a great measure upon their success in making good their defence. If they fail he will also fail, and the burden will fall upon all.

In regard to the question of set-offs, the difficulty suggested by counsel equally arises where the action is several and one of the defendants relies upon the plea of bankruptcy, infancy, or any other matter which goes to the personal discharge of such defendant.

In all this class of cases it is conceded that although one of the defendants may be acquitted, the plaintiff may nevertheless have judgment against him who is liable;

and yet the latter may be deprived of his set-offs by a joinder with him who is not liable. How does the learned counsel propose to get rid of this difficulty; one, no doubt, of frequent occurrence in the administration of justice. All the defendant can do under such circumstances, is to bring his cross-action, obtain his judgment, and at the proper time apply to the proper court to have the judgments set off one against the other. The practice of setting off one judgment against another is derived from the general authority of the common law courts over sureties, and is said to be the exercise of an equitable jurisdiction

434 *in those courts; a jurisdiction liberally exerted, and not confined to debts due to and from the same number of persons. The law of set-offs is almost exclusively a creature of statutory regulation. At common law it was never permitted unless the debts were mutual and grew out of one and the same transaction. If the effect of the statute is to restore that rule in a few exceptional cases—no doubt of rare occurrence—and to put a defendant to his separate action, it is difficult to see that any great hardship or injustice is thereby inflicted. Clearly there is no just cause of complaint where the defendant by his form of contract, deliberately executed, places it in the power of the creditor to sue one or all the obligors to the bond.

In regard to all the views presented by the counsel for the defendant, it may with perfect truth be said, that none of them apply to his client. The defendant Bush was not precluded from relying upon any set-off he might claim, or of offering his plea of a conditional obligation. He had the fullest opportunity after the case was tried on the pleas of non est factum, of making any defence he could have made if the action had been against him only. It was never pretended or even suggested that he had any defence other than that of usury.

It is very true that Bush resided in Franklin, and that jurisdiction was given to the Roanoke court as to him by joining the three defendants who are acquitted. But it has never been even intimated that the plaintiff was guilty of bad faith in so doing. He no doubt honestly believed that all the parties had executed the bond. The statute declares that the suit may be brought in any county wherein either of the defendants resides, and it authorizes process to be sent to the distant counties for the co-defendants.

435 *It could scarcely have been the design of the legislature that a plaintiff who pursues the statute does so at his peril; and that whenever a resident co-defendant is acquitted by the verdict, the action must abate as to him who resides in another county. If the plaintiff honestly believes that both defendants are liable, and has reasonable grounds for so believing, he is entitled to proceed as though all were in fact liable. The jurisdiction of the court having once attached, will not be ousted because it turns out that the resident de-

defendants are not liable. In such case, a prima facie defendant is a proper defendant for all the purposes of jurisdiction. As already said, if the process of the court is abused, and a mere pretext made to give a color of jurisdiction, the corrective power of the court will be used in punishing the offence by a prompt dismissal of the suit at the cost of the offending party.

I have thus attempted to notice some of the more prominent objections of the counsel for the defendant to the statute, according to our interpretation. These objections might have been more properly addressed to the legislature, in as much as the courts must execute the law as they find it, and not as they would have it. It may not be amiss, however, to consider briefly some of the mischiefs which will result from a contrary interpretation. These may throw some light upon the design of the legislature in passing the statute.

In the first place, the rule requiring a plaintiff in an action *ex contractu* against several defendants to prove the contract as to all, is a mere rule of the common law. Like many other of the common law rules, it is purely technical in its nature, in many instances producing great delay and much inconvenience without any corresponding advantages. The defendants very rarely derive any real substantial benefit from it. Whether one or many be sued, the parties soon understand by the pleadings the real matter of controversy, and come prepared to meet it.

On the other hand, the plaintiff often encounters difficulties, not only as to the form of action, but also in determining the proper parties defendant. A person in possession of a written obligation as obligee or assignee, signed, or purporting to have been signed by several, and honestly believing they are all liable, brings his suit against all. He is met on the trial with a plea of non est factum by one or more of the defendants. A verdict is rendered in his favor, bills of exception are taken, writ of error allowed, a reversal by the appellate court; other trials are had, and finally a verdict for the defendants upon these pleas. And then, after years of fruitless litigation and expense, the plaintiff is compelled to start out upon a new expedition against the other defendants who are confessedly liable, and who never had a shadow of defence. And all this because the plaintiff had sued five defendants, when he ought to have sued four or a less number. But why go in pursuit of imaginary cases, when the one before us furnishes a most apt illustration. The plaintiff was in possession of a bond probably brought to him by the principle obligor. He doubtless believed that all the signatures were genuine. The presumption is, he would not have taken it if he had not so believed. Upon the trial he is met with pleas of non est factum by three of the defendants. What was he to do under such circumstances—dismiss his suit and commence a new one against the others? That will scarce be contended. He was not bound

to give up the security furnished by these three apparent obligors. It was his right and his duty to try the question.

Until the case was actually decided by a jury, it was impossible to say whether the defence would be successful or not. The defendant Bush was himself materially interested in the issue; for if the plaintiff succeeded, the burden which otherwise must be borne by him singly would be shared by others equally with him. It is not pretended that the defendant Bush is discharged from his obligation by the acquittal of the other defendants. All that is claimed is that the plaintiff ought to discontinue and commence a new suit against him. But why bring a new suit? All the facts necessary to enable the defendant to make his defence are already in the record. Why turn the plaintiff around to another action, when perfect justice can be done and was done to the parties in this? I am justified in saying that justice was done, because it does not appear—no complaint is made—that any damage or loss was sustained by this defendant in the present action which might have been avoided in a separate suit against him. The objections made by his counsel are purely technical, and do not affect the real merits of the controversy. And now, after the lapse of fifteen years, we are called upon to reverse the present judgment, not because injustice has been done this defendant, but because the plaintiff brought a joint action against all, instead of a separate action against each. This simple statement is of itself sufficient to vindicate the wisdom of the statute. If the legislature had never passed such a provision, the common voice of the profession would say that such an enactment is demanded by the highest considerations of justice and sound policy.

The only remaining assignment of error to be considered is, that the jury being sworn to try all the issues joined, it was improper to permit them to render a verdict in favor of a part of the defendants on some of those issues. The learned counsel for the defendant, in his note of argument, quotes a remark made by Judge Green in *Gardner's adm'r v. Vidal*, 6 Rand. 106, that there is no example of a verdict being set aside as to one issue and suffered to stand as to others, and trying a cause by piece-meal; and the learned counsel insists that the converse of the proposition is equally true, that "there is no example of a jury being allowed to render a verdict on one issue when they cannot agree as to others, and thus trying the cause, by piece-meal." As has been already seen, at common law if the plaintiff elected to treat the contract as joint, and sued all the contracting parties, his judgment must have been jointly against all or none. There could, of course, be but one final judgment. As a necessary consequence the jury could never find part of the issues for a portion of the defendants.

But if our construction of the statute be correct, if notwithstanding the acquittal of

a part of the defendants upon grounds personal to them, the plaintiff may still have judgment against the others, no good reason suggests itself why such judgment may not be had at a subsequent term of the court.

If the jury are agreed as to some of the defendants upon issues personal to them, why should they be prohibited from rendering a verdict as to such defendants merely because they are not agreed as to others who make a wholly different defence? Why should the plaintiff be precluded from assenting to such a verdict if he is satisfied it is justified by the evidence? Is he to go on from term to term summoning witnesses, empanelling juries, and incurring increased expense, in support of an issue he knows must always be decided against

439 *him? Is one defendant to incur the trouble and expense of successive trials because the jury are not agreed upon other issues as to other defendants, with whom he is in no manner connected? If such a rule be adopted, the result will be that the plaintiff will always bring several actions against the obligors, of which they must bear the costs, when a single action would answer but for the rule.

The plaintiff is authorized by statute to take judgment from time to time against the defendants as they are served with process. Long before this enactment it was the constant practice, where some of the defendants had not been arrested, for the plaintiff to take judgment against those who were, although those not arrested had not been proceeded against as far as the law authorized. 1 Rob. Prac. 258-'9; Moss v. Moss's adm'r, 4 Hen. & Mun. 293. This was in effect allowing several judgments against several defendants at different times, in a joint action on contract. And I can see no good reason why, under the influence of the statute, there may not be separate verdicts as to different defendants, where the issues are entirely distinct, and the plaintiff is barred as to part of them upon grounds which do not affect the liability of the others.

I have had no access to any reported cases in states where statutes similar to ours are in force; but in Hilliard on New Trials, 145, note a, reference is made to the case of Sprague v. Childs, 16 Ohio St. R. 107. It is said to have been decided in this case, where there are several defendants, each of whom pleads a separate defence, upon which issues are joined, and a second trial is taken (under the Ohio Code) by one of the defendants, the only issues then to be tried are those between plaintiff and defendant.

440 If the defendant's *plea goes to the plaintiff's right to recover against any of the defendants, it will, so far as it is established, enure to the benefit of the other defendants as fully as it would have done upon the first trial. But if the defence of the defendant goes no farther than to exonerate himself from liability, the liabilities of the others will remain unaffected by the result of the second trial. This is substantially the proposition involved in the case

before us—several verdicts at different terms as to different defendants, whose defences are not connected.

It has been urged that the defendant, Bush, was vitally interested in the trial of the pleas of non est factum, and a verdict thereon ought not to have been received without his consent.

The defendant had the fullest opportunity of taking part in the trial of the pleas of non est factum. How long was the case to be continued upon those issues? How many trials to be had until the defendant himself was convinced of the hopelessness of the struggle?

If the defendant was interested, so was the plaintiff, in showing that all the signatures to the bond were genuine. The latter seems to have been satisfied that the defence was well founded. If the jury had, at the same term of the court, rendered a verdict upon the plea of usury as to the defendant, Bush, he would have had no just cause of complaint; and yet his condition, in that event, would have been no better than it is now. Suppose after the verdict was rendered in favor of the three defendants the plaintiff had discontinued and commenced a new action against the present defendant, in what respect would his position have been improved? So soon as those defendants were out of the way, the defendant, Bush, could make any defence he might have made

441 had they been omitted in the first *instance. So far from being prejudiced, he was actually benefited by the

rendition of the separate verdict. He made no objection to it. It seems to have been acquiesced in on all sides, no doubt from a consciousness that the result was inevitable, and could not be varied upon any future trial. The jury being unable to agree upon the question of usury were discharged by consent of all parties. This was at the April term 1859. More than a year thereafter the verdict was rendered against the defendant, Bush. His motion, in arrest of judgment, did not embrace this objection. It was made for the first time in the petition for an appeal. If there was any weight in the objection at any time, it was one the defendant might prefer to waive, and one he had the right to waive. Having seen without objection the return of the separate verdict, having agreed to the discharge of the jury upon the other issue, having subsequently moved for a continuance of the case, and having taken his chances before another jury, where his defence was fully investigated, the defendant cannot be permitted for the first time in this court to make the point in this court, but must be held to have waived the irregularity, if indeed it could be regarded as an irregularity.

Upon the whole, I am of the opinion the judgment of the Circuit court is right, and should be affirmed.

Judgment affirmed.

442 *Hoback v. Kilgores.

[21 Am. Rep. §17.]

June Term, 1875, Wytheville.

1. **Mistake—Mutual—Compensation.**—K sells to H a tract of land, expressing the belief, which he no doubt entertained, that there were 127 acres in the tract, and H relying on that belief purchased, and paid the purchase money. There were in fact but 81 acres. K having sold, and H having purchased under a mutual mistake, H is entitled to compensation for the deficiency.
2. **Same—Same—Same—Measure.**†—Although in cases of mere deficiency in quantity, within the boundaries of a tract sold, the general rule of compensation is according to the average value of the whole tract, yet where, as in this case, there are valuable improvements upon the land, the value of which bears a very large proportion to the value of the land, the just and true measure of compensation is according to the average value of the land without the improvements, considering both together with the price for which it was sold, estimating the quantity of the land, as the parties did, at 127 acres.
3. **Sales of Land—Warranty—General—Special.**—A vendor of land in his own right is bound to convey it with general warranty, unless it be otherwise agreed between the parties. But a party who had sold to the vendor, and had retained the legal title, or had some interest in the land, is only required to convey with special warranty.

This was suit in equity in the Circuit court of Wise county, brought in August 1872, by Levi Hoback against Isaac and Hiram Kilgore, to enforce a contract for the sale of a tract of land by Isaac Kilgore to Hoback.

***Mistake—Mutual—Compensation.**—As to the necessity for mutuality in order to allow relief, see citation of the principal case in *French v. Chapman*, 88 Va. 322; *Massie v. Heiskell*, 80 Va. 801. See also, as to equitable relief, *Mauzy v. Sellars*, 26 Gratt. 641. In *Crislip v. Cain*, 19 W. Va. 550, the court says: "The case of *Hoback v. Kilgores* is very imperfectly reported, the contract between vendor and vendee not being stated, nor its contents even alluded to by the court. The vendee was relieved in part from the payment of the purchase-money because of a deficiency. JUDGE MONCURE, on page 444 states, that 'the vendor represented to the vendee, that the quantity of the land was one hundred and twenty-seven and a half acres; and the vendee made the purchase on the faith of that representation. Whereas in truth and in fact there were but eighty-one acres of land in the tract.' If this be a correct statement of the case, on the principles, which we have laid down, an abatement should have been made on account of the deficiency, as was done. But the reporter states a case essentially different, as does the syllabus; and if the reporter is right in his statement of the case, on correct principles no such relief could have been granted the vendee."

†**Same—Same—Same—Measure.**—The mode of ascertaining the compensation, as laid down in the principal case, is followed in *Yost v. Mallicote*, 77 Va. 614; *Trinkle v. Jackson*, 86 Va. 241; *Nichols v. Cooper*, 2 W. Va. 847; *Triplett v. Allen*, 26 Gratt. 721; *Blessing v. Beatty*, 1 Rob. 287. See especially, *Watson v. Hoy*, 28 Gratt. 718, and *note*. The principal case is cited in 21 Am. Rep. §17.

The plaintiff in his bill charged that Isaac Kilgore had sold him the land, and assured him that the tract contained one hundred and twenty-seven and a half acres, for which he was to pay him \$1,400; which he had paid. That he had since had the land surveyed, and the tract in fact contained but eighty-one acres and a fraction. He therefore claimed compensation for the deficiency.

The defendant, Isaac Kilgore, in his answer, insisted that he sold the land by the boundaries, and denied that he gave assurance of any particular quantity.

It appears from the evidence, that Isaac Kilgore had purchased the land from his brother Hiram Kilgore, in 1856, and they estimated that there was in the tract one hundred and twenty-seven and a half acres; and that he expressed strongly to Hoback, at the time of the sale to him, that he believed, as he no doubt did believe, that there was that quantity of land; and that Hoback purchased supposing there was that quantity.

It appeared further, that Isaac Kilgore had, after his purchase of the land, put improvements on it, consisting of a dwelling-house, a barn and other outhouses, also a tan-yard and a grist-mill.

And it also appeared, that at the time of the sale to Hoback, the title to the land was in the Commonwealth.

The cause came on to be finally heard on the 4th day of April 1874, when the court held that the sale to the plaintiff was a sale in gross, and that Isaac Kilgore was not liable to account for any deficiency in the estimated number of acres of the land; and decreeing that Isaac and Hiram Kilgore should convey to the plaintiff all their right, interest and claim to the land, with special warranty, gave them their costs. From this decree Hoback applied to this court for an appeal; which was allowed.

Burns, for the appellant.

Gilmore, for the appellees.

444 *Moncure, P. delivered the opinion of the court.

The court is of opinion, that there was a mutual mistake between the vendor and vendee in this case as to the quantity of land included in the boundaries of the tract sold by Isaac Kilgore to Levi Hoback, as in the proceedings mentioned; the vendor having represented to the vendee that the said quantity was one hundred and twenty-seven and a half acres, and the vendee having made the purchase on the faith of that representation; whereas, in truth and in fact, there were but eighty-one acres of land in the said tract.

The court is further of opinion, that the vendee, having fully paid the purchase money of the said tract according to the contract of the parties, is entitled to be compensated for the said deficiency in the quantity of land in the said tract, according to the principles laid down in *Blessing v. Beatty*, 1 Rob. R. 287, and the cases therein cited.

The court is further of opinion, that although, in the case of a mere deficiency in quantity within the boundaries of a tract of land conveyed or contracted to be conveyed, the general rule of compensation is according to the average value of the whole tract—Id. p. 305; yet there will be a departure from that rule when particular circumstances require it—Id. And the court is of opinion, that there are such circumstances in this case, arising from the fact that there are valuable improvements upon the land, consisting of a dwelling-house, barn, and other outhouses, a tan-yard, and a grist-mill, the value of which improvements bears a very large proportion to the value of the land. And the court is therefore of opinion,

that in this case the just and true
445 measure of compensation *is according to the average value of the land without the improvements, considering both together to be worth the contract price of fourteen hundred dollars, estimating the quantity of the land, as the parties did, at one hundred and twenty-seven and a half acres.

The court is further of opinion, that a vendor of real estate in his own right is bound to convey the same with general warranty, unless it be otherwise agreed between the parties; and there having been no such other agreement between these parties, the vendor, Isaac Kilgore, is bound to convey the said tract of land to the vendee, Levi Hoback, with general warranty. But though it is necessary for the appellee, Hiram H. Kilgore, who seems to have the legal title to or some interest in the land, to join in the said conveyance; yet as he was not the vendor, he is bound to convey only with special warranty.

And the court is therefore of opinion, that the Circuit court, instead of making the final decree which it did, ought to have decreed that the said vendee, Hoback, is entitled to a specific execution of the said contract for the purchase of the said tract of land, and to be compensated for the deficiency in the quantity of the said tract which was sold to him as containing one hundred and twenty-seven and a half acres, the said compensation to be ascertained in the manner aforesaid. And the court ought to have ascertained the extent of the deficiency and the amount of compensation to which the said vendee is entitled therefor, by a reference to a commissioner of the court, unless such reference had been rendered unnecessary by an agreement of the parties as to such extent and amount; and ought to have decreed the payment of the said amount with interest from the time at which it was due by the vendor to the

446 vendee, and the conveyance *of the said tract of land in fee simple to the vendee by the vendor Isaac Kilgore with general warranty, and by the said Hiram H. Kilgore with special warranty, and the payment by the said Isaac Kilgore of the costs of the plaintiff in this suit in the said Circuit court.

The court is therefore of opinion, that the

decree appealed from is erroneous; and it is decreed and ordered that the same be reversed and annulled, that the appellee Isaac Kilgore pay to the appellant his costs by him expended in the prosecution of his appeal aforesaid here, and that this cause be remanded to the said Circuit court for further proceedings to be had therein to a final decree, in conformity with the foregoing opinion.

Which is ordered to be certified to the said Circuit court of Wise county.

Decree reversed.

447 *Hendricks, by Stuart v. Fields.

June Term, 1875, Wytheville.

Absent, STAPLES, J.*

Mechanics' Liens—Conveyance of Property Subject to.

—In March 1866 F entered into a written contract with H to erect for H on land in the country, certain buildings. The buildings were completed, and on a settlement H owed him \$1,321.17, for which he gave to F his two notes dated the 4th of July 1867, one payable one day after date, and the other by the 1st of November 1867. On the 10th of January 1868 F had the contract recorded in the clerk's office of the county. In May 1868 F filed his bill against H, claiming a mechanics' lien on the land and buildings under his contract; and on the 8th of October the bill was taken for confessed, and a decree made that H should pay the amount due F; and if this was not done by the 15th of November, then the land and buildings should be sold &c. No sale was made under this decree, and before it was rendered, viz: on the 1st of October 1868, H conveyed the land to S, with general warranty, and other covenants of title. And S thereupon, in the name of H, moved the court to set aside the decree, as being erroneous. This motion was heard and overruled on the 31st of May 1873. And from this decree, and also the decree of the 8th of October 1868, S, in the name of H, obtained an appeal to this court. The cause came on here upon a motion by the appellee to dismiss the appeal, and also on the merits. **HELD:**

1. Same—Same—Appeal—Right of Assignee to Sue in Name of Assignor.—S is entitled to prosecute an appeal in the name of H, for the benefit of S, for the purpose of having the decree of the 8th of October reversed, and the said land discharged of the claim to said lien.

2. Decrees—Interlocutory—Statute of Limitations.—The decree of the 8th of October 1868 is not a final decree, and therefore, though it was rendered more than two years before the petition for the appeal was presented, yet the said
448 petition *was not barred by the limitation prescribed by the Code, ch. 178, § 3, p. 1136.

3. Mechanics' Lien—Under Code of 1860—Construction.—On the 1st of March 1866, when the contract between H and F was entered into, the only

This case has never been cited or in any way referred to in subsequent cases in either Virginia or West Virginia, apparently, because of the fact that its decision was based solely upon statutory enactments which were soon after amended or abolished.

*JUDGE STAPLES had been counsel in the cause.

mechanics' lien was that provided for in the Code of 1860, p. 567, ch. 119, § 2, which provided for such lien only where the land on which the buildings were erected or repaired, was situate in a city or town; and that not being the fact in this case, F was not entitled to a mechanics' lien under that law for the money due him for erecting the buildings.

4. Same — Same — Application — Retrospection. —

Though said § 2, of ch. 119, was amended by the act of the 13th of April 1867, Sess. Acts 1866-'67, p. 806, ch. 86, and by that amendment gave a lien on land whether situate in a city or town or in the country, yet that act operates prospectively only, and not retrospectively also; and therefore does not give a mechanics' lien to F for the money due him on the contract.

5. Novation of Contract by Recordation. — Even if the said contract was duly admitted to record, the effect of said act was not to produce a novation of the contract, or to bring it down to the date of the recordation, so as to subject the said contract to the operation of the said act of April 13, 1867, and to give to F, under and by virtue of the same, the benefit of a mechanics' lien thereunder.

In May 1868 James Fields brought a suit in the Circuit court of Russell county against A. L. Hendricks, to enforce a mechanics' lien. In the bill filed in the suit, the complainant represented that on the 1st of March 1866 he and the defendant entered into a written contract, by which said Fields agreed to build certain brick houses for said Hendricks, upon the land of the latter in the county of Russell, on certain terms set out in said contract, which is marked A and exhibited with the bill; that the said contract was duly admitted to record in the clerk's office of Russell County court, on the 10th day of January 1868, as will appear by the official certificate of the clerk endorsed on the contract; that said Fields completed the work "according to the contract, and upon a settlement between the parties there was found to be due for said work a balance of \$1321.17, for which said Hendricks executed his two notes to said Fields, one for \$672.75, dated on the 1st day of July 1867, and due one day after date, and the other for \$648.42, dated on the 4th day of July 1867, due by the 1st of November 1867; that the notes were still unpaid and due to the plaintiff, subject to the various credits endorsed on one of them; that six months had elapsed since the last instalment of the money to be paid under the contract became payable; and that he, the plaintiff, was advised that he had a lien upon the land on which said buildings were erected for the amounts still due him upon the notes aforesaid. (See acts 1866 and 1867, pages 805 to 806.) He therefore prayed that Hendricks might be made defendant to the bill, and be decreed to pay the money due as aforesaid, with interest and costs; that to secure such payment the specific lien aforesaid might be enforced, and for general relief.

On the contract marked A, and exhibited with the bill, is an endorsement in these words:

"This agreement between A. L. Hendricks and James Fields, bearing date the 1st day of March 1866, was delivered to me in the clerk's office of Russell County court, on the 10th day of January 1868, and admitted to record. Teste, J. C. Gent, D. C."

There is no other certificate endorsed on, or annexed to the agreement, and nothing to show it was acknowledged before the clerk or his deputy unless that fact can be properly inferred from the certificate endorsed thereon as aforesaid.

On the 8th of October 1868 the bill was taken for confessed, and the court being of opinion that the plaintiff was entitled to the lien which he claimed, *decreed that he recover of the defendant the sum of \$1321.17, with interest as aforesaid, and subject to the credits aforesaid; and that unless payment thereof was made by the 15th day of November 1868, then the land and buildings in the bill mentioned, or so much thereof as might be necessary, should be sold on the terms and in the manner mentioned in the decree, by a commissioner therein named, who was directed to report his proceedings to the court.

No sale was ever made under the said decree, and before it was rendered, to wit: on the 1st day of October 1868, the said Hendricks and wife, by deed executed by himself and wife, and bearing date and duly recorded on that day in the clerk's office of the County court of Russell, conveyed to William A. Stuart, in fee simple and with general warranty and other covenants of title, a tract of land in said county, including the land on which the said Fields claimed a mechanics' lien as aforesaid. And the said Stuart contending that there was error in the proceedings in the suit of Fields v. Hendricks, in which it had been decreed that the former had a mechanics' lien on the land of the latter as aforesaid, and that he was entitled as assignee of said Hendricks, and in the name of said Hendricks, to have said decree set aside and reversed, he, the said Stuart, accordingly, in the name of said Hendricks, moved the Circuit court of Russell, in pursuance of a written notice to that effect, to set aside and annul the said decree, as being erroneous and contrary to law and equity; assigning as error that there was no law giving such lien, and because the contract, on which said lien was claimed, had never been duly acknowledged and admitted to record. After sundry proceedings were had on the motion, it was finally heard on the 31st day of May 1873, when it was overruled with costs by the court.

451 *From the said decree overruling the said motion, as well as from the said decree of the 8th day of October 1868, the said Hendricks, or the said Stuart in the name of the said Hendricks, applied to a judge of this court for an appeal, which was accordingly allowed.

While the appeal was pending, the appellee submitted a motion to dismiss it on two grounds: 1st, that the appellant had given an order for that purpose, which was duly

authenticated and filed with the record; and that the said Stuart had no right to prosecute the said appeal in the name of the said Hendricks; and, 2dly, that more than two years having elapsed after the said decree of the 8th day of October 1868 was rendered, and before the petition for an appeal therefrom was presented, the said appeal was barred by the act of limitations. Evidence was taken and filed by both parties; that is, the said Fields and the said Stuart, in regard to the first of these two grounds, and the cause came on to be heard by the Court of Appeals, both upon the motion to dismiss the appeal and upon the appeal itself at the same time.

Terry & Pierce, for the appellant.

Cummings and J. A. Campbell, for the appellee.

Moncure, P. delivered the opinion of the court.

The court is of opinion, that the appellant A. L. Hendricks having by deed executed by himself and wife, bearing date and duly recorded in the clerk's office of the County court of Russell on the first day of October 1868, conveyed to William A. Stuart, in fee simple and with general warranty and other covenants of title, a tract of land in said county, including 452 *the land on which the appellee James Fields claims in this case a mechanics' lien, the said Stuart is entitled, as assignee of the said Hendricks, to prosecute in his name and for the benefit of the said Stuart this appeal, for the purpose of having the decree of the Circuit court in this case reversed and the said land relieved and discharged of the claim to the said lien. And the court doth therefore overrule the motion of the appellee to dismiss this appeal upon the ground that the said Stuart has no right to prosecute the same in the name of the said Hendricks.

The court is further of opinion, that the decree appealed from in this case is not a final decree; and therefore, though it was rendered more than two years before the petition for the said appeal was presented, yet the said petition was not barred by the limitation prescribed by the Code, chapter 178, section 3, page 1136. The court doth therefore overrule the motion to dismiss the said appeal upon the ground that the said petition was barred by the said limitation.

The court is further of opinion, that as on the 1st day of March 1866, when the contract between said Hendricks and Fields was entered into for the erection of certain buildings by the said Fields for the said Hendricks, as mentioned and set forth in the agreement marked A and filed with the bill, and as for a long time thereafter, and until the work contracted for as aforesaid had been fully executed, the only law of this state which provided for a mechanics' lien was that laid down in the Code of 1860, page 567, chapter 119, section 2, which provided for such lien only where the land on which the

buildings were to be erected or repaired was situated in a city or town; and as the land on which the buildings were contracted to be erected in the agreement aforesaid 453 was situate not in *a city or town but in the country; therefore the said Fields was not entitled to a mechanic's lien under the said law for the money due to him for erecting the said buildings.

The court is further of opinion, that although by an act passed afterwards, to-wit: on the 13th day of April 1867, Acts of Assembly 1866-'67, page 805, chap. 36, the said second section of the Code of 1860 was amended by omitting the words "in a city or town," in the first line of the said section, the effect of which amendment was to give a lien on the land whether it be situate in a city or town or in the country; yet that act operates prospectively only, and not retrospectively also, and therefore does not give a mechanics' lien to the said Fields for the money due to him as aforesaid.

The court is further of opinion, that even if it be conceded, for the purposes of this case, that the said agreement was duly admitted to record, the effect of that act was not to produce a novation of the contract or to bring it down to the date of such recordation, so as to subject the said agreement to the operation of the said act of assembly, and to give to the said Fields, under and by virtue of the same, the benefit of a mechanics' lien as aforesaid.

The court therefore, without deciding whether the said agreement was duly admitted to record or not (a question not necessary to be decided in this case), is of opinion that the appellee is not entitled to the lien which he claims, and that the decree of the Circuit court is therefore erroneous, and ought to be reversed, and the bill dismissed.

The decree was as follows:

This day came again as well the said 454 appellant as *the said appellee by their counsel, and the court having maturely considered the said motion together with the depositions, affidavits and exhibits, and the arguments of counsel touching the same, doth, for reasons stated in writing and filed with the record, overrule the said motion to dismiss the appeal; and having further maturely considered the transcript of the said decree and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the said decree is erroneous; therefore it is decreed and ordered that the same be reversed and annulled, and that the appellee pay to William A. Stuart (for whom and at whose expense the appeal is prosecuted) the costs of the appellant in the prosecution of the same. And this court proceeding to render such decree as the said Circuit court ought to have rendered, it is further decreed and ordered that the appellee's bill be dismissed, and that the appellee pay to the appellant his costs by him expended in the said Circuit court.

Motion to dismiss the appeal overruled.
Decree reversed.

455 *Ashby's adm'or & als. v. Porter & als.

September Term, 1876, Staunton.

Absent, BOULDIN, J.*

Notes—Confederate Currency.—The note of A & Sons, partners, given in renewal of notes due before the war, was discounted at the bank in Winchester on the 30th of January 1862, and fell due on the 3d of April, when it was protested for non-payment. On the 7th of March, before the note was due, the bank removed to Farmville, and there did business until the end of the war. A & Sons wishing to take up this note, agreed with P, whose business frequently carried him to Richmond, to take up the note for them, they agreeing to give him their note for the amount; and his agent Y having been sent to Richmond on the business of P, by his directions went on to Farmville and took up the note, paying the bank in Confederate money at par. On his return he took the note of A & Sons for \$7723.24, dated the 19th of April 1862, payable in one year, which included principal, interest and charges, and their note was delivered to them. Nothing was said either when the arrangement was made with P, or when the note was given to him, as to the kind of currency in which it was to be paid. **Held:**

1. **Same—Same.**—The debt of A & Sons to P is a Confederate debt.
2. **Same—Time When Scale is to Be Applied.**—It is to be scaled as of the date of the note, and not as of the date of its maturity.
3. **Partnership Debts—Liability of Real Estate for.**—Though A is dead, and he is largely indebted individually as well as a partner, his real estate is equally liable for this partnership debt, as for his individual debts. See Code of 1849, ch. 144, § 12.

This was a suit in equity in the Circuit court of Clarke county, brought in
456 August 1866 by Colin C. *Porter against the administrator with the will annexed of Buckner Ashby, deceased, and others claiming under him, to subject the estate of said Ashby to pay a debt due to the plaintiff from Buckner Ashby & Sons, who had been partners. In the progress of the cause, under an order of the court, a commissioner reported an account of debts due from Buckner Ashby individually, and also of debts due from Buckner Ashby & Sons as partners. It does not appear that there was any dispute about any of the debts reported, except that of the plaintiff. As to that, the questions were whether it was or

was not a Confederate debt; and if a Confederate debt whether it should be scaled as of the date of the note, or as of the time it fell due. There was also a further question, whether being a partnership debt it could be decreed to be paid out of the estate of Buckner Ashby, until his individual debts were paid.

The case came on to be heard on the 11th of November 1872, when the court held that the plaintiff's debt was to be scaled as of the day of the date of the note, and made a decree in favor of him and of many other creditors of both classes. From this decree Buckner Ashby's adm'ors, and the other parties in the same interest, obtained an appeal from a judge of this court. The case is stated by Judge Moncure in his opinion.

McDonald and A. Moore, for the appellants.

Andrew Hunter, S. J. C. Moore and D. B. Lucas, for the appellee.

Moncure, P. delivered the opinion of the court.

The principal questions involved in
457 the case are, *whether the debt in controversy was a good money debt, or a Confederate money debt, and if the latter, whether it should be scaled, and if so, in reference to what time the scale should be applied, whether to the time of the date of the note, or to the time of its maturity? The court below decided that the debt was a Confederate money debt, that it ought to be scaled, and that the scale should be applied in reference to the time of the date of the note, and not the time of its maturity. Another question arose, and was decided in the case, which will sufficiently appear in the opinion about to be delivered.

The note in question was made by B. Ashby & Sons; was dated the 19th day of April 1862; was payable twelve months after date to Colin C. Porter, and was for the sum of \$7,723.24. The origin of the note was as follows:

B. Ashby & Sons at that time resided and were engaged as partners in the manufacture of flour in the county of Clarke. They were indebted before the war in various notes to the Farmers Bank of Virginia at Winchester, which were renewed from time to time, and afterwards consolidated into one note. This note was discounted on the 30th of January 1862, was payable at said bank sixty days after date, and was due March 31st and April 3d, 1862, when it was protested for non-payment. On the 7th of March 1862 the bank removed from Winchester to Farmville, and there continued open and doing business till the close of the war. Ashby & Sons were anxious to take up their note, thus being under protest at the bank in Farmville, but not finding it convenient to do so, or to go to Farmville for that purpose, they made an arrangement with Porter to take it up for them. He was at that time a resident of the adjacent county of
458 Jefferson, *in West Virginia, and was largely engaged in manufacturing and

*JUDGE BOULDIN did not attend this term of the Staunton court.

†**Notes—Confederate Currency.**—The rules in the principal case for the kind of currency in which such notes are to be paid and the time when they are to be scaled, are followed in *Burton v. Slaughter*, 26 Gratt. 921; *Jarrett v. Nickell*, 9 W. Va. 353. See also, *Fultz v. Davis*, 26 Gratt. 903.

‡**Partnership Debts—Liability of Real Estate for.**—The proposition, that the separate estate of a deceased partner is liable *pari passu* for both his individual and social debts, is applied in *Robinson v. Allen*, 85 Va. 731; *Pettyjohn v. Woodruff*, 86 Va. 480. See also, V. C. § 2855, which is a *verbatim* re-enactment of the statute cited in the principal case on this subject.

selling woollen goods, and his business frequently required him to go or send to Richmond; in fact he was engaged in the business of blockade running, as it was called. He had money to invest, and did not know what to do with it. Ashby & Sons said to him they had a note at the bank in Farmville under protest, and were anxious to pay it. Porter told them that his agent, Young, had to go to Richmond to sell some goods, and might go on to Farmville and pay it for them. Ashby & Sons then said they would give their note with security to Porter for the amount. He said he did not require security, and it was agreed between them that if he demanded a return of the money, when they could not rise it, he would take flour for it, at a price which was then agreed upon them. There was no agreement or understanding between the parties about the currency in which the debt was to be paid by Porter to the bank. Nothing was said on that subject. Almost the only currency which then existed in Winchester or in Farmville, or elsewhere in the state, not in the hands of the enemy, was Confederate currency, and the said bank, and all other banks in the state, where that currency existed, received it in payment of debts due to them. Young, the agent of Porter, in pursuance of the arrangement aforesaid, went on from Richmond to Farmville, paid the note of Ashby & Sons to the bank, received it, and brought it to them, took from them another note, payable to Porter at twelve months, for the amount of the debt, including interest and charges of protest, being the note for \$7,723.24 aforesaid, and returned to them their note to the bank. The payment was made by Young to the bank in Confederate currency. Nothing was

459 said by the parties, or *either of them, as to the currency in which the new note was to be paid. That note was not paid at maturity, nor was any payment made on account of it during the war. After the close of the war the controversy involved in this suit arose between the parties, and the court below decreed in the suit as before stated; and from that decree this appeal was taken. My opinion upon the several points presented by the appeal is as follows:

First. I am of opinion that the debt due by Buckner Ashby & Sons to the Farmers Bank of Virginia at Winchester, which was paid by Colin C. Porter for said Ashby & Sons in April 1862, after the removal of said bank from Winchester to Farmville, during, and in consequence of the war, was, at the time of such payment, a specie or good money debt. It was due by a note dated the 30th day of January 1862, payable sixty days after date, for \$7,700, and discounted on the day of its date by said bank for said firm. It was made and discounted as a renewal of notes before made and discounted at the said bank, which notes were in their origin ante-war debts, and of course payable in specie or good money, and the presumption in the absence of any evidence to the contrary is, that the said note, made in

continuation of the same loan and accommodation, was intended to be payable in the same currency.

The said note, being at the time of its payment a good money debt, it would have been competent for the bank, the holder of the note, instead of receiving payment in Confederate money at par, to have demanded payment in good money. And it would have been competent for the bank, instead of receiving payment of the note in Confederate money from the debtor, to have sold and assigned it to Porter or any

460 *other person, in consideration of the same amount of Confederate money received from such assignee. And in that case it would have been competent for the assignee to have demanded payment of the note in good money. He would have been invested, by virtue of the assignment, with all the rights and remedies of the assignor in regard to the note. But,

Secondly. I am of opinion that Porter did not become the assignee of the note by paying the amount of it to the bank. There was no privity of contract between him and the bank in regard to the note. Its payment by him had the same effect in regard to the bank, and in regard to the continued existence of the note, as its payment by Ashby & Sons would have had. It was in effect paid by them, so far as the bank was concerned. So that Porter could not have maintained an action at all upon the note, either in his own name or in that of the bank, much less could he have recovered in such an action the amount of the note in good money. In the absence of any express contract between him and Ashby & Sons, his only right of action against them, arising from such payment, was an action of indebitatus assumpsit for so much money paid to their use, and the measure of his right of recovery in such action would have been the precise amount so paid. Having paid the par amount of the note in Confederate money, he would have been entitled to recover the value of such amount, at the time of such payment, with interest thereon from that time.

Thirdly. I am of opinion that the circumstances under which the payment was made by Porter, for Ashby & Sons, did not render the latter liable to him for any greater amount than they would have been liable for had the payment been made at their mere request. There was certainly no

461 express promise by *Ashby & Sons to pay to him any greater amount in value than it was necessary for him to pay in discharge of the note, even supposing that such a promise would have been free from the taint of usury; a point which need not be decided in this case, according to my view of it. It is not at all improbable, nay, it is probable, that Porter expected to receive good money from Ashby & Sons in payment of the amount he had paid for them in Confederate money in discharge of the note. His object was to make a good investment of his Confederate money, and we cannot see how he could have done so by

receiving the same amount of the same kind of money at some future period. His going or sending to Farmville, to make the payment, was attended with trouble and expense, for which it seems no charge was made by him to them. He might have made profit on his Confederate money by trading upon it in the business of blockade running, in which he was engaged, or in buying land. He no doubt thought he would do better by investing it in a specie debt, which he probably supposed he was doing. He might perhaps have effected his object by negotiating with the bank, and obtaining from it an assignment of the note, instead of negotiating with Ashby & Sons, and making payment of the debt for them.

But while such was probably the expectation of Porter, the circumstances of the case do not warrant us in saying that such was the expectation or intention of Ashby & Sons, or that they intended to make any other contract than that which was implied in the payment of the money by him for their use and at their request. They may well have supposed that Porter, having perhaps more Confederate money than he needed, might have been willing to accommodate them by taking up *their
462 note to the bank, which he could hold at less risk than the same amount of Confederate money. They may have supposed that Porter had other business at Farmville, as he certainly had at Richmond, and would have incurred no additional expense in taking up the note for them, or that he would charge them any additional expense incurred by him in so doing; which they would no doubt readily have paid, if notified of the fact that such expense was incurred. They no doubt knew that the banks were receiving Confederate money at par in payment of debts due to them, and therefore knew that this debt to the bank could be paid in the same way. It is not to be presumed, in the absence of any evidence tending to prove the fact, that they would have given up the advantage of making payment in that way. I think, therefore, that there is not sufficient evidence in this case that there was any agreement of the parties, express or implied, that Ashby & Sons should be liable to Porter for any greater amount than that which Porter paid in discharge of their debt to the bank.

Fourthly. I am of opinion that the execution of the note by B. Ashby Sons to C. C. Porter for \$7,723.24, with interest from date, dated the 19th day of April, 1862, payable twelve months after date, the said principal sum being the amount paid on the day of its date by the said Porter to the bank in discharge of a debt due to it by said Ashby & Sons, makes no difference in regard to the extent and amount of the liability of said Ashby & Sons to said Porter; and that the debt due by the former to the latter is to be scaled as of the 19th day of April 1862, precisely as if the said new note had not been executed. That
463 note was not an extinguishment of the pre-existing liability of Ashby & *Sons

to Porter for the same debt arising from his having paid the debt to the bank for them and at their request; and though it postponed the right of action by Porter against Ashby & Sons until the note became payable, yet that note not having been paid, it was competent for Porter to sue at his election either upon the original right of action or upon the new note. Whether he sued upon the one or the other, the measure of liability and the time for scaling the debt was precisely the same. The new note was given, not to change the amount of the debt, but to extend the time for its payment, in consideration of which Ashby & Sons were to pay legal interest on the amount during the period of the extension. But certainly Porter had no idea of agreeing to receive less than the principal of his debt, and that, too, after waiting twelve months for its payment. Confederate money had already depreciated, and was continuing to depreciate; and it must have been morally certain, that at the end of twelve months the depreciation would be much greater, as actually turned out to be the case. Porter no doubt believed that the debt was due him in good money, and according to that view the new note was solvable only in good money. But if we suppose that he believed the debt to be due to him in Confederate money, we cannot suppose that he intended by the new note to agree to receive in its payment Confederate money at par, though much more depreciated at the maturity of the note than at its date. We must suppose in that case that he expected and intended to receive in payment of the note the value of the Confederate money paid by him for Ashby & Sons, with interest on that value from the date of the note till payment. That

even Ashby & Sons contemplated the
464 date of the note, *and not its maturity, as the period at which the debt, if due in Confederate money, was to be scaled, is shown by the fact, that they stipulated for the right to pay it in flour at an agreed price, if when payment of the money was demanded they should not be ready to make such payment. Of course, the price of the flour was fixed in reference to its market value at the time of the date of the note. The act passed March 3, 1866, (Acts of Assembly 1865-'6, p. 185,) authorizes a contract in such cases "to be liquidated and settled by reducing the nominal amount due or payable under such contract in Confederate States Treasury notes to its true value at the time they were respectively made and entered into, or at such other time as may to the court seem right in the particular case." It seems to me to be right in this particular case, according to all the circumstances, most but not all of which I have detailed, that the debt, supposing it to be a Confederate debt, should be scaled as at the time the contract was made and entered into, to wit: the date of the note, (as was done by the court below,) and not at the time of its maturity, nor at any other time. The difficulty I have had in this case has been in determining whether the debt was a good money debt or

a Confederate debt. Considering it to be a Confederate debt, I have none in determining that the date of the note and not its maturity is the proper period for applying the scale. Certainly that determination does full justice to Ashby & Sons, and places them precisely where they would have stood if they had paid their own Confederate money in discharge of their debt to the bank, instead of requesting Porter to pay it for them. To apply the scale, as at the time of the maturity of the note, would do gross injustice to Porter. I am therefore for applying it as at the date of the note.

465 *The only other objection made to the decree of the court below is, "that it was error upon any application of the scale to decree the payment of a debt due from B. Ashby & Sons out of lands belonging to the estate of B. Ashby, deceased, late one of the members of said firm, after the dissolution of the partnership, and until the individual creditors of said B. Ashby, deceased, had been provided for."

This objection seems not to be at all relied on, and little or no notice was taken of it in the argument. At all events it is wholly unsustainable. The liability of partners for a partnership debt is joint and several, even after the death of one or more of the partners. This has been the case, even at law, ever since the enactment of the Code of 1849, chapter 144, section 13, which provided that "the representative of one bound with another, either jointly or as a partner, by judgment, bond, note or otherwise, for the payment of a debt, or the performance or forbearance of an act, or for any other thing, and dying in the lifetime of the latter, may be charged in the same manner as such representative might have been charged, if those bound jointly or as partners had been bound severally as well as jointly, otherwise than as partners." See the note of the revisors to this section in their report, page 724. The amendment of the law was made after the decision of the case of *Morris's adm'r v. Morris's adm'r &c.*, 4 Gratt. 293, in which there was much conflict of opinion among the judges. Had the case occurred after, and been governed by the amended law, it is presumed there would have been no such conflict. For all the judges in that case concurred in holding, that "two partners having given their joint and several bond to a creditor of the
466 firm, for a partnership *debt, the creditor is entitled to share with the separate creditors the separate estate of the deceased partner."

I am of opinion that there is no error in the decree complained of to the prejudice of the appellants, and I am therefore for affirming it.

Decree affirmed.

467 **Brown v. Rice's Adm'r.*

September Term, 1875, Staunton.

Contracts—Misrepresentation in Procurement.—A & J.*

**Contracts—Misrepresentation in Procurement.—The*

partners, give two notes to R. They both die. A being the survivor. At the death of A both notes are barred by the statute of limitations. After the death of A, R knowing that the notes were barred by the statute, fraudulently, or under a mistake of the law, represents to B, his administratrix, that said notes are unpaid, and are valid and in full force in law against the estates of A & J, and proposes that if B will give her bond to R for one-half the amount of the notes, R will settle the other half with J's representative, who is R's daughter: and thereupon B trusting to these representations, executes her bond to R for the amount of one-half of the notes. **HELD:**

1. *Same—Same—Of Law—Equitable Relief.*—If this was a misrepresentation of the law, still it is a case in which equity will relieve B; and the defence may be made at law by plea under the statute setting out the facts.

2. *Same—Same—Of Fact—As Matter of Defence.*—But it was in truth a misrepresentation of a fact; and the facts set out in a plea is a good defence to an action on the bond by R's adm'r against B.

This is an action of debt in the Circuit court of Rockingham county, brought by William R. Warren, adm'r c. t. a. of Milly Rice, deceased, against Mary B. Brown, upon two bonds executed by said Mary B. Brown to said Milly Rice. The defendant filed two special pleas, to which the plaintiff demurred, and the demurrer was sustained; and there was judgment in favor of the plaintiff. Mrs. Brown thereupon applied to this court for a supersedeas; which was allowed. The case is sufficiently stated by Judge Anderson, in his opinion.

468 *Berlin and Harnsberger, for the appellant.

G. G. Grattan, Woodson & Compton, for the appellee.

Anderson, J. delivered the opinion of the court.

This is an action of debt by the defendant in error against the plaintiff in error upon two bonds—one for \$1,900, payable one day after date, and the other for \$491.55, payable on or before the 1st of July 1869, both bearing the same date, the 24th of February 1869. They are executed to Milly Rice, the intestate of plaintiff below, and signed "Mary B. Brown, adm'r of A. B. Brown," with a (seal) annexed.

The defendant tendered two special pleas under the statute in bar of the action, both of which were rejected by the court. The second plea is substantially a plea to this effect. That the said Milly Rice, plaintiff's intestate, in her lifetime "fraudulently

principal case is cited and followed in *Anderson v. Phlegar*, 98 Va. 422; *Meek v. Spracher*, 87 Va. 109; *Rorer Iron Co. v. Trout*, 83 Va. 407; *McMullin v. Sanders*, 79 Va. 866; *Lowe v. Trundle*, 78 Va. 60; *Hull v. Fields & Thomas*, 76 Va. 607; *Webb v. City Council of Alexandria*, 33 Gratt. 176. See in West Virginia, *Bates v. Swiger*, 21 S. E. 874; *Whittaker v. S. W. Va. Imp. Co.*, 34 W. Va. 218, 12 S. E. 507. These authorities make an exception to the general rule of law that equity will not relieve against a mistake of law.

procured the execution of the said writings obligatory in the declaration mentioned by the defendant, as administratrix of A. W. Brown, for and in consideration of the one-half of two notes not under seal, which had been executed to her in her lifetime by defendant's intestate, and J. G. Brown as partners, in their firm name of A. W. & J. G. Brown, by falsely and fraudulently representing to her, the said defendant, that the said notes were still "unpaid, valid, and in full force in law against the estate of A. W. & J. G. Brown, when, in truth and in fact, both of the said notes were then barred by the statute of limitations; which fact was well known to the said Milly Rice, but was fraudulently concealed from the defendant.

The averments by the first plea are more in detail. It sets out the dates of the notes of A. W. & J. G. Brown, and when payable; 469 the death of J. G. Brown, "and the subsequent death of A. W. Brown, from which it appears that the latter, as surviving partner, was entitled to the possession of the social effects, and was bound for the debts of the firm; and from which it also appears that the said notes were barred by the statute of limitations in the lifetime of A. W. Brown, the defendant's intestate. It also appears from the said plea, that the defendant never saw the said notes; but that representations were made to her by the plaintiff, then acting as the agent of Milly Rice, through defendants brother, that the said notes were lawful debts, outstanding against the estate of A. W. & J. G. Brown; and a proposition, that if she, as administratrix of A. W. Brown, would give her bonds for one-half of said notes, she, Milly Rice, would arrange the other half with the widow of said J. G. Brown, who was her daughter, and that the estate of A. W. Brown would be benefited, as it would thereby be released from one-half of the debt for which it was then bound. And that she, the defendant, was induced by these representations to assent to the proposition. That afterwards the plaintiff, as agent of the said Milly Rice, had the bonds, which are the writings obligatory in the declaration mentioned, drawn and sent to her by her brother, and she executed them as administratrix, and not in her own right, not knowing until afterwards the fraud which had been practiced on her in procuring the execution of her bonds for notes which were barred by the statute of limitations, and which she had never seen. Such are in effect the averments of the first plea, stripping it of much that is immaterial and surplusage.

Both pleas are, that the bonds were executed by her in her character as administratrix, and not in her individual right, 470 or as her personal obligations, as she had "no assets. Though the legal effect of the obligations be different, and she is bound personally, the averment to the contrary cannot vitiate the pleas, if they constitute a good equitable defence against the bonds, considering them as her

personal obligations. And it cannot be doubted that the facts averred in the pleas present as good a defence against the bonds, regarding them as personal, as if they only bound the assets; because, whether personal or not, it was an obligation to pay the debt of the intestate; and if personal and binding upon her, it constitutes a stronger defence for her, because the debt being extinguished as a debt of the intestate by the statutory bar, she could have no recourse upon the estate if she paid it. The question remains, are these pleas a bar to the plaintiff's action?

It is contended for the defendant in error, that the misrepresentation alleged by the pleas is a misrepresentation as to matters of law, and that such misrepresentation does not constitute fraud, because the law is presumed to be equally within the knowledge of all the parties. But whilst the legal proposition is in general true, it is also true that, "if a man dealing with another misleads him, and takes advantage of his ignorance respecting his legal position and rights, though there be no legal fraud, the case may come within the jurisdiction exercised by courts of equity." Kerr on Fraud and Mistake, p. 90-1.

Mistake also, as well as fraud, is a ground for relief in equity. And whilst mistake, in matter of law, cannot in general be admitted as ground of relief, the maxim *juris ignorantia non excusat* is not universally applicable in equity. "Mistake in law, to be a ground of relief in equity, must be of a material nature, and the determining ground of the transaction." It was precisely so in this case. It may 471 be a misapprehension "of the law, or of their rights, by both parties, "or it may be a misapprehension of the law, or of his private right, by one of the parties alone." Kerr on Fraud and Mistake 399.

If the mistake of law, or as to his private right, be that of one party only to the transaction, though the other party was not aware of it, a court of equity may, under the peculiar circumstances of the case, grant relief. "But if it appear that the mistake was induced or encouraged by the other party to the transaction, or was perceived by him and taken advantage of, the court will be more disposed to grant relief than in cases where it does not appear that he was aware of the mistake." Kerr on Fraud and Mistake, p. 400.

In support of this position the author cites various adjudged cases. He cites *Broughton v. Hutt*, where the heir at law of a shareholder in a company, the shares in which were personal estate, supposing himself, through ignorance of law, to be liable in respect of the shares, had executed a deed, taking the liability on himself, it was held that he was entitled to have the deed cancelled. Also, when a man having a legal security, gave it up in exchange for another security, upon the faith that the right which he gave up would be secured to him by the substituted security but the substituted security

proved a mere nullity, relief was given; also, where a woman renewed a note, believing that she was liable on the original note, relief was given. *Ibid.*, p. 401. And other cases are cited. This last case is strikingly analogous to the case in hand if the defendant below executed her bonds under a mistake of law, that her intestate's estate was liable upon the notes, for the one-half of which her bonds were given. But it is unnecessary now to decide how far courts of equity may go to relieve

472 against a mistake of *law, as we regard the misrepresentations alleged were with regard to a matter of fact.

It was represented (2nd plea) that the notes in the possession of Milly Rice, or her agent, the plaintiff below, were subsisting debts, "unpaid"—that they were "valid" debts, being "in full force in law against the estate." By the first plea, that they were "lawful debts," outstanding against the estate. "Lawful," "outstanding," still in force. These representations implied that they were under seal, or, that sufficient time had not elapsed since right of action had accrued on them to bar a recovery. The question was not as to the law of limitation. If the notes were not under seal, there was no doubt that the law of limitation was five years. The point about which the defendant was not informed, and about which she had not the means of information, (the notes being in possession of Milly Rice, or her agent, and not even surrendered upon the execution of the bonds by defendant, but retained in her possession, and only credited by her with the amount of the bonds when delivered to her or her agent,) was whether they were of such a character as to be subject to the limitation? or at what time right of action had accrued upon them? and whether they were barred by the lapse of time since?—facts which would appear from the inspection of the notes. But these difficulties were anticipated, and all met and removed by the assurances which were given by the plaintiff, acting as the agent of Milly Rice, through the brother of the defendant, as averred in the pleas. It is not necessary that the fact which does not exist should be expressly stated. It is laid down by the eminent writer, already referred to in his book, p. 91, and supported by a citation of numerous authorities, that "to constitute a fraudulent representation the

473 *representation need not be made in terms expressly stating the existence of some fact which does not exist. If a statement be made by a man in such terms as would naturally lead the person to whom it was made to suppose the existence of a certain state of facts, and if such statement be so made designedly, and fraudulently, it is as much a fraudulent representation as if the statement of an untrue fact were made in express terms."

The statements alleged to have been made by the pleas in this case, would naturally lead the defendant, to whom they were made, to conclude that the notes were

under seal, or that five years had not elapsed since right of action had accrued on them. If they were lawful outstanding debts against the estate, they could not have been barred by the statute of limitations.

But it is argued, that the representations alleged by the pleas were not untrue; that a debt was not unlawful because it was barred by the statute of limitations. The allegation in one of the pleas is, that the debt was represented to be "a lawful outstanding (that is subsisting) debt against the estate;" in the other, "an unpaid" (that is subsisting) "valid" debt, being "in full force in law against the estate." The fact is, the debt was barred by the statute of limitations in the lifetime of the intestate, and therefore could in no way be revived against the estate. *Seig. adm'or v. Acord's ex'or*, 21 Gratt. 369, 371.) It was not therefore a lawful outstanding debt against the estate, or a subsisting, valid debt, in full force against the estate. The representation was therefore untrue in fact.

Again, it is argued that the defendant should not have relied upon these representations. She ought to have made further inquiry—she had the same means 474 *of information that the other party had. That she had the same means of information does not appear from the averments of the pleas. But if she might have had access to accurate information it was not incumbent on her to make further inquiry. "A man to whom a particular and distinct representation has been made is entitled to rely on the representation, and need not make any further inquiry." "No man can complain that another has relied too implicitly on the truth of what he himself stated." (Same book, p. 80, 81.)

These false representations induced the defendant to execute the bonds, as is substantially averred in the first plea. The second plea avers, that by these false and fraudulent representations the execution of the bonds by the defendant were fraudulently procured by the plaintiff's intestate. We are of opinion that both pleas, though imperfectly and informally drawn, set out sufficient matters of equitable defence under the statute to bar the plaintiff's action. We are of opinion that the court did not err in overruling the defendant's demurrer to the declaration, but that it erred in rejecting the special pleas, and therefore that the judgment must be reversed with costs, and the cause remanded.

The judgment is as follows:

This day came again the parties by their attorneys, and the court having maturely considered the transcript of the record of the judgment aforesaid, and the arguments of counsel, is of opinion, for reasons stated in writing, and filed with the record, that the court below erred in rejecting the defendant's special pleas. It is therefore considered that the judgment be reversed, the verdict be set aside, and the cause remanded

475 *to the Circuit court of Rockingham county, to be proceeded with

in conformity with the principles declared in the foregoing opinion, with instructions to said Circuit court, that if the defendant shall again offer her said special pleas that they be received, and the plaintiff be required to take issue thereon. And it is further considered that the plaintiff in error recover her costs of the defendant in error expended in the prosecution of her writ of error here, which is ordered to be certified to the said Circuit court of Rockingham.

Judgment reversed.

476 *McBride & als. v. McBride & als.

September Term, 1875, Staunton.

1. **Wills—Form—Intention.**—It is not necessary to the validity of a will that it should have a testamentary form, or that the decedent should know that he had performed a testamentary act, or that he should intend to perform such act. If the paper contains a disposition of the property to take effect after the death of the testator, though it was not intended to be a will, but an instrument of a different shape, yet if it cannot operate in the character intended, it may operate as a testamentary act.
2. **Same—Same—Same.**—It is not necessary that the paper should be the identical one intended by the testator for his last will. If the instrument has once received the sanction of the testator as the final disposition of his property, it will so remain until revoked or cancelled in a way prescribed by the statute, though he may have always intended to make another will.
3. **Same—Same—Same.**—It is necessary, however, that the instrument, whatever it may be, whether note, deed, letter, or settlement, should have been designed to operate as a disposition of his property. That identical paper must have been intended to take effect in some form. It must have been written *animo testandi*.
4. **Same—Same—Notes as Testamentary Papers.**—But where the draft or notes of a will embody the provisions actually designed by the testator with reference to his property, and declare the settled purposes of the testator, they will be established as his will, although his purpose may have been to extend the notes or draft into a more regular form. This, however, is only permitted where the testator is prevented by the act of God from completing the instrument in the form in which he designed it. And even in such a case it is essential that the paper shall contain the final determination of the testator with regard to the disposition of his property.
5. **Same—Same—Intention Controlling Principle.**—In all other cases, the paper offered for probate must have been designed thereby to dispose of his property. He must have looked to that paper as the

***Wills—Form—Intention.**—The principal case is nowhere cited in Virginia, but in West Virginia it is approved in *French v. French*, 14 W. Va. 473, and in *Lauck v. Logan*, 45 W. Va. 251, 31 S. W. 987. In Virginia, however, the cases of *Perkins v. Jones*, 84 Va. 356, and *Warwick v. Warwick*, 86 Va. 596, lay down rules similar to those expounded in the principal case.

means by which an object was to be accomplished, *and that object the disposition of his estate after his death. Unless he intended this, the paper is not his will, whatever he may have called it. If he did so intend, it is his will whatever he may have called it. The intention is the controlling principle in such cases.

6. **Facts.**—M has a will prepared by his council, which he examines and approves, and says he will meet the counsel in B, a village near, and execute it. A few days after this he writes to a brother in Texas, and after giving him a detailed account of his domestic troubles, which he suggests to him to burn, he states that he has made a will, and states the bequests in it, and that he has appointed this brother and his counsel his executors. He says it is not such a will as he expects to make. The letter is signed with the initial of his Christian name J—. Two months after seeing the will prepared for him he is accidentally killed, not having executed the paper. **Held:**

1. The letter is not a testamentary paper, either alone or as connected with the unexecuted will.
2. **Signature.**—Quare: If the signing the paper with the initial of his name is a sufficient signing by a testator.

This was an appeal from the judgment of the Circuit court of Rockbridge county, rejecting certain papers which had been propounded as the will of J. Jackson McBride. It appears from the evidence, that some time before the death of J. Jackson McBride, his counsel, David P. Curry, prepared a will for him; but the counsel had mistaken his directions as to the shares in which his property was to be divided, and it became necessary therefore to prepare another. This second paper was prepared about two months before McBride's death. This paper the counsel carried in his pocket, expecting to meet with him, so that he could execute it, as he said he would, when they should meet, and it became so much worn that the counsel copied it. Eight or ten days before McBride's death, he went to the house of the counsel to have another paper drawn, and whilst there examined the will, and said he had no changes to make in it, and

478 that they *would meet in Brownsville in a day or two, and get two men he named, to witness it. The paper remained in the hands of the counsel, who did not see McBride again until he was thrown from his horse, and was so badly injured as to be unconscious, and died in a day or two afterwards without having executed the paper. This paper is marked C.

After his last interview with his counsel, J. Jackson McBride wrote to his brother, who lived in Texas; and this is the paper which, in connection with the unexecuted paper, was propounded for probate. It bears date May 20th, 1872, and commences—Capt. John J. McBride—Dear Brother.

After saying why he had not procured some orchard grass seed for his brother, he proceeds:

"You want to know more about Maggie and our separation. Well, I do not talk about the mater, and to write is worse. So you had better burn all I say about it."

He then proceeds to give an account of the separation of himself and his wife, and the terms, and how they were carried out. He then says: "Margaret had a daughter on the 14th of December 1871. I do not recognize it as mine, and want nothing to do with it." And after something more on the same subject he says: "For fear of the child coming in for my property, in case anything might happen to me, I have made my will, leaving my property to be equally divided between John J. McBride, Zach'y McChesney, Jackson and Amy McBride (each one-fourth), and leave yourself and Capt. D. P. Curry my executors. Capt. Curry has been my counsel all through my trouble, and knows and can give you more efficient aid than any one I could associate with you. I expect him to do the business, but you see it is properly done. It is not

479 such a will as I expect to make, but *do it at present to cut out the child, in case I should die without making any other arrangements. What I leave you, I expect you to leave at your death to the three, if you should not need to use it yourself. Margaret swears that it is my child, and they are trying to make the public think so, but I do not think they believe her. I say nothing, and allow no one to talk to me about it." And then after speaking of his mother's health, and of other members of the family, he says: "I don't know where to direct this letter, and don't like such to send it on uncertainties, and will not sign it. You know who it is from if you get

J—."

This paper was marked A.

This letter was put into the post-office at Brownsburg, Rockbridge county, by the writer, and was directed to Capt. John J. McBride, Palestine, Anderson county, Texas. The writer knew that his brother had property near Palestine, but that was not his place of business. What it states as to the disposition of his property among the four persons named is the same in the unexecuted will, except that this last does not say anything about what he expects John J. McBride to do with what was given to him at his death.

There was full proof that the whole letter, including the signature J, was in the handwriting of J. Jackson McBride, and that he was competent to make a will up to the time of the accident which caused his death. And it was further proved that he was a decided man, and prompt to do whatever he determined upon. The persons mentioned in both papers as his devisees, are a brother and the children of a deceased brother and sister.

John J. McBride and McChesney, the 480 propounders *of the paper, excepted to the opinion of the court rejecting the paper; and obtained an appeal to this court.

Tucker and Wm. J. Robertson, for the appellants.

Wm. A. Anderson and H. Sheffey, for the appellees.

Staples, J. delivered the opinion of the court.

The only question presented for our decision in this case is, whether the papers offered for probate in the court below are valid testamentary instruments. This question has been very ably argued on both sides, and the whole law of the case examined and discussed. Before considering the papers which are the subject of controversy, it may be well to state very briefly the principles which will control our decision.

All the authorities hold, indeed it is very clear, it is not necessary to the validity of a will that it should have a testamentary form, or that the decedent should know that he had performed a testamentary act, or that he should intend to perform such act. A deed poll, or an indenture, a bond, a marriage settlement, a letter, a promissory note, and the like, have been held valid as a will. If the paper contains a disposition of the property, to take effect after the death of the testator, though it was not intended to be a will, but an instrument of a different shape, yet if it cannot operate in the character in which it was intended, it may operate as a testamentary act. 1 Lomax on Ex'rs, pages 33, 34.

It is not necessary that the paper should be the identical one intended by the testator for his last will and testament. If the instrument has once received the sanction of the testator as the final disposition of his property, it will so remain until 481 revoked or cancelled *in some one of the modes required by the statute.

He may have always intended to make another will, but until that intention is consummated by the execution of a posterior instrument, the first will stand as the last will and testament, however little may reflect the wishes of the testator.

It is necessary, however, that the instrument, whatever it may be, whether a note, settlement or deed, should have been designed to operate as a disposition of the testator's property. That identical paper must have been intended to take effect in some form. It must have been written animo testandi. In the language of Judge Cabell, "A paper is not to be established as a man's will merely by proving that he intended to make a disposition of his property similar to or even identically the same with that contained in the paper. It must satisfactorily appear that he intended the very paper to be his will. Unless it does so appear, the paper must be rejected, however correct it may be in its form, however comprehensive in its details, however conformable to the otherwise declared intentions of the party, and although it may have been signed by him with all due solemnity."

This doctrine is sound in principle, is commended by its intrinsic justice and wisdom, and is fully sustained by the authorities. Sharp v. Sharp, 2 Leigh 249; Hocker v. Hocker, 4 Gratt. 277; Walke v. Walke, 1 Gratt. 454; Pollok & wife v. Glassel, 2 Gratt. 439.

To this rule there, is, however, one apparent exception, or rather a modification of it. It is where the draft or notes of a will embody the provisions actually designed by the testator with reference to his property. If such notes or draft declare the settled purposes of the testator, they will be established as his will, although his purpose may have been to extend the *notes or draft into a more regular form. This, however, is only permitted where the testator is prevented by the act of God from completing the instrument in the form in which he designed it. Even here it is essential that the paper shall contain the final determination of the testator with regard to the disposition of his estate.

With this single exception, for I know of no other, the paper offered for probate must have been intended by the testator as an operative instrument. He must have designed thereby to dispose of his property. He must have looked to that paper as the means by which an object was to be accomplished, and that object the distribution of his estate after his death. Unless he intended this, the paper is not his will, whatever he may have called it. If he did so intend, it is his will, whatever he may have called it. The intention is the controlling principle in such cases. The courts will not force a man into the performance of a testamentary act against his deliberate intentions.

Applying these principles to the case before us, the result is a matter of no serious difficulty. The papers offered for probate in this case, consist, 1st, of a letter written by James J. McBride, the decedent, to his brother, John J. McBride, dated May 20th, 1872. This letter is signed only with the initial letter J. It was mailed at Brownsburg, Rockbridge county, Va., and was directed to Palestine, Anderson county, Texas. The person to whom it was addressed did not reside in Palestine, but in Galveston, Texas. It seems that the writer did not know where his brother resided. It is supposed that he directed the letter to Palestine because he knew that John J. McBride owned property in that place.

The other paper offered for probate is the draft of a *will, prepared in due form by an attorney, with a regular attestation clause for witnesses, but never executed by the decedent. It is not pretended that this paper is a valid testamentary act. It is probably offered in connection with and as explanatory of the letter, and as showing that the dispositions of the property, as expressed in the letter, are identical with those in a paper carefully prepared by counsel, by the instructions of the decedent. The main and the only reliance of the appellant's counsel is upon the letter already mentioned. The first part of this letter is upon a matter of business having no connection with the subject of controversy. The writer then gives a somewhat detailed account of his domestic troubles, his want of confidence in his wife, his thorough conviction of her infidelity, the

negotiations between them for a separation and divorce, the settlement to be made upon her, and his suspicions that she was attempting to defraud him in this settlement. He also states the birth of his wife's child in the month of December previous, his belief that the child was not his, and his fixed purpose that it should never inherit any part of his estate. He then states: "For fear of the child coming in for my property, I have made my will, leaving my property to be equally divided between John J. McBride, Zach'y McChesney, Jackson and Amy McBride (each one-fourth), and leave yourself and Capt. D. P. Curry my executors." Further on he says: "It is not such a will as I expect to make, but do it at present to cut out the child in case I should die without making any other arrangements."

At the time this letter was written, the draft of the will already mentioned had been prepared and was in the possession of the attorney who had written it. The reference made in the letter was doubtless to this draft, *as there is no evidence showing or tending to show the existence of any other testamentary paper executed by the decedent. As already stated, the letter is dated 20 May 1872: the decedent was thrown from his horse on the 28th of May, and died on the 30th. The draft of the will was prepared about two months before; was handed to him by the attorney, and then returned to the latter, with the remark that he would execute it; but no day was appointed for the purpose. It was again shown to the decedent some eight or ten days before his death, and, as would seem, about the time the letter was written. He said he would meet the attorney in a few days, and execute the paper; and he named the attesting witnesses; but he fixed no day, nor did he even indicate the time for the execution of the paper. He never expressed, says the witness, any doubt or vacillation as to his purpose. That he was fully aware of the importance of immediate action, there cannot be a question. He was frequently told by his attorney that it was very important for him to attend to the matter; that he had his purposes to carry out, and they could not be effected without the execution of the instrument. During the two months immediately preceding his death, the decedent was in good health, in possession of his faculties, mental and physical, with ample leisure and the fullest opportunity for signing the paper. He is represented by all the witnesses as a man of decided character, decisive in his purposes, and prompt in their execution.

Why, then, did he not attach his signature to the instrument; why did he postpone it from day to day, and even for months? Who, looking to this record, can comprehend his motives? It may have been that spirit of procrastination and delay in regard to the execution of last wills and testaments which so often *springs from youth and health and the confidence in a long life. It may have been that he was

not fully satisfied of the illegitimacy of the child, that he still had doubts and hopes upon that subject, and was therefore reluctant to take the final step of disinheriting it. Supposing that his purposes on this point were fixed, it may be that still he was not satisfied with the dispositions he had made, that there were other objects of his bounty having equal claims upon him who were not provided for in this draft of his will. With the lights before us, how are we to say which of these theories is correct, or whether either is correct. In his letter he is careful to say, it is not such a will as he expected to make. He says it more than once, and that it was only done to exclude the child in case he should die without making other arrangements.

What were those other arrangements? We have no means of determining. Whatever they may have been, it is very certain that the dispositions of his estate, as made in the draft and mentioned in the letter, were not satisfactory to the decedent. They were not such as he desired or expected finally to make; they were to be merely temporary. But, temporary as they were, as anxious as he was to cut off the child, he still hesitated, and at last failed to sign the paper by which the persons therein named were to take his entire estate to the exclusion of all others. His unwillingness that they should so take may have been the cause of this otherwise inexplicable delay. He no doubt thought that he had ample time to make a will such as would carry out his final intentions with reference to his property. With this positive knowledge that he declined, or at least failed, so long, without any satisfactory reason suggested, to execute the draft of the will, how can we consistently set
486 up a *mere letter as a testamentary act, identical in its provisions with the unexecuted draft. If he was unwilling to sign the draft prepared for him, could he have ever intended, or even imagined, that the letter would be used to establish his final disposition of his property? A letter not testamentary in form, written with no testamentary intent, and containing upon its face the strongest evidence that the dispositions now claimed were not satisfactory, and were not such as he designed finally to make.

In striking confirmation of the view that this paper was never intended as a will, was never designed to operate in any form, is the direction given by the writer to his brother to burn the letter. The learned counsel for the petitioners says that this direction applies only to the domestic portion of the letter, and not to its testamentary purposes. But the letter is all domestic; it is a narrative of domestic matters, written apparently in answer to inquiries made by the brother residing in Texas; and the testamentary dispositions, if they may be so termed, are so blended with the story of his domestic troubles that the destruction of so much of the letter as relates to the latter necessarily involves the destruction of the entire paper.

It is very true that when a will is once properly executed, a mere direction by the testator to destroy it, and a belief on his part that it has been in fact destroyed, will not operate as a revocation. The direction must be followed by a substantive act of destruction. But when an attempt is made to establish a mere letter as a testamentary act, a request of the writer to destroy the letter leads irresistibly to the conclusion, his purpose was that that paper at least should not be his will. To treat it as
487 such because *the writer has mentioned his views and purposes with regard to his estate, is palpably to violate his intentions, and to make that effectual which he intended should have no effect whatever.

It is impossible to foresee the mischiefs that will result, if a doctrine of this sort is established as the law of the land. The mischief of converting private letters into wills—of clothing loose and unguarded expressions with the solemnities of testamentary acts—is too obvious to require comment or discussion.

Looking at the letter in this aspect alone, it lacks one of the main essentials of a testamentary act.

In determining whether this letter constitutes a valid testamentary act, there is one other view which ought not to be omitted. It has been held in England that a will is valid if signed with the initials of the testator's name, or even his mark without any signature. It must be borne in mind, however, that under the English statute every will, even though written wholly by the testator, must be attested by witnesses. When, therefore, in England, an initial is used only, the attestation of the witnesses very clearly indicates that the testator designed that this form of signature should be a signing. Under our statute, an autograph will is valid without witnesses. Whether we can recognize an initial as sufficient, to the same extent as the English courts, may not be so clear. Upon that question we express no opinion. Its decision is not necessary for any of the purposes of this case.

Our statute, it will be observed, contains an important provision not found in the English statute. It requires that "the will shall be signed by the testator, or in his presence and by his direction, in such manner as to make it manifest that the name is intended as a signature." In the con-
488 struction of this provision it *has been held that no will is sufficiently signed unless it appears affirmatively, from the position of the signature, or from some other internal evidence equally convincing, that the testator designed by the use of the signature to authenticate the instrument. *Waller v. Waller*, 1 Gratt. 454; *Ramsey et als. v. Ramsey's ex'or*, 13 Gratt. 664; *Roy et als., v. Roy's ex'or*, 16 Gratt. 418. It is true that these cases turned upon the question of the finality of the testamentary intent, the question being whether the paper was to be regarded as a final and concluded

act. The principle is the same, however, and is equally applicable in the present case. The signing must be such as upon the face and from the frame of the instrument appears to have been intended to give it authority. It is said that the design of our statute is probably the same in effect as that which the English statute requires when it says that it shall be signed at the foot or end thereof by the testator and be attested by witnesses. Under both statutes, the identity of the instrument is ascertained and its finality and authenticity established without resort to extrinsic evidence.

In the case before us, the letter is signed only with the initial of the writer's christian name. In the concluding part he says: "I don't know where to direct this letter, and don't like much to send it on uncertainties, and will not sign it; you know who it is from if you get it;" and then follows the letter J. The paper does not show where it was written or mailed; neither state, county nor post-office is given. So far from the signature being intended to give it authenticity, it is very apparent that this form of signing was adopted to conceal the name of the writer. His purpose was not to identify himself with the paper, but to prevent even a suspicion of his connection with it in any form. *And

no one, unacquainted with the history of the man and his family, could by possibility tell where or by whom the letter was written. The brother to whom it was addressed was expected to understand the allusion from his own independent knowledge of the writer and the transactions to which he refers. If the letter reached its destination, it would be immediately destroyed; if it did not, the name of the writer, and even his residence, would be unknown, and his narrative without interest to strangers. The conclusion is irresistible, that he did not intend this "initial" letter as a signing within the true intent and meaning of the statute.

Upon the whole we are of opinion there is no error in the decree, and that it must be affirmed.

Decree affirmed.

**490 *Ergenbright & als. v. Ammon's
Adm'r & als.**

September Term, 1875, Staunton.

Fiduciaries—Neglect—Liability.*—About 1849 M executed his bond to E for a debt he owed him, without security. E died in 1852, and A qualified as his administrator, and as guardian of his children. On the 1st of January 1853, M and K, as his surety,

***Fiduciaries—Neglect—Liability.**—See upon this subject. V. C. § 2976; 3 Minor's Inst. (2d Ed.) p. 580; Southall v. Taylor, 14 Gratt. 273; Chapman v. Shepherd, 24 Gratt. 377; McClure v. Johnson, 14 W. Va. 432. See particularly, as to the extent of the liability of fiduciaries, Douglass v. Stephenson, 75 Va. 747; Lovett v. Thomas, 81 Va. 245; Lacy v. Stamper *et als.*, 27 Gratt. 42; Sterling v. Wilkinson *et als.*, 83 Va. 791.

executed to A. guardian of the legatees of E, a paper, intended to be a bond, payable on demand for \$3000.00, for the debt of M to E. A settled his accounts as guardian, charging himself with this bond. He died in 1867 or 1868, when the bond went into the hands of his administrators, one of whom offered it to the wards, but they declined to receive it, when he brought suit upon it against M and K, recovered judgment, and issued execution in December 1869, which was unproductive. From the date of the bond to the end of the war M and K were in independent circumstances. At the end of the war M was very much injured, but still owned valuable land. K was injured by the war, but he was able to pay his debts until 1869, when his land was greatly injured by a flood. **Held:** The estate of A is liable to the wards for the debt.

This was a suit instituted in October 1870, in the County court of Rockingham, by Christina J. Ergenbright against the surviving administrator and heirs of Jacob Ammon, deceased, to have a settlement of the accounts of said Jacob Ammon, as guardian of herself and her three brothers and sister, and that his lands might be subjected, if necessary, to pay what might be found due to them. The cause was referred to a commissioner to take the accounts; and the only question was as to a single bill or note executed to the guardian by Henry Miller and Joseph H. Kite. The County court held that Ammon's estate was not
491 liable *for that debt; and upon appeal to the Circuit court of the county the decree of the County court was affirmed. Thereupon, Christina J. Ergenbright and her brothers and sister applied to a judge of this court for an appeal; which was allowed. The case is fully stated by Judge Moncure, in his opinion.

Berlin and Harnsburger, for the appellants.

Woodson and Compton, for the appellees.

Moncure, P. delivered the opinion of the court.

The controversy in this case is about a bond or note in these words:

"On demand we promise and oblige ourselves, heirs, &c., to pay Jacob Ammon, guardian for legatees of Jacob B. Argenbright, the sum of nine hundred and thirty-six dollars and sixty-three cents for value received, as witness my hand this 1st January 1853.

Henry Miller, [Seal.]
Jas. H. Kite, [Seal.]"

The controversy is between the wards, or late wards, of said Jacob Ammon, five in number, to wit: Christina J. Ergenbright, alias Argenbright, and others, children, described in said bond or note as "legatees of Jacob B. Argenbright," and the said guardian's representatives, he being dead; and the question is, whether the loss of the money due upon the bond or note should fall on the said wards, or on the estate or representative of the said guardian; the debtors in said bond or note having become insolvent, without having paid the same.

The commissioner by his report charged the guardian with the debt; but made 492 an alternative statement *charging each of the five wards with one-fifth of the debt. The court below, on the 24th day of January 1873, being "of opinion that the estate of Jacob Ammon ought not to be held responsible for the debt due from Henry Miller and Joseph H. Kite to said Ammon as guardian" aforesaid; "neither the said Jacob Ammon in his lifetime, or his administrators, having been guilty of such negligence or mala fides in regard to said debt as to justify charging said estate of Jacob Ammon therewith;" confirmed the said alternative statements, and decreed accordingly. From that decree this appeal was applied for and obtained.

In the petition for the appeal three errors are assigned:

"1st. Because the other statement of commissioner A. M. Newman, which charges said Jacob Ammon's estate with the Miller and Kite debt of \$936.65, should have been confirmed, and not the said alternate statement, which was confirmed.

2nd. Because, had suit been instituted within a reasonable time, the said Miller and Kite debt might have been secured and made; and that by reason of gross negligence on the part of said guardian and his personal representatives, said debt has been lost.

3rd. Because, before any suit was instituted, said note of Miller and Kite was barred by the statute of limitations."

The third assignment of error is immaterial, in the view we propose to take of the case, and no further notice will therefore be taken of it.

Three witnesses were examined in the case. Two of them in behalf of the representatives of the guardian, and one in behalf of the wards. First, Henry Miller, the principal debtor, was examined in behalf of the guardian's representatives. He

493 testified *that he gave his bond to Jacob Ergenbright three or four years before his death for a lot of hogs, gave no security in the bond, and was requested to give none. After the death of Mr. Ergenbright, this bond came into the hands of Jacob Ammon, as the guardian of said Ergenbright's children. Witness then took up the bond he had executed to Jacob Ergenbright, and executed the bond or note which is the subject of controversy in this suit to Jacob Ammon as guardian, with Joseph H. Kite as security. At the date of the bond or note, on the 1st of January 1853, and up to 1861, witness had property over and above what he owed. Lost during the war, by the sale of land for Confederate money, in negroes, horses, crops, debts, &c., not less than from \$22,000 to \$25,000. Thought his property, at the time he gave his testimony, would not meet his debts. His inability to pay his debts was the result of losses sustained during the war. Thought his surety, Joseph H. Kite, was very good. He owned a good deal of prop-

erty, but lost the greater portion by fire and the flood of September 1870.

On cross-examination, the witness said that if the guardian had instituted suit and obtained judgment previous to the war, the debt could have been secured. If he or his personal representative had instituted suit, and obtained judgment since the war, and previous to September 1870, witness thought the debt would have been secured. In October, or November of that year, Kite's property was sold under execution, and produced some \$600 or \$700. Y. C. Ammon, one of the representatives of Jacob Ammon, called on witness during the war, in 1862 or 1863, witness thought, before he lost his property, and said that he, Y. C. Ammon, had gotten in his hands, after the death of his father, the bond witness owed 494 Jacob Ergenbright's *heirs, and stated that he, Y. C. Ammon, wanted a portion of the money to pay to some of the heirs. Witness promised to pay him a portion at some future time, and remarked, if he had doubts as to the debt, witness would give him additional security; but he seemed to be satisfied with the witness and Kite.

2nd. Joseph A. Hammon, sheriff, or deputy sheriff of Rockingham county, was examined in behalf of the wards. He testified that he had an execution in the name of John Argabright's adm'r or v. Henry Miller and Joseph H. Kite, for \$670.80 and interest and costs, and made on said execution \$715.07, at a sale of property levied on October 28, 1869. His acquaintance with their pecuniary condition commenced in 1867; he collected all the executions he had against said Kite up to the present one; had several against Miller, but could make nothing out of him from his personal estate; considered Kite good, but Miller insolvent.

3d. Dr. S. P. H. Miller was examined in behalf of the guardian's representatives: testified that he had been acquainted with the pecuniary condition of Miller and Kite since 1857 or 1858: looked upon them at that time, and up to the disasters of the war as solvent: at the time of giving his testimony he did not think either of them solvent: thought the prime cause of their insolvency was their losses during the war. They owed debts previous to the war; during the war they made nothing, and their debts accumulated by interest. This accumulation of interest, and the loss of slaves, &c., by Henry Miller, were the causes of his insolvency. The same causes apply to Kite; and, in addition, he lost heavily by the flood. Witness considered that a judgment obtained against these parties, at November court 1869, for about \$1,000, could have been made of *Mr. Kite. His real 495 estate, in 1869, was *worth not less than \$16,000 to \$18,000. The damage to his real estate by the flood witness supposed was \$8,000. Miller, in 1869, owned two hundred and thirty-five acres of land, assessed at \$35 per acre. Witness thought that a debt of \$1,000, if judgment had been obtained in 1867 or 1868, could not have been made of Henry Miller.

In the answer of John B. Ammon, surviving administrator of Jacob Ammon, he says that after the war, by the results of which the aforesaid debtors, Miller and Kite, were reduced in their financial condition, and when it was doubtful whether or not they would be able to pay their debts, he "offered the above mentioned bond to the wards of Jacob Ammon, but they declined to receive it, and thereupon this respondent brought suit upon it, obtained a judgment, upon which execution issued, and was returned 'no property,' as will appear from exhibit 2, herewith filed." That exhibit is a part of the record, and is a copy of said execution and return, the execution bearing date the 3d day of December 1869.

On whom should the loss of this debt of Miller and Kite fall? on the wards or on the guardian? The court below thought, and so decreed, on the wards. Whether that decree is correct or erroneous is the question we now have to solve.

We are of opinion that the decree is erroneous, and that the loss ought to fall not on the wards, but on the said guardian or his estate.

We think it extremely doubtful from the record, to say the least, whether the debt of Miller and Kite ever was regarded or intended by the guardian as a debt due to his wards. The debt of Miller, which was the consideration of the debt of Miller and Kite, was due to the father of the wards, Jacob Ergenbright, of whom
 496 *it seems Jacob Ammon was administrator; and although the latter took the bond of Miller and Kite for the amount, payable to himself as "guardian for the legatees of Jacob Argenbright," yet this may have been a mere descriptio personae, and he may have given his wards credit for the amount and held the bonds as his own property. Whether this was his original intention or not, it seems that afterwards he so treated the matter; and that neither he nor his representatives ever made any return, or rendered any account, of the debt as part of the estate of his wards until 1869, after the debt had become worthless, when John B. Ammon, surviving administrator of the guardian, offered the bond to the wards as aforesaid. It appears that the accounts of the guardian and his administrator were frequently, if not regularly, settled; though some of them seem to have been destroyed by the public enemy during the war—some of them however were preserved—and it does not appear that in any account settled before the institution of this suit, the guardian or his representatives claimed any credit for this debt, or referred to it in any way; on the contrary, in all the accounts then settled of which we have any copy or trace in the record, that debt is included in the amount charged to the guardian and credited to the wards; thus forming a part of the balance reported as due to the wards respectively. Now if this be the true state of the case, nothing can

be plainer than that it was too late, in 1869 for the first time, for the guardian or his representative to claim credit for this debt, in the settlement of his account with his wards; and that it must remain charged to him, as it had long previously been by himself.

But if it be considered as a debt still due to the wards, and as never having been
 497 intended by the *guardian to be charged to himself; has it not been lost by the default of the guardian and his representatives, and are not he and they responsible for the loss of it, and chargeable with the amount of it in the settlement of the guardianship account?

We are of opinion that this question must be answered in the affirmative. When Jacob Ammon died, in 1867 or '8, he ceased of course to be guardian of the Ergenbrights, and the estate of his wards should then, at least have been delivered to them if of age; and if not, to another and succeeding guardian; and if none, should have been brought into court and invested under the order of the court for them. Instead of that, the bond or note never was brought into court, nor reported to the commissioner as part of the estate of the wards, and never was offered to them, nor were they ever informed of it, so far as the record shows, until 1869; but remained in the possession of the guardian and his representatives, without any suit being brought upon it until that time. Whereas, in the meantime, both the debtors, who were perfectly solvent when the debt was created, became perfectly insolvent—the principal, Miller, having been ruined by the war, and the surety, Kite, having been ruined by the war and by a flood, which happened several years thereafter. If suit had been brought for the debt at any time before 1869 it might have been made. Such suit ought to have been brought by the guardian or his representatives long before that time, supposing the debt to be still due to the wards. Certainly it was the duty of Jacob Ammon's administrator to put the debt in suit; if not sooner, at least when Miller, the principal debtor, had become insolvent by the results of the war.

There was then but one solvent debtor
 498 remaining, and he was a surety, *and the administrator certainly had no right to hold up the debt longer at the risk of the wards. Though Kite was still solvent, he might become otherwise, as he afterwards did, before judgment was recovered for the debt in 1869. It was a time of doubt and danger, when fiduciaries had no right to delay the collection of debts, and certainly no right to delay the institution of suits therefor, whereby security might be obtained by judgment and execution. Several, if not all, of the wards had become of age before 1869, and if the debt was considered as still due to them, they ought to have been informed of the fact, and their consent ought to have been obtained to the long indulgence which was given.

We are therefore of opinion that the de-

cree of the court below ought to be reversed; that the estate of Jacob Ammon ought to be held responsible for the said debt; that the report of commissioner Newman, charging the said estate with the said debt, and not his alternate statement charging each of the said wards with one-fifth of the said debt, ought to be confirmed, and that the cause ought to be remanded to the court below for further proceedings to be had therein in conformity with the foregoing opinion. And that liberty ought to be reserved to the representatives of said Jacob Ammon to apply, by further proceedings in this suit, for any relief to which they may be entitled against the administrators of said Jacob Ammon, or either of them, or the estates of them, or either of them, on account of the default of them, or either of them, in regard to the collection of the said debt.

The decree was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript *of the record of the order aforesaid, and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the estate of Jacob Ammon ought to be held responsible to the appellants for the debt due by Henry Miller and Jos. H. Kite, in the proceedings in this case mentioned; that the report of commissioner Newman, charging the said estate with the said debt, and not his alternate statement, charging each of the appellants with one-fifth of the said debt, ought to be confirmed, and that the said decree appealed from is erroneous, and ought to be reversed: therefore it is decreed and ordered that the said decree be reversed and annulled, and that the appellants recover of the appellee, John B. Ammon, surviving administrator of Jacob Ammon, deceased, out of the estate of the said Jacob, which is now in, or may hereafter come to, the hands of the said administrator to be administered, the costs by the said appellants expended in the prosecution of their appeal aforesaid here, for which said costs the whole estate of said Jacob, of whatever it may consist, and in whosoever hands it may be, shall be liable.

And it is further decreed and ordered that this cause be remanded to the court below for further proceedings to be had therein in conformity with the foregoing opinion; and that liberty be reversed to the representatives of said Jacob Ammon to apply by further proceedings in this suit in the said court for any relief to which they may be entitled against Yelverton C. Ammon and John B. Ammon, administrators of said Jacob Ammon, or either of them, or the estates of them, or either of them, on account of the default of them, or either of them, in regard to the collection of the said debt; which is ordered to be certified to the said Circuit court of Rockingham county.

Decree reversed.

500 *Frazier v. Frazier & als.

September Term, 1875, Staunton.

Partition—By Judicial Proceedings—Sale.—*F and R owned one-half of two tracts of land, one in Bath county, called the Bath Alum, and the other in Rockbridge, called the Rockbridge Alum. The other half of these tracts was owned by J. an infant aged 17 years, subject to his mother's dower; and she had married P, who became the guardian of J. F sold the Bath Alum tract with some furniture to B, for \$30,000 Confederate 8 per cent. bonds, subject to the ratification of the court. F & R then brought their suit in equity to have the sale ratified, alleging that the property could not be conveniently divided, and that it was for the interest of all parties, including the infant, that the property should be sold. P & wife and J answered, concurring in the statements of the bill, and in the prayer that the sale to B should be confirmed. Three witnesses concur in sustaining the statements of the bill, and that the price is a full price for the land. And the court confirms the sale. When J comes of age he files a bill to set aside the sale. **HOLD:**

1. **Same—Same—Conclusiveness of.**—The suit of F & R was a suit for partition, and the proceedings having been regular throughout, the fact that the sale was made for Confederate bonds, which have since become worthless, is no ground for setting aside the sale.
2. **Same—Mode of Making Divisions.**—The fact that the parties owned another tract of land in another county, and that it did not appear that partition in kind of the two tracts could not be made, is not ground for setting aside the sale: the parties not wishing to sell this other tract, which was productive.
3. **Same—Valuation.**—The fact that the witness spoke of the value of the land, not referring to the furniture, which was not worth more \$2,000 or \$2,500 in Confederate money, but estimating the price to be given as a very full price for the land, is not grounds for setting aside the sale: especially as this objection was not made until the court had decreed to dismiss the bill, when it was set up by an amended bill.

501 *This was a suit in equity in the Circuit court of Bath county, brought in 1868 by James A. Frazier against William Frazier, Joseph Baxter and others, to set aside a sale of land made in 1863, when he was an infant. There was a decree in the cause made on the 23d of April 1874, by which the bill and amended bill of the plaintiff was dismissed; and he thereupon obtained an appeal to this court. The case is stated in the opinion of the court delivered by Judge Christian.

Wm. J. Robertson, Jno. Letcher and H. B. Michie, for the appellant.

***Partition—By Judicial Proceedings—Sale.**—For the principle that a decree of partition of a court of competent jurisdiction is binding and cannot be attacked collaterally except on the ground of fraud or surprise, see *Wilson v. Smith*, 22 Gratt. 493; *Fox v. Cottage, etc.*, Ass'n, 81 Va. 677; *Marrow v. Brinkley*, 85 Va. 55. See also, V. C. § 2564, as to partition by decree of court.

G. M. Cochran, for the appellees.

Christian, J. delivered the opinion of the court.

The bill in this case is filed by the appellant, James A. Frazier, under the seventh section of chapter 178, Code of 1860, which secures to an infant the right within six months after he arrives at the age of twenty-one years, to show cause against a decree directing a sale of his land during his minority.

The object of the bill is to impeach and set aside a decree of the Circuit court of Bath county, pronounced on the 15th day of May 1863, in the suit of John S. Randolph and Wm. Frazier v. Porter & wife & others. The record in that case discloses the following facts: Randolph and William Frazier and John W. Frazier were joint-tenants of two tracts of land, one lying in Bath county, known as the Bath Alum Springs, and the other lying in Rockbridge county, known as the Rockbridge Alum Springs. In both these tracts Randolph and William Frazier owned one undivided moiety, and John

502 W. Frazier the other. *During this joint-tenancy John W. Frazier died, leaving as his sole heir at law the appellant, James A. Frazier, who inherited from his father the two moieties in said tracts of land subject to the dower of his mother. Mrs. Frazier subsequently intermarried with Stephen A. Porter, who qualified as the guardian of her son, James A. Frazier.

In February 1863, Randolph and Frazier being desirous to have partition of the "Bath Alum" property, and satisfied that it could not be divided in kind, (Stephen A. Porter being of the same opinion,) a contract of sale was entered into between William Frazier, "acting for himself, his partner, Randolph, and for and on behalf of Stephen A. Porter, guardian of James A. Frazier," of the one part, and Joseph Baxter of the other part, by which contract it was agreed to sell to the said Joseph Baxter the property known as the "Bath Alum Springs," with the household and kitchen furniture, (excepting the furniture of two rooms,) for the sum of thirty thousand dollars in Confederate States 8 per cent. bonds.

This sale was made expressly upon condition that it was to be ratified by a decree of the Circuit court of Bath, upon proper proceedings to be had in that court. In the meantime Baxter was to deposit with R. H. Maury & Co., bankers, in the city of Richmond, Confederate bonds, bearing 8 per cent. interest, to the amount of \$30,000, to await the action of said Circuit court.

Accordingly on the day of 1863 a bill was filed by Randolph and Frazier in the Circuit court of Bath county, to which bill Stephen Porter and wife, James A. Frazier, the infant, Stephen Porter, guardian of James A. Frazier and Joseph Baxter, were made defendants.

503 *The bill set forth with much detail how the property had been acquired, for what purpose it had been used, and the joint interest of the owners therein. It

alleges the impracticability of a partition in kind, and the advantages to all interested in having a sale for partition. It sets forth as reasons for a sale the fact, that the property had been used as a watering place, which constituted its chief value; that the buildings were rapidly going to decay and ruin, being then used as a hospital for Confederate soldiers; that the enterprise of keeping the Bath Alum Springs had never been profitable; and that it could not again be used for that purpose without large expenditure of money in the way of repairs. With the bill is exhibited the contract of sale with Baxter, which the court is asked to ratify and confirm as a sale for a full and fair price, and one in every way advantageous to the parties interested.

The answer of Porter and wife admits that partition cannot be made in kind advantageously to the parties interested, and "that the best mode of disposing of said property would be a sale, and the disposition of the proceeds of sale, according to the rights of the parties; and that therefore they willingly concur in the sale made by the plaintiffs to their co-defendant Joseph Baxter, as stated in the plaintiff's bill, at the price of thirty thousand dollars; and respectfully ask that the said sale may be confirmed by a decree of the court, and the proceeds thereof legally disposed of."

The separate answer of Stephen A. Porter, as guardian of the appellant, James A. Frazier, is also filed, in which "he admits that the buildings of the 'Bath Alum' have become very much dilapidated and out of repair, so that it would take a large amount to put them in a proper state of repair.

504 He also admits the "said 'Bath Alum' could not be advantageously divided between the parties interested therein by metes and bounds; and that the interest of all parties concerned would be greatly promoted by a sale thereof, and more especially would his ward be greatly benefited by such a sale; and influenced by that consideration he most heartily concurred, and still concurs, in the sale made by William Frazier for himself and on behalf of other parties in interest to Joseph Baxter on 6th February 1863 * * * ; that said sale was for a full and very adequate price, and highly advantageous, so far as his ward is concerned;" and asks that the court may confirm said sale.

A guardian ad litem was appointed for the infant, and he also files his concurrence. The infant (the appellant) being over the age of fourteen years, (then being seventeen years of age,) his answer is also filed, in which he says: "The sale made of the 'Bath Alum' Springs is highly advantageous to the parties interested therein, and especially to the respondent, and that the consideration agreed to be paid by said Joseph Baxter is fully adequate; that he is therefore willing that the sale should be confirmed; but being under the age of twenty-one years he submits his interest to the protection of the court."

The depositions of three highly respect-

able witnesses, who were well acquainted with the property and its then present condition, were taken and returned to the court. They all agree in four most material facts: 1st, that the property is of such a character that it could not be divided in kind; 2d, that it was rapidly depreciating and going to ruin; 3d, that the price offered by Baxter was a full and adequate price; and 4th, that it was to the manifest interest of all parties

that the sale made to Baxter for thirty
505 *thousand dollars cash should be confirmed by the court.

On the 15th of May 1863, the cause coming on to be heard on the bill and answers, exhibits filed, and examination of witnesses, and the court being of opinion that the Bath Alum Springs property was altogether "incapable of division by metes and bounds, without great injury and sacrifice of the rights and interests of those entitled, that a sale for division is not only absolutely necessary, but that even if the subject were susceptible of division in kind, a sale of the subject would better promote the interests of the infant defendant, as well as the adults, than a specific allotment and division;" and being further of opinion that the sale to the defendant, Baxter, for thirty thousand dollars in Confederate 8 per cent. bonds is judicious, and for a full and adequate price," the said sale to Baxter was ratified and confirmed by the court.

After the close of the war, and after by its result Confederate bonds had become worthless, the infant defendant in the suit of Randolph & Frazier v. Porter &c., (James A. Frazier) having arrived at age filed his bill, in which he claimed the right to show cause against the decree in that suit above referred to, and impeached the decree upon various grounds. The cause came on to be heard upon the bill and answers and deposition of witnesses, and the Circuit court of Bath pronounced its decree, in which it was held that the case of Frazier & Randolph v. Stephen A. Porter et als., was a suit for partition under the one hundred and twenty-fourth chapter of the Code of Virginia (1860); that all the proceedings were regular; that it was satisfactorily proven by intelligent and disinterested witnesses, that the Bath Alum Springs

508 *property was incapable of division in kind; that the property was rapidly going to decay; that the interest of the plaintiff, then a minor, would be promoted by a sale, and the price agreed to be paid by the defendant, Joseph Baxter, was fair and adequate, and no reason now appearing for impeaching the decree confirming said sale rendered on the 15th day of May 1863, either on the ground of fraud, collusion or error, it is therefore adjudged, ordered and decreed that the plaintiff's bill (original and amended) be dismissed. It is from this decree that an appeal was allowed by this court.

The court is of opinion that there is no error in this decree of the said Circuit court.

The proceedings in the suit of Frazier &

Randolph v. Porter & others, were all regular and in strict conformity with the provisions of the third section of chapter 124, Code 1860.

Under the pleadings and evidence in that cause, prepared and conducted with unusual care, conforming in every respect to all the provisions of the statute, the Circuit court of Bath had full and unquestioned authority to decree a sale of the subject. It had the same authority to ratify and confirm a contract of sale which the adult parties had already entered into, upon condition of its subsequent ratification by the court.

The complaint of the appellant that the consideration was grossly inadequate because it was sold for Confederate money greatly depreciated, and the investment for him in Confederate bonds, and that he has thereby lost his inheritance without his assent, is one made in the light of subsequent events; and is not such cause shown against the decree as can now impeach or invalidate it. In Walker's ex'or v. Page &c., 21 Gratt. 636, this court held,

507 that "the right of an *infant to show cause against a decree which affects his interests after he arrives at age must be limited to this extent, to show cause existing at the rendition of the decree, and not such as arose afterwards. The question always must be, can any cause be shown why the decree at the time it was rendered was not a legal and binding decree?"

The argument now made, that the interests of the infant were not promoted, because the land was sold for a depreciated currency, and the investment made in Confederate bonds, which proved to be worthless, is, as was said in Walker's ex'or v. Page, "not based upon the evidence before the court at the time the decree was entered for a sale of the property, is not made in the light of the facts then existing and proved before the court, but upon facts existing subsequent to the decree, and in the light of events that happened afterwards. It is easy to show now, after the close of the war, after Confederate currency and Confederate securities have perished, that as subsequent events have transpired, the interest of the infant has not been promoted by a sale of his real estate. And if such considerations could govern the adjudications of this court, then every sale of real estate in which infants were interested, made under decrees of courts during the war, must be vacated and annulled. The conclusion this court announced, in the case above cited, after a most careful and deliberate consideration, was this: "If the court which pronounced the decree had jurisdiction of the subject and the parties; if the proceedings were regular and in accordance with the requirements of the law, and the decree is sustained and justified by the evidence there introduced, the infant, upon arriving at age, will not be allowed,

as against a bona fide purchaser, to
508 go out of the record to *show that, upon facts and events arising subsequent to the rendition of the decree, his inter-

ests were not promoted by a sale of his real estate; especially when these subsequent events were the results of civil and political revolutions, over which the parties and the court of chancery had no control, and could not possibly foresee." These principles, enunciated in the case of Walker's ex'or v. Page, have been repeatedly recognized and reaffirmed by this court.

But the case before us, in many of its aspects, is a case still stronger for affirmance than Walker & Page. That was a case of the sale of infant's land under a bill filed by the guardian. This is a case of partition, in which the adult parties were interested along with the infant, and their interests were the same as that of the infant. One of the plaintiffs, William Frazier, was a near relative of the infant, and had the same interest as the infant. The co-defendants were the mother, the step-father and guardian of the infant. All the parties, both plaintiffs and defendants, united in asking for a sale, and all united in insisting that the property could not be conveniently divided in kind. The proceeding was, as it properly ought to have been, under the provisions of the 124th chapter, Code 1860, and not under chapter 128. It was a suit for partition, and not a suit for the sale of infant's land by the guardian. Every requirement of the former statute was strictly complied with. It was conclusively shown both that partition of the entire subject could not be conveniently made, and that the interests of the parties entitled would be promoted by a sale. It is true that one of the parties entitled was an infant; but the third section of chapter 124 expressly provides, that such sale for partition may be made "notwithstanding any of the parties entitled may be an infant."

509 *The record shows that the suit of

Frazier & Randolph v. Porter & wife & others, was conducted with unusual care, not only observing all of the requirements under chapter 124, (Code 1860,) but, as far as possible, those of chapter 128, making the guardian of the infant a party, with his sworn answer approving the sale, the infant himself a party, with his answer, (he being seventeen years of age,) approving the sale, and appointing a guardian ad litem for the infant. All these answers concurred in asking for a sale, and admitting that the land could not conveniently be divided in kind. The evidence of respectable witnesses all concur in stating that a division thereof could not be made, and that the interest of all parties would be promoted by a ratification of the sale to Baxter; which all concurred in opinion was a full and adequate price. All this concurred in by the experienced and able judge who entered the decree, made it a case in which this court is constrained to conclude cannot now be impeached or invalidated.

But it is insisted by the learned counsel for the appellants, that the parties in the suit of Frazier & Randolph v. Porter & wife et als. were also tenants in common, and joint owners in the "Rockbridge Alum

Springs," as well as in the "Bath Alum," which last was the subject of the suit for partition, and that partition might have been made in kind if both of these tracts of land had been taken into account in the suit for partition. It is sufficient in answer to the objection, to note the fact, that these two properties are not only entirely separate, lying more than twenty miles apart, but are situated in different counties, one being in the county of Bath, and one in the county of Rockbridge. The latter was valuable and remunerative as "spring's property;" the other was never a successful enterprise; was occupied at the
510 *time the decree of sale was entered, as a hospital, liable to be destroyed on that account by raiding parties of the Federal army, and rapidly falling into ruin and decay. Reasons which applied with full force to sell the one piece of property, had no application to the other. The parties in interest could not be compelled to sacrifice their interest in the "Rockbridge Alum" property lying in a different county and a different jurisdiction, in order to make a sale of the "Bath Alum" property, which, by common consent, it was necessary to sell for partition.

The only remaining objection to the decree of the Circuit court of Augusta, in the case of Frazier & Randolph v. Porter & wife is, that the contract of sale made by the adult parties to Baxter, which was confirmed by the court, included certain personal property, being the furniture left at the Bath Alum Springs, and that the testimony of the witnesses was confined to the value of the real estate.

To this complaint, it is sufficient to say that this objection was not made in the original bill impeaching the decree, and was not then thought of as a ground of invalidating that decree until after the suit had progressed to a final decree: then an amended bill was filed for the first time urging this point. But the evidence taken under the amended bill shows that this old furniture was only worth some \$2,000 or \$2,500 in Confederate money, and could not have been a material element to change the estimate of value of the real property by the witnesses, who all agreed that the purchase at thirty thousand dollars was a very high price for the property.

Upon the whole case, we are of opinion that there is no error in the decree of the Circuit court of Bath, and that the same be affirmed.

Decree affirmed.

511 *Omohundro v. Henson & als.

September Term, 1875, Staunton.

I. Bonds—Assignments—Parties to Suit by Assignee.*

—An assignor of a bond secured by deed of trust

*Bonds—Assignments—Parties to Suit by Assignee.

—The rule laid down in the principal case, that where there has been an unconditional and entire assignment of a chose in action, the assignor is not a

upon land, the assignment being absolute, is not a necessary party in a suit by the assignee against the vendee of the obligor, to subject the land to satisfy the debt.

11. **Same—Same—Same.**—H and B, as his surety, execute their bond to M, executor, for land purchased of him by H, and which H afterwards conveys to O. M recovers judgment upon the bond against H and B, and B pays the debt, and M assigns it to him without recourse. On a bill by B against O and H to subject the land to satisfy the debt. **Held:**

1. **Same—Same—Same.**—Whether B claims as assignee, or as a security who has paid the debt, M is not a necessary party.

2. **Same—Same—Subrogation.**—B is entitled to have the land sold to pay his debt without proceeding first against H; especially as O did not ask for such a decree in the court below.

3. **Equities between Vendor and Vendee.**—O may, if he chooses, make an issue in this case between himself and H, and have the equities between them settled.

By deed bearing date the 13th day of December 1860, William W. Minor, as executor of Dabney Minor, deceased, conveyed to Bartlett A. Henson a tract of land lying on Mechunck creek, in Albemarle county; and by deed of the same date, Henson conveyed the same land to S. V. Southall, in trust to secure the payment of four bonds of the same date as the deed, and each for \$1,415.10, given by Henson to Minor as executor, for the purchase money of the land. These deeds were duly admitted to record in the clerk's office of Albemarle county on the 7th of January 1861.

512 *Bartlett S. Henson paid off three of the bonds to Minor, the executor; and then by deed bearing date the 1st of September 1863, and duly admitted to record, he conveyed the land he had purchased from Minor to Richard F. Omohundro.

In 1866 it would seem, though the date is not given, Minor brought suit in the Circuit court of Louisa county, upon the unpaid bond against Bartlett A. Henson, Benjamin Henson and two others, who were obligors therein, and recovered a judgment. The interest on this judgment was paid from time to time, from September 1867 to June 1870, by Benjamin Henson, and he, at this last date, paid the whole amount then due to Minor, the plaintiff; and, by an endorsement on the receipt, Minor assigned the judgment to Benjamin Henson without recourse.

In May 1871 Benjamin Henson instituted a suit in equity in the County court of Albemarle against Bartlett A. Henson and the other obligors in the bond to Minor,

necessary party to the suit by the assignee to enforce collection of the chose, is followed in the decision of *Tatum v. Ballard*, 94 Va. 375, where the principal case is cited with approval. The principal case is also cited but distinguished in *Lynchburg Iron Co. v. Taylor*, 79 Va. 674. See also, *Barton's Ch. Pr.*, Vol. 1 (2d Ed.) page 171; *James R. & K. Co. v. Littlejohn*, 18 Gratt. 53; *Scott v. Ludington*, 14 W. Va. 393; *Vance v. Evans*, 11 W. Va. 342.

Richard F. Omohundro, and Southall, the trustee, in the deed to secure the debt; and in his bill he set out the foregoing facts, and averred that Bartlett A. Henson was the principal on said bond, and the plaintiff and the other obligors were his sureties; and that Omohundro took the land with full knowledge of the deed of trust to secure the debt. He claims that having paid the money he was entitled to be substituted to the rights of Minor under the said deed of trust; and he prays that the land may be sold, and the money he had paid might be repaid to him, and for general relief.

Omohundro answered the bill. He admitted as true the facts, so far as they were sustained by record evidence; but as to all other facts alleged, especially payments said to be made by the plaintiff to Minor, he called for strict proof.

513 *The case was referred to a commissioner to state an account of the payments made by the plaintiff, and the report was several times recommitted. The last report stated the amount paid by Benjamin Henson, charging interest on the payments, from the date of payment, at \$2,257.20, as of January 1st, 1872. He made a special statement omitting the interest, showing the amount paid to be \$2,143.38.

Omohundro excepted to the report, 1st, because it was made prematurely; Wm. W. Minor, the executor of Dabney Minor, deceased, not having been made a party in the suit; and 2d, to the fixing the amount due at \$2,257.29, because it results from compounding the interest; which was erroneous.

After filing the exceptions to the report, Omohundro was, on the 10th of October 1872, allowed to demur to the bill, on the ground that Minor was a necessary party. And on the same day the cause came on to be heard, when the court overruled the demurrer, and adopting the special statement of the commissioner, made a decree, that unless Omohundro, within six months from the date of the decree, should pay to the plaintiff, Henson, the sum of \$2,143.38, with interest on \$1,415.10, part thereof from the 1st of January 1872 till paid, and the costs of this suit, a commissioner named should proceed to sell the land in the bill mentioned, in the mode and on terms stated in the decree. After the decree was made the cause was removed to the Circuit court; and then Omohundro applied to this court for an appeal; which was allowed.

Wm. J. Robertson, for the appellant.

Watson & Perkins, for the appellee.

514 *Anderson, J. delivered the opinion of the court.

The court is of opinion that William W. Minor, executor of Dabney Minor, deceased, had no interest in the subject of the suit, and was not a necessary party. The deed of trust was executed to secure the payment to the said Minor, as executor as aforesaid, of four bonds, which had been given to him by Bartlett A. Henson and his sureties,

Benjamin Henson, the appellee, and others, for the purchase money of a tract of land belonging to the estate of Dabney Minor, deceased, which had been sold and conveyed by deed of record by said Minor, executor as aforesaid, to the said Bartlett A. Henson, and which, subsequently, the said Bartlett sold and conveyed to the appellant. Three of the bonds were fully paid by the principal himself to the said Minor. Upon the fourth and last bond suit had been brought, and judgment obtained by the said Minor, which was fully satisfied by Benjamin Henson, the appellee, one of Bartlett A. Henson's securities, who brought this bill in equity, to enforce by right of subrogation, Minor's lien upon the land.

What interest could Minor have in the suit? He was fully satisfied of the debt secured by the deed of trust, and had no further interest in the subject. And the security of the debtor was entitled for so much of it as had been paid by him, to be subrogated to the securities and remedies of Minor, the creditor, upon well established principles of equity.

If the appellee was seeking to enforce this lien as the assignee of Minor, upon the authority of *Littlejohn v. Ferguson*, 18 Gratt. 53, 81, 82 and 83, Minor would not have been a necessary party. Minor did assign to him without recourse. But it is insisted by the learned counsel for the

515 appellant, that the assignment was nugatory, *because Minor having received payment, the debt due him was discharged, and he had no interest in the bond and security to assign. Whether the assignment was nugatory or not it is not material to decide. But the argument that it is, is based on the concession that Minor had no interest in the subject of the suit. Why then should he be made a party to a suit in which he had no interest? There is less reason for making him a party to a bill by a security who paid the debt, to substitute him to his rights and remedies, than in a bill by his assignee to enforce the lien; because, in the latter case, the security does not rely on the ground of a transfer of his right by the act of Minor.

And it is not necessary that he should be made a party for the protection of the appellant, the subsequent purchaser of the land, because, when the appellee paid the debt, his payment was a full satisfaction and discharge of the obligation of his principal and his securities to Minor, and is a legal bar to any claim which might be made by him to the land. Minor has no claim that he could set up against it. His bond is filed in the clerk's office with the record of the suit, and is merged in the judgment, which the return upon the execution shows is satisfied. After the bond was discharged he has no claim against the land which he could ever assert. It is not then necessary for the appellant's protection that Minor should be a party to the suit; and there is no error in the judgment of the court overruling the demurrer for this cause.

The court is further of opinion that there

is no error for which the decree should be reversed for not decreeing primarily against Bartlett A. Henson personally. Omohundro asked for no decree against him. He, as

516 grantee of Henson, took the land as it was in *the hands of Henson, subject to the lien. And as it was competent for Minor to have proceeded primarily against the land in the hands of Henson, to subject it to the payment of the debt, so it was competent for him to have proceeded against it primarily in the hands of Omohundro, the purchaser from Henson, with notice of the lien; and if Omohundro had paid Henson, he had recourse against him on his covenants. But the court having all the parties before it, to the end that complete justice might be done, might have decreed over in favor of Omohundro against Henson, his grantor, if, upon an issue being made between them, it appeared that Omohundro was entitled to recourse against him. But no such demand was made by Omohundro, and no such issue was made between him and Henson. If it had been, it was a matter of interest only between the appellant and his grantor, which did not concern the appellee. He was entitled to stand in the shoes of the creditor, whose debt he had paid, who had an unqualified right to recourse primarily against the land. And if a decree over against his grantors can be of any avail to the appellant, the cause is still open for him to ask for such decree, which might raise an issue between him and his grantor, if he should have any equities against it, which may still be determined by the court below in this cause; but it is not right that the appellee should be postponed to give the appellant further time to litigate such matter with his grantor,—if he should desire to do so.

The court sees no error, and is of opinion to affirm the decree of the Circuit court with costs and damages.

Decree affirmed.

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*Zirkle v. McCue & al.

September Term, 1875, Staunton.

I. Partition—Right of Guardian to Maintain Suit For.*

—A guardian of infants may maintain a suit for partition of real estate held jointly by the infants and other adult parties.

II. Same—Judicial Sales—When Warranted—Infants.†

—In a suit for partition, to authorize the sale under the statute of lands in which infants have

***Partition—Right of Guardian to Maintain Suit For.—**

The right of a guardian to bring a suit for the sale of his ward's land as allowed in the principal case is cited with approval in *Redd v. Jones*, 30 Gratt. 133; and that he is the proper person to bring such a suit is well settled. See 1 Minor's Inst. 470; Barton's Ch. Pr. (2d Ed.) 587.

†Judicial Sales—Validity—Facts Warranting—Infants.—The authority of the courts thus to sell the estate of persons under a disability is a purely statutory and not an inherent power. See *Faulkner v. Davis*, 18 Gratt. 663; *Hoback v. Miller*, 44 W. Va. 635,

an interest, the case must be one in which partition cannot be conveniently made, and it must appear that the interests of the parties will be promoted by a sale of the property.

III. Judicial Sales—Validity—As Evidenced by Record.—It is not necessary that the facts necessary to warrant a decree for sale should appear from the report of commissioners or by the depositions of witnesses. It is sufficient if the facts appearing in the record reasonably warrant the decree of sale: And this especially when the proceeding is to defeat the title of an innocent purchaser.

IV. Facts.—M died in 1862, leaving E his widow, and ten children, two infants, the children of E, and eight adults. He left a tract of 780 acres of land, slaves, &c. In March 1863 E filed her bill, in which she asked to have her interests and those of her children (whose guardian she was) in the estate ascertained and laid off: To have her dower in kind or commuted in money; and that the interests of her children might also be ascertained and placed under her control as their guardian, and for a settlement of the rights of all the parties. The administrator and children of M were made defendants, and the case regularly proceeded in.

Held:

1. **Suit for Partition—By Guardian.**—It is a suit for partition, and E might properly bring it.

2. **Same—Sale—Conclusiveness of.**—If in the progress of the cause, it appears to be a case under the statute for a sale of part of the land, and a sale was made, which all the adult parties and E, as guardian of her children, approved, and it was confirmed and perfected by payment of the purchase money and a conveyance, it cannot afterwards be questioned by the infants as unauthorized in that suit.

518 *3. Same—Same—Rights of Purchaser.—Even if it is doubtful whether E could maintain such a suit, yet it having been brought, and the sale having been so made and perfected, the purchaser will not be disturbed in his purchase at the suit of the infants.

V. Decree—Binding on Infants.—It is well settled in Virginia that an infant, as a general rule, is as much bound by a decree against him as a person of full age. He is not permitted to impeach such

decree, except on the same grounds as a person of full age may impeach it—such as fraud, collusion or error.

VI. Judicial Sales—Rights of Infants.—But in suits for partition, whenever the court sells and conveys as infant's inheritance, he is entitled to an opportunity of making a defence at any time within six months after he arrives at full age.

VII. Same—Rights of Innocent Purchaser.—The errors for which a judicial sale of an infant's land may be set aside must be substantial errors. A fair purchaser is not bound to go through all the proceedings, and to look into all the circumstances and see that the decree is right in all its parts. He has the right to presume the court has taken the necessary steps to investigate the rights of parties, and upon such investigation has properly decreed a sale. He will not be affected by any imperfection in the frame of the bill if it contain sufficient matter to show the propriety of the decree. The propriety of the sale must be tested, and its validity determined by the circumstances then existing, and the surrounding circumstances. The only matter for enquiry is, Did the court have jurisdiction of the subject matter? Were the proper parties before it? Were the proceedings regular? Was the sale proper under all the circumstances then surrounding the parties? If so, the title of an innocent purchaser is not to be disturbed, because, from subsequent events, the sale has proved unfortunate for the infants.

In March 1863 Ellen S. McCue instituted a suit in equity in the Circuit court of Augusta county, and in her bill she set out that she was the widow of John McCue, deceased, who departed this life in April 1862, seized and possessed of a tract of land of seven hundred and eighty-nine acres, estimated to be worth \$90 per acre, and also of a number of slaves and other valuable personal property. That the heirs and distributees of said McCue are the plaintiff, and said McCue's ten children, naming them, eight of them by a former

519 *wife, all of whom were of age, and two of plaintiff's, who were infants of tender years. That plaintiff is desirous of having her interests and those of her children (whose guardian she is) in the estate, clearly ascertained and laid off. She is willing to have her dower in the land assigned in kind, or that it be commuted for a sum in gross, as may be deemed most advantageous for all concerned. That the buildings, which are large and valuable, are at one end of the farm. That it is obvious if the dower of plaintiff were laid off and the estate divided among the heirs, it would give but a small portion to each. For this reason it will probably be to the interest of all parties to sell the land entire or in two or more parcels. If a sale should be deemed advisable, it might be necessary to sell the mansion house and the adjacent land, in order to make the rest bring its value, as the absence of improvements on the other parts might deter parties from purchasing. Plaintiff, however, merely makes these suggestions for the consideration of the court. She is content to take either a fair allotment of dower, or

20 S. E. Rep. 1014. For statutory authority in Virginia, see V. C. § 2616; Acts 1887-8, pp. 239, 503; Acts 1891-2, p. 551; Acts 1897-8, p. 404. In West Virginia, see Code of W. Va., ch. 84. The opinion in the principal case is quoted with approval in *Roberts v. Coleman*, 37 W. Va. 157, 16 S. E. Rep. 486; but criticised in *Hull v. Hull*, 28 W. Va. 23. See as to the setting aside of judicial sales after confirmation, *Barr v. White*, 30 Gratt. 531, and *note*.

§Same—Same—Same—As Evidenced by Record.—The principal case is cited with approval, for the rule that the facts as evidenced by the record are conclusive as warranting the sale of infant's lands, in *Lancaster v. Barton*, 92 Va. 623; *Stevens v. McCormick*, 90 Va. 735.

§Decree—Binding on Infants.—"The law recognizes no distinction between a decree against an infant and a decree against an adult." See *Harrison v. Wallton*, 95 Va. 725, citing principal case, also, *Pennybacker v. Switzer*, 75 Va. 688; 1 Minor's Inst. 507. See in West Virginia, *Lafferty v. Lafferty*, 42 W. Va. 785, 26 S. E. Rep. 263; *Turk v. Skiles*, 38 W. Va. 408, 18 S. E. Rep. 561; *Dickel v. Smith*, 38 W. Va. 685, 18 S. E. Rep. 721.

the equivalent in the form of a commutation for money. She prays that all necessary steps may be taken by the court to have her rights in the lands, slaves, &c., of her deceased husband, ascertained and assigned to her in kind, or its equivalent in money; and that the interest of her infant children may be also ascertained, and placed under her control as their guardian; and that all such orders and decrees may be made as may be necessary for a full and final adjustment and settlement of the rights of all the parties in the whole estate, real and personal, and to secure to each and every one their respective rights, &c. The administrator and all the children of John McCue, deceased, were made parties defendants.

520 *The adult defendants answered.

Some of them objected to the commutation of the plaintiff's dower in the land, and insist she shall take the same as the law directs. They all agree that if the land remaining after laying off the plaintiff's dower, can not by consent, be satisfactorily sold in parcels, it be divided among the heirs; but in respect to this matter they are willing the subject may be disposed of in a manner most conducive to the interests of the heirs at law; conceding, however, to each heir, and reserving for themselves respectively, the right to take each his share in kind, provided it can be done without manifest injury to the others. The infants answered by guardian ad litem.

The cause came on to be heard on bill and answers, when, by consent, the court appointed commissioners to make a survey and plat of the land, laying off one-third in quantity and quality, which might be assigned to the widow for dower. And in order that the court might be advised, in case the court should decree a sale of the whole tract, out and out, the commissioners were directed to report by metes and bounds, in what parcels the land should be sold; and they shall give their opinion whether it would be most expedient, in case of a sale out and out, to sell the whole tract together or in parcels. And if the court should determine to assign dower in kind, they should report whether it would be best for the heirs to sell the remainder in the tract as a whole or in parcels. There were other enquiries directed which need not be stated.

In June 1863 the commissioners returned their report. They report against selling the whole land, either all together or in parcels, and against commuting the widow's dower. They think that amid the

521 inflation *of the currency and uncertainties which harass the country, it is best for the widow and her infant children, to have a comfortable home, and land enough to guarantee to her at least an adequate and secure support. They have accordingly assigned to her dower; and this includes the mansion house and improvements and one hundred and eighty-seven acres of land, and is laid down on the survey and plat returned with the report. They assigned to Bell, who owned two

shares in the land, a tract of one hundred and twenty acres; and there still remained four hundred and seventy acres for distribution in whole or in parcels. The commissioners concluded to divide it into two parcels of equal value. These tracts, the commissioners say, may be sold or allotted to the heirs; the upper tract to four heirs, who may unite in taking it as coparceners; and the lower tract to four, who may take it. They express the opinion, that in case a sale be made of the residue after deducting the land assigned for dower and to Bell, it would be best to sell in the parcels designated as the upper and lower tracts, instead of selling the whole four hundred and seventy acres together. They say that they have been informed that the Misses McCue (Hannah and Martha) prefer retaining their interests without sale, and that the widow, who is the guardian of the infant children, prefers likewise retaining their shares; and they think it probable these four shares could be allotted together, constituting one of the said two tracts; and so with regard to the other four shares.

The cause came on to be heard on the 16th of June 1863 upon the report of the commissioners, which, except as modified in the decree, was confirmed. The assignment of dower in the land to Mrs. McCue was confirmed; and the parties by **522** their counsel suggesting *to the court that it will promote the interests of all concerned to sell the residue of the tract, after deducting the dower aforesaid, in three parcels, rather than make an assignment of any particular parcel to any one or more of the heirs, and to make an equal division of the proceeds of the sale among the heirs, A. H. H. Stuart, William H. Harman and Hugh W. Sheffey, were appointed to sell the same in three lots described in the decree, upon the terms specified therein; but with the privilege to the purchaser to pay the whole amount of his purchase money in cash.

In July 1863 the commissioners proceeded under this decree to sell the land, when Moses Zirkle became the purchaser of two of the lots, one of $234\frac{1}{4}$ acres at \$185 per acre, and the other of $183\frac{1}{4}$ acres at \$175 per acre; and he paid the whole purchase money in cash. The other lot was purchased by Bell, who held one-fifth interest in the estate.

The commissioners returned with their report of sales of the land, a paper signed by Mrs. McCue, as guardian of her two infant children, and all the other heirs, in which they say that being entirely satisfied that the lands belonging to said McCue's estate sold at the sale by commissioners Stuart, Harman and Sheffey, sold for their full value, they express their approbation of said sales, and their wish that the court shall confirm the same.

The cause came on again to be heard in November 1863, when the court confirmed the report; and by another decree a commissioner was appointed and directed to convey to Zirkle and Bell respectively the

land purchased by them, by deed with general warranty binding the heirs of John McCue, deceased.

In this suit the slaves were divided, the administration account was settled, 523 and the whole estate, except *the widow's dower, distributed; but it is unnecessary to refer to these things further.

In September 1871 Alexander H. McCue and Henry M. McCue, infants, who sued by Ellen S. McCue, their mother and next friend, instituted a suit in equity in the Circuit court of Augusta county against the widow and the other heirs of John McCue, deceased, and Moses Zirkle, to review the decrees in the aforesaid suit, and that the sales of the land may be set aside. In their bill they set out very fully the averments of the bill and the answers. They say that the suit was instituted by the widow alone, claiming dower and distribution in the estate of her husband, but asserting no right in the estate; and it was not instituted under the act for the sale of infants lands. They say no witnesses were examined, or facts agreed by the adult heirs, before the decree appointing commissioners to make report; they refer to their report, as against a sale; and yet with a knowledge that a partition in kind could be made, and a sale was not for the interests of the parties, yet upon a mere suggestion by counsel, that it would promote the interest of all concerned to sell the land, after deducting the dower, in three parcels, &c., the court decreed the sale of the land, &c. And they pray that the decrees and proceedings in said suit may be reviewed, reversed, and set aside, and the plaintiffs restored to their rights; and for general relief.

Zirkle demurred to the bill; and also filed a plea that he was a bona fide purchaser of the land; was clothed with the legal title to it by deeds duly executed to him, which he exhibits; and that he had paid in full the purchase money for said lands; that he had been in undisturbed possession of said lands under said deeds since the day of

524 1863; and *that at the time said deeds were executed and delivered to him, he had no notice of any equitable claim or title of the complainants in and to said lands, or of anything connected with the sale sufficient in law to avoid such deeds. He also answered referring to the proceedings in said suits, and insisting that the court was authorized and justified by the facts to decree a sale of the land in that suit.

The cause came on to be heard on the 3d of April 1873, when the court made a decree to overrule the demurrer and review the decrees; and that the decree in said cause made on the 16th day of June 1863, so far as the same provides for the sale of the real estate of John McCue, deceased, in said decree mentioned, and all subsequent proceedings in said suit founded upon and intended to give effect to the sale so decreed be set aside and annulled, so far as they effect the rights or interests of the infant plaintiffs in this cause. And commissioners were

appointed to lay off to the plaintiffs each one-tenth of the said land purchased by Zirkle and Bell, &c., &c. And thereupon Zirkle applied to a judge of this court for an appeal; which was allowed.

Sheffey & Bumgardner, and Tucker & Christian, for the appellant.

George M. Cochran, for the appellees.

Staples, J. delivered the opinion of the court.

The first question for our consideration is as to the true character of the suit brought by Mrs. Ellen McCue in the year 1863. It is clear that the bill was not filed under the statute which authorizes a 525 suit in the *name of the guardian for the sale of the ward's real estate. It was not so intended, and it would be unjust to all the parties so to treat it.

The bill is plainly a suit for assignment of dower to the widow, and for partition of the realty among the heirs, or a sale, as might be deemed most conducive to the interests of all. The complainant describes herself as widow and as guardian. Although she does not formally sue as guardian, the averments are sufficient to bring her before the court in that character. She sets forth the names of the children; the quantity and equality of the lands; that it would be for the interest of all the parties to sell it, either entire or in two or more parcels; she asks that the interests of her infant children may be ascertained and placed under her control as guardian, and that such orders may be entered as may be necessary for a full and final adjustment and settlement of the rights of all the parties in the whole estate, real and personal. In this respect the case is very similar to that of Cooper v. Hepburn, 15 Gratt. 551. In that case objection being made that the bill did not formally aver that it was filed by the complainant in his capacity of guardian, Judge Daniel, speaking for the whole court, said: "But surely this can furnish no sufficient ground for reversing the proceedings, when it is seen that the bill distinctly states his qualification as guardian of the children; details the facts and reasons going, in his opinion, to show that it would be to the interest of the children as remaindermen that the land should be sold and the proceeds properly invested." Now what is here said very strongly applies to the case before us; and we may fairly consider the original bill of Mrs. McCue filed as well in her capacity of guardian as in that of widow.

526 *It is said that it is not competent for a guardian to maintain a suit for partition. It is difficult to perceive any very good reason why he is not. The guardian has the legal right to the possession of the ward's lands during the guardianship. He may maintain trespass for an injury to the soil; or even ejectment for its recovery. He may grant a copy-hold in reversion or remainder in his own name. He may have a writ of right of ward, and

recover the land and damages, as well as the body of his ward. 2 P. Wms. 122; *Truss v. Old*, 6 Rand. 556.

In Bacon's Abridgment it is laid down, that a guardian may make partition in behalf of the infant; and it will bind the infant if equal; for the guardian is appointed by law to take care of the inheritance of the ward. Bacon Abr., Guardian, 415. And in Schouler on Domestic Relations, 472, the doctrine on this subject is thus expressed: "Guardians may assign dower; and it seems the assignment will bind the heirs. Guardians may also institute proceedings for partition. Such proceedings in England should be by bill in equity. In this country the subject is usually regulated by statute."

These authorities sufficiently show that it is competent for the guardian to institute proceedings in equity for a partition of the ward's lands. Indeed, the judge of the Circuit court has recognized the original bill as a suit for partition. After setting aside the decree of sale under which the appellant claims title, the decree directs a partition of the lands which are the subject of controversy here.

But if it be conceded, that according to strict right, a suit for partition cannot be maintained by a person occupying the position of both guardian and widow, still,

if a bill is filed by such person for assignment of dower, and in the progress of the suit the court, having all the heirs before it, should ascertain that these interests will be protected by a partition or sale, there would seem to be no reason why it should not decree accordingly, instead of turning the parties around to a new suit. It would be simply a decree between defendants. Such an irregularity, if it be one, would clearly not be sufficient to reverse the proceedings and vacate the sale as against a purchaser for value clothed with the legal title.

The only remaining inquiry is, whether the court was warranted in decreeing a sale of the lands, instead of directing a partition.

It must be remembered that the sale took place in 1863; that the rights of a bona fide purchaser are involved, a purchaser who has paid the full amount of the purchase money, whose purchase was confirmed by the court; who received his conveyance, and was put in possession of the property. It is held in many states, that such a purchaser will not be affected by errors in the proceedings under which the sale was made. It is the established doctrine of the Supreme Court of the United States, and of the courts of several of the states, that if the court has jurisdiction of the subject-matter, and the proper parties are before the court, rights acquired by third persons under authority of the decree will be sustained, notwithstanding a reversal of such decree.

In *Gray v. Brignardello*, 1 Wall. U. S. R. 627, 634, the Supreme Court of the United States say: "Although the judgment or decree may be reversed, yet all rights acquired at a judicial sale while the decree or judgment was in force, and which they au-

thorized, will be protected. It is sufficient for the buyer to know that the court had jurisdiction, and exercised it, and that the

order, on the faith of which he purchased, was made, and authorized the sale. With the errors of the court he has no concern. These principles have so often received the sanction of this court, that it would not have been necessary again to reaffirm them had not the extent of the doctrine been questioned at the bar. In support of this view, the court cites the case of *Thompson v. Tolmie*, 2 Peters' R. 168; *Voorhees v. Bank of United States*, 10 Peters' R. 449; and other cases. See also articles cited in *Rorer on Judicial Sales*.

These authorities are not cited for the purpose of following or approving the rule they establish, but simply to show the extent to which the decisions of other states have been carried. This court has never given its sanction to the doctrine, that the title of the purchaser is not affected by a reversal of the decree under which the sale is made, nor has it expressly repudiated that doctrine. The question with us must be regarded as an open one.

It is, however, well settled with us, that an infant, as a general rule, is as much bound by a decree against him as a person of full age. He is not permitted to impeach such decree except on the same grounds as a person of full age might have impeached it, such as fraud, collusion or error. 1 Dan. Ch. Pr. 221.

In *Williamson v. Gordon*, 19 Ves. R. 114, Lord Eldon said: "Admitting the right of the infant to show cause, he cannot do that if the decree would have been right against him had he been an adult. He can show nothing but error in the decree."

In *Pierce's adm'ors v. Trigg*, 10 Leigh 406, 429, Judge Tucker said: "The decree against an infant, though it gives him a day in court to answer, is of the nature of a final decree, and is carried into execution as such; nor is it reversible, but for error or fraud or collusion."

529 *Since the revisal of 1849 and '50, it is unnecessary to insert in the decree a provision allowing the infant a day to show cause; but in any proper case he may, within six months after he arrives at maturity, show such cause in like manner as if the decree contained such provision."

It is laid down by some authorities, that in suits for partition the infant has no day in court, but is bound by the decree absolutely; but the better opinion is, that he has the right in such cases to show cause against the decree. This privilege has, however, been taken away by statute in England, and now in suits for partition in the courts of that country no day is given. But in this state the rule seems to be well settled, that whenever the court is asked to sell and convey an infant's inheritance, he is entitled to an opportunity of making a defence at any time within six months after he arrives at full age. The only exception to this rule is found in those proceedings

in equity under the statute for the sale of small inheritances of less value than three hundred dollars. *Parker & als. v. McCoy & als.*, 10 Gratt. 594.

Conceding that the title of the purchaser falls with the reversal of the decree, and that the infant can only reverse upon showing error in the decree, the question still recurs as to the nature of the error sufficient for such reversal as against a purchaser not a party to the suit, who has paid the purchase money and received his conveyance under a decree of confirmation.

According to the English practice, if a mortgage is foreclosed the infant has his day; but if a sale is decreed, instead of a foreclosure, the infant is absolutely bound by the decree, and has no day. And so if

the land is decreed to be sold to satisfy judgment creditors, *without an account of the personal estate, the purchaser will not be affected by the error.

Neither in the case of a foreclosure, nor a sale under the mortgage, is the infant permitted to unravel the accounts, nor to redeem by paying what is reported as due. See *Wilkinson's adm'or v. Oliver's representatives*, 4 Hen. & Mun. 450.

In *Parker et als. v. McCoy et als.*, 10 Gratt. 594, 605, Judge Lee in delivering the opinion of the court said: "There are strong authorities to show that a fair purchaser is not bound to go through all the proceedings and to look into all the circumstances, and see that the decree is right in all its parts, and that it cannot be altered in any respect. He cannot, of course, be protected against a title not in issue in the cause, nor against the claims of persons not parties to the cause, and therefore not bound by the decree; but it would seem that he has the right to presume the court has taken the necessary steps to investigate the rights of parties, and upon such investigation has properly decreed a sale.

In *Daniel & als. v. Leitch*, 13 Gratt. 195, 210, Judge Moncure also speaking for the other judges said: "The purchaser at a judicial sale will not be affected by error in the decree, such as not giving a day to show cause in cases in which a day ought to be given, or in decreeing a sale of lands to satisfy judgment debts without an account of the personal estate. A fortiori, he will not be affected by any imperfection in the frame of the bill if it contain sufficient matter to show the propriety of the decree.

In the case of *Walker's ex'or v. Page et als.*, 21 Gratt. 636, 643, Judge Christian, in delivering the opinion of the court, said: "The right of an infant to show cause against a decree which affects his interests after he arrives *at age, must be limited to the extent, to show cause existing at the rendition of the decree, and not such as arose afterwards."

These extracts, and others that might be given, show that while this court has never gone as far as the courts of other states in favor of purchasers at judicial sales, it has, on all occasions, manifested a very strong disinclination to interfere with the rights

of such purchasers, unless upon palpable and substantial errors in the proceedings and decrees under which such titles are acquired.

In the language of this court, in *Parker & als. v. McCoy et als.*, already cited: "It is, of course, to the interest of the infant that the property should bring the best possible price; and it is to the public interest that the real estate of the citizen should be properly cultivated and improved. But who would be willing to purchase the land of an infant at a fair price, or to improve it after he should purchase it, if at a remote period, when the infant attained his age, he could come in, rip up the whole proceeding, and reclaim the property. The effect must be either to put an end to such sales altogether, or to occasion ruinous sacrifices, still farther impoverishing the helpless and needy object of the court's protection."

In *Voorhees v. Bank of the United States*, 10 Peters' R. 449, 476, the Supreme court say: "The principles which must govern this and all other sales by judicial process, are general ones adopted for the security of titles, the repose of possession, and the enjoyment of property by innocent purchasers, who are the favorites of the law in every court and by every code."

Bearing these principles and rules of decision in mind, we are to consider whether the court, in decreeing the sale of the 532 infant's land, committed such error *as demands a reversal of the decree and the vacation of the sale. Was it a case for partition exclusively, or might the court, under the circumstances, direct a sale of the different interests of adults and minors? Our statute provides that: "In any case in which partition cannot be conveniently made, if the interests of those who are entitled to the subject or its proceeds will be promoted by a sale of the entire subject, or allotment of part and sale of the residue, the court, notwithstanding any of those entitled may be an infant, insane person, or married woman, may order such sale, or such sale and allotment, and make distribution of the proceeds of sale according to the respective rights of those entitled.

Under this section, the case must be one in which partition cannot be conveniently made; and it must appear that the interests of the parties will be promoted by a sale of the property. These concurring circumstances are necessary to warrant a decree for such sale. It is not necessary they should appear from the report of commissioners, or by the depositions of witnesses. It is sufficient if the facts appearing in the record reasonably warrant the decree of sale. This is especially true when the proceeding is to defeat the title of an innocent purchaser.

If the report of the commissioners appointed by the court to assign the widow's dower and partition the land of the infant had said, or even indicated, that such partition could be conveniently made, or that the interest of the parties would not be promoted by a sale at that time, it would be

very difficult, by anything appearing in the record, to overcome the weight due to evidence of that character. But I do not understand the report as making any such averment, or containing any recommendation of the kind. The commissioners

533 "do say it is not best for the widow, or for the interest of all concerned, to sell the whole tract, out and out, altogether, or in parcels. But this statement was made in answer to the proposition to sell the widow's dower also, and pay her a sum in gross, or the interest on one-third of the purchase money. They, the commissioners, express the opinion that, under all the circumstances, it is best for her and the infant children to have a comfortable home and land enough to guarantee to her at least an adequate and secure support. And they say: "Accordingly we have assigned the widow" her dower, including the mansion house and improvements, and one hundred and eighty-seven acres of land.

The commissioners do not partition the residue of the tract among the heirs according to their respective interests—they do not recommend it—they do not intimate that it could be conveniently done. What they did do was to divide the tract into two parcels of two hundred and forty acres, each equal in value. These parcels to be sold, or one of them to be allotted to four heirs, who may unite in taking it as coparceners, and the other to be disposed of in the same way. Of course this plan was not feasible unless all the parties consented to its adoption. They did not consent to it, and of course it was abandoned. After the assignment of dower, and of David T. Bell's two interests, there remained only four hundred and seventy acres for division among eight heirs, being about sixty acres to each one. The commissioners clearly saw the difficulty of partitioning a small tract among so many, with due regard to wood and water and places of residence. They were no doubt satisfied it could not be conveniently done, and the division into

two tracts was the only plan that could
534 be adopted consistently with *the interests of all the parties. It is impossible to give any other interpretation to the report.

After that report was made and returned, the parties by their counsel suggested to the court, it would promote the interests of all concerned to sell the residue of the tract in three parcels, rather than make an assignment of any particular parcel to any one or more of the heirs. A decree of sale was entered accordingly; and Alexander H. H. Stuart, William H. Harman, and Hugh W. Sheffey, were appointed commissioners to make the sale. The sale was made, and the appellant became the purchaser of two parcels—one of two hundred and thirty-four acres at one hundred and eighty-five dollars per acre, and the other of one hundred and eighty-three acres at one hundred and seventy-five dollars per acre, making in the aggregate the sum of \$75,920.62. The adult

heirs, including the husbands of those that were married, expressed their entire approval of this sale, their conviction that the land was sold for its full value, and they united in a written request to the court to confirm the sales. Mrs. McCue, the mother and guardian of the infants, joined with the others in making this request. Upon this ratification by all concerned, the purchaser paid the whole amount of the purchase money, and the court confirmed the sale—the learned judge, the Hon. Lucas P. Thompson, expressing his conviction that the land was sold for a fair price. Thereupon a deed of conveyance was executed, and the purchaser placed in possession.

We have here then the report of the commissioners that the land could not be divided; we have the statement of all the parties concerned, that the interest of all would be promoted by a sale; we have the written request of the six adults, and

535 the mother and guardian *of the two infants, that the sale might be confirmed; and we have the deliberate opinion of the distinguished and discriminating judge then presiding, that the land was sold at a fair price; we have all these concurring facts and circumstances in favor of this purchase. There is nothing in this record adverse to this pretension, except the entire loss of the infants' share of the purchase money. Had the struggle in which we were engaged terminated differently, it is highly probable—nay, it is almost certain—this controversy would never have arisen.

If any proposition can be regarded as well settled, it is, that the propriety of this sale must be tested, and its validity determined, by the circumstances then existing and surrounding the parties. The purchaser can no more be held liable for the loss of the fund by the results of the war than he would be for its loss from the insolvency of a guardian, or the failure of a bank in which the fund was deposited.

In the opinion just delivered by Judge Christian, he has quoted largely from the observations of this court in Walker, ex'or, et als. v. Page, 21 Gratt. 636, 644. These observations apply with equal force to the case in hand. It is unnecessary, however, to repeat them here. They, in effect, declare that now after the Confederate currency has perished, that as subsequent events have transpired, it is easy to show that the interests of the infants have not been promoted by a sale of their real estate during the war; and if such considerations could govern the adjudications of this court, then, every such sale in which infants were interested must be annulled. But this is not the true criterion. The only matter for inquiry is: Did the court have jurisdiction of the subject matter; were the proper parties before it; were the proceedings

536 regular; *was the sale proper under all the circumstances then surrounding the parties. If so, there is no pretence for interfering with the title of an innocent purchaser, because in the light of subsequent occurrences the sale has proved in-

judicious and unfortunate for the interests of the infant.

For these reasons, the decree of the Circuit court of the 3d of April 1873, and of the 16th of June 1874, must be reversed and annulled, and the bill of the appellees dismissed with costs.

The decree was as follows:

This day came the parties by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the decree aforesaid is erroneous. It is therefore decreed and ordered that the same be set aside, vacated and annulled; and that the appellant recover against the appellees Alexander H. McCue and Ellen S. McCue, next friend of Henry M. McCue, an infant, his costs by him expended in the prosecution of his appeal aforesaid here. And this court proceeding to pronounce such decree as the said Circuit court ought to have rendered: It is further decreed and ordered that the bill of the plaintiffs be dismissed, and that the defendant, Moses Zirkle, recover against the plaintiffs his costs by him about his defence in this behalf expended: Which is ordered to be certified to the said Circuit court of Augusta county.

Decree reversed.

537 *Beirne v. Rosser & Turner.

September Term, 1875, Staunton.

1. **Plea in Abatement—When Bad.**—R brings assumpsit against B. in the county of N. and the process is served upon him. B appears at the rules, and files a plea in abatement, that at the time of the service of the process upon him, and at this time, he was not and is not a resident of N; but was and is an inhabitant of, and resides in M county, West Virginia. This plea does not give the plaintiff a better writ in this state; and is therefore bad.
2. **Evidence—Parol Proof of Writings.**—Plaintiff offers in evidence the copy of a letter from himself to the defendant, and states that defendant replied to that letter. He states on oath that he placed the letter with other papers in the hands of his counsel in West Virginia; that he had written to his counsel to send him his papers by express, which the counsel did, writing to him at the same time that he had sent him all of his papers that were in his hands; but the letter and other papers which he put in the counsel's hands were not in the package of papers so sent. That he had not since ap-

***Plea in Abatement—When Bad.**—As authority for the rule that a plea in abatement must generally give the plaintiff a better writ, see 4 Minor's Inst. (2d Ed.) 1164-65, where the principal case is cited; Barton's Law Pr. (2d Ed.) 220, also citing the principal case. For a qualification of the general rule, see Warren v. Saunders, 27 Gratt. 267. Middleton v. Pinnell, 2 Gratt. 202, lays down the general rule. See generally, monographic note on "Plea in Abatement" appended to Warren v. Saunders, 27 Gratt. 260.

plied to the counsel for the letter, because he supposed it was useless after the counsel's letter saying he had sent all the papers. **HOLD:** There being no suspicion of fraudulent purpose, that parol proof of the contents of defendant's letter was admissible in evidence.

3. **Exceptions—Form of Bill.**—The exceptions of the defendant to the admission of parol proof of the contents of his letter, not stating what was so proved, the appellate court cannot know whether or not the appellant was injured by the evidence, and therefore cannot reverse the judgment even if the admission of the evidence was improper.

This was an action of assumpsit in the Circuit court of Nelson county, brought by Rosser & Turner against Oliver Beirne, to recover a balance of \$2,378.39, which *they claim to be due to them for constructing a road leading from the Sweet Springs in Alleghany county, to the White Sulphur Springs in Greenbrier. There was a verdict and judgment for the plaintiffs; and thereupon Beirne applied to this court for a supersedeas; which was awarded. The case is fully stated by Judge Moncure.

Watson, for the appellant.

Whitehead, for the appellee.

Moncure, P. delivered the opinion of the court.

This is a supersedeas to a judgment of the Circuit court of Nelson county. Rosser and Turner brought an action of assumpsit in that court against Oliver Beirne, a resident of Monroe county, in West Virginia, who happened at the time to be in Nelson county, and upon whom the summons in the case was executed in that county. The declaration contained the common counts. The bill of particulars filed therewith, shows that the action was brought to recover a balance claimed to be due for the construction of a road, leading from the Sweet to the White Sulphur springs. The defendant pleaded in abatement, "that at the time of and before the institution of the suit, and at this time (to wit, the time of filing the plea) he neither was, nor is, a resident of Nelson county, nor of Virginia; but was and is an inhabitant of, and resides in Monroe county, West Virginia; that he has no land, estate or debts within the county of Nelson aforesaid, subject to the claim of the said plaintiffs; and that the cause of action for

***Bills of Exceptions—Necessary Statements in.**—A bill of exceptions objecting to the admission of improper evidence must show the facts. See Barton's Law Pr. (2d Ed.) 661; *Martz v. Martz*, 25 Gratt. 361; *Johnson v. Jennings*, 10 Gratt. 1; *McDowell v. Crawford*, 11 Gratt. 387; *Valley M. L. Ass'n v. Teewalt*, 7 Va. 421; *Taylor v. Com.*, 90 Va. 110; *Union C. L. Ins. Co. v. Pollard*, 94 Va. 157; *Harman v. City of Lynchburg*, 33 Gratt. 37, and note.

Venue.—For the general principle that a transitory action may be brought wherever the defendant may be found and served with process, see *Mahany v. Kephart et al.*, 15 W. Va. 621; *Witten v. St. Clair*, 27 W. Va. 767, citing the principal case.

which said suit was brought, or any part thereof, did not originate in the said
 539 county of "Nelson, Virginia, but in the county of Monroe, West Virginia, aforesaid." To this plea the plaintiffs filed a demurrer, in which the defendant joined. The demurrer was sustained. The defendant afterwards pleaded non assumpsit; to which the plaintiffs replied generally. On the trial of the issue thus made up, the jury found a verdict for the plaintiffs, and assessed their damages at \$2,378.39, with legal interest thereon from the 1st day of January 1867; and judgment was rendered accordingly. On the trial of the cause the defendant excepted to an opinion of the court then given, and tendered his bill of exceptions, which was signed and sealed by the court, and made a part of the record.

It appears from the said bill, that on the trial, one of the plaintiffs (Fayette Rosser), being introduced for the plaintiffs, was shown a paper in the following words and figures, to wit:

"Mr. Beirne,

Dear Sir: I am willing to make your road from the Sweet springs to the White Sulphur, 19 feet wide, except in difficult places, say 18 feet; and to be paid for thorough grading 60 cents for rock, and 29 cents for dirt, per cubic yard, and the prices for thorough embankments that are given for thorough cutting; \$2.88 per perch for bridge masonry, rubble work, and the same price for culverts; the superstructure of the bridges at cost. In changing Cove creek channel, in order to save bridging, 60 cents for rock and 30 cents for dirt. I am willing to construct the road at the above prices, complying with the specifications, and complete it within 12 months from the time of contract for the sum of \$850 per mile.

540 I shall expect to be *paid every month for the amount of work done—the ten per cent. reserved on the monthly payments.

Respectfully,

May 8, '60.

Thos. Rosser.

The bridges and culverts are not included in the mile:"

and testified that the same was in the handwriting of his father, Thos. Rosser; and being asked if the defendant replied to said letter, answered that "he did;" and was proceeding to state the contents of the letter of the defendant in reply; to which the defendant by counsel objected; and the witness being asked what had become of the said reply, said that it had been lost; that he, the witness, had possession of it, and he placed it, with other papers, in the hands of a lawyer in Union, Monroe county, West Virginia; that after the witness returned to Virginia, he wrote to his lawyer to send him his papers by express, which the lawyer did; writing to him at the same time that he had sent him all of his papers that were in his hands; but the letter and other papers that he had put into the hands of his said lawyer, were not in

the package of papers so sent him by express; and being asked if he ever afterwards applied to his lawyer for the said O. Beirne's letter, said that he had not. And being further asked, why he did not do so, said that he did not think it worth while to apply again, as the lawyer had written to him that he had sent him all of the papers he had in his possession belonging to the witness; nor had he ever informed the lawyer that he had failed to send said reply. And thereupon defendant's counsel objected to the witness stating the contents of the

said letter of the defendant, on the
 541 ground that no *proper foundation had been laid for giving secondary evidence of the contents of the said letter. But the court overruled the said objection, and allowed the witness to testify as to its contents; to which ruling of the court the defendant excepted as aforesaid.

To the judgment aforesaid the defendant applied to a judge of this court for a supersedeas, which was awarded accordingly. The only errors assigned in the petition are: 1st. that the court sustained the demurrer of the plaintiffs to the defendant's plea in abatement to the jurisdiction of the court; and, 2ndly, that the court erred in admitting upon the trial, parol evidence of the contents of the alleged letter of the petitioner.

As to the first error assigned, to-wit: in sustaining the demurrer to the plea in abatement; the court is of opinion that the Circuit court did not err in sustaining the said demurrer.

All actions are either local or transitory. Real and mixed actions are local, and personal actions are transitory. This is a personal action; being for the recovery of damages for the breach of a contract; and is, therefore, a transitory action. It is a general principle of the common law, that a transitory action can be brought against a party wherever he may be found and served with process; no matter where he may reside, or where the cause of action may have arisen. See Story on the conflict of laws, 538; and 1 Rob. Pr., new edition, pp. 316, 353, 354, 356 and 357, and the authorities there cited. This general principle is modified by statute, which has created various exceptions to it. Most of them will appear by reference to 1 Rob. Pr., new edition, pp. 357 and 358; Code p. 1082, ch. 165; p. 1083, ch. 166; and p. 1088, ch. 167. But this case comes within the general principle and

542 not *within any of the exceptions. It is a case in which no court in the state has jurisdiction, except that in which it was brought, whose process was executed upon the defendant within the county over which it has jurisdiction; and that court has jurisdiction because, and only because, the defendant was found and served with process within the county. That fact gave that court jurisdiction, according to the general principle of the common law before referred to. The plea in abatement did not give to the plaintiff a better writ; did not show what court in the state had jurisdiction of the case; which was necessary to make the

plea a good one. If the defendant be within the state, so as to be served with process thereon, there must be a remedy against him in some court in the state; and if in no other, in the courts of the county in which he may be found and be served with process. The plea in this case was therefore not a good one, and the demurrer to it was properly sustained.

As to the second error assigned; that the Circuit court erred in admitting upon the trial parol evidence of the alleged letter of the appellant.

The first question presented by this assignment of error is, whether a sufficient foundation was laid to authorize the introduction of parol or secondary evidence of the contents of the letter? Was the loss of the letter sufficiently proved, or was a sufficient excuse shown for not producing it on the trial?

Fayette Rosser, one of the plaintiffs, on his examination as a witness in the case, testified that the letter had been lost. If his testimony had stopped there, he would have proved the loss of the letter, which would have been sufficient to let in secondary evidence of the contents of the letter. But he did not stop there. The witness proceeded to explain how the letter was

543 *lost: "that he, the witness, had possession of it, and placed it with other papers, in the hands of a lawyer in Union, Monroe county, West Virginia; that after the witness returned to Virginia, he wrote to his lawyer to send him his papers by express, which the lawyer did, writing to him at the same time, that he had sent him all his papers that were in his hands; but the letter and other papers that he had put in the hands of his said lawyer were not in the package of papers so sent him by express." And being asked if he ever afterwards applied to his lawyer for the letter said, "that he had not;" and being further asked, why he did not do so, said, "that he did not think it worth while to apply again, as the lawyer had written to him that he had sent him all of the papers he had in his possession belonging to the witness; nor had he ever informed the lawyer that he had failed to send said reply." Was a sufficient foundation thus laid for the introduction of secondary evidence of the contents of the letter?

The letter was proved to have been out of the state; and "the question has occasionally arisen," as is said in a note (446) to 2 Phillips on Evidence, Cowen & Hills and Edwards' notes, edition of 1868, page 434, "whether proof that a paper is out of the state, will, of itself, be sufficient to lay the foundation for introducing secondary evidence of its contents without further evidence showing an effort to obtain it. In Connecticut it has been held that it would not. *Townsend v. Atwaler*, 5 Day's R. 298, 306. So also in Louisiana, *Lewis v. Beatty*, 8 Martin, N. S. 150. Otherwise, however, in Kentucky; and the court likens it to the case of a subscribing witness absent from the state. *Boone v. Dyke's legatees*, 3 Monr. R.

530. See also *Eaton v. Campbell*, 7 Pick. R. 10." In this case there was further

544 *evidence, showing an effort to obtain the letter. After the witness returned to Virginia, he wrote to his lawyer living in West Virginia, in whose hands he had placed the said letters with other papers, requesting him to send him his papers by express; which the lawyer did, writing to him at the same time that he had sent him all of his papers that were in his hands; but the letter and other papers that he had put in his hands were not in the package of papers so sent him by express. The witness further said, in answer to questions propounded to him, that he never afterwards applied to his lawyer for the letter, that he did not think it worth while to do so, as the lawyer had written to him that he had sent him all of the papers he had in his possession belonging to the witness; nor had he ever informed the lawyer that he had failed to send said letter.

Now was this evidence that the letter was out of the state, taken in connection with the effort which was used by the plaintiffs to obtain it, a sufficient foundation for the introduction of parol or secondary evidence of its contents?

The Circuit court was of that opinion, and so decided. Will this court say that the decision was erroneous, and on that ground reverse the judgment?

The point thus decided was a preliminary and incidental one, addressed solely to the court, and not affecting the issue to be tried by the jury; and parties and persons interested are recognized as competent witnesses in respect to the facts and circumstances necessary to lay a foundation for secondary evidence. 1 Phil. on Ev., supra, p. 436, note 446, and cases therein cited. "Secondary evidence," as is said in note 473 to that work, page 469, "is not admissible, if by reasonable diligence the

545 original could have been *produced; but the degree of diligence will depend on the nature of the transaction to which the paper relates, the apparent value of the paper, and other circumstances."—"The rigor of the old common law rule has been relaxed in this respect; and the non-production of instruments is now excused for reasons more general and less specific, upon grounds more broad and liberal than were formerly admitted. In general, the party should give all the evidence reasonably in his power to prove the loss. He is not bound, however, to furnish the strongest possible assurance of the fact. If any suspicion hangs over the instrument, or that it is designedly withheld, a rigid enquiry should be made into the reasons of its non-production. But where there is no such suspicion, all that ought to be required is reasonable diligence to obtain the original. In practice, when there is no ground of suspicion that the paper is intentionally suppressed, nor any discernible motive for deception, courts are extremely liberal in regard to secondary evidence." After making the above, and other remarks on the sub-

ject, and referring to cases to sustain them, the writer of the note thus concludes:

"From the foregoing observations, extracted from several cases, it will be seen that but very few propositions of a general character can be safely advanced on this subject. The sufficiency of the proof given, by way of allowing a resort to secondary evidence, is, in general, a preliminary point addressed to, and to be determined by the court exclusively, and upon which they are to pass in view of the peculiar features which may chance to characterize each case as it arises." The record in this case discloses no ground for suspicion that the letter was intentionally suppressed, nor any discernible motive for deception on the part of the plaintiffs.

546 *We cannot therefore say that the decision of the Circuit court on this preliminary point is erroneous, and that on that ground the judgment ought to be reversed.

But even if we could say that such decision is erroneous, can we say that it sufficiently appears from the record that the defendant was injured by such error?

In order to reverse a judgment of the court below, it ought to appear to the appellate court not only that there is error in the judgment, but that such error injured the party who complains of it.

Can we say that the error complained of in this case, if there be such error, injured the party who complains of it?

The bill of exceptions states, that the court overruled the objection to the witness stating the contents of the letter, and allowed him to testify as to such contents. If it can be inferred from the record that such contents were stated by the witness, certainly none of them are set out in the bill of exceptions, and we cannot therefore say that the defendant was injured by the testimony. The letter may have had no relation whatever to the case, or none that was at all material, or may have been rather in support of the plaintiff's than the defendant's side of the case. If the defendant was injured by the admission of the testimony, ought he not to have shown the fact by setting out the testimony in his bill of exceptions?

In *Nailor v. Williams*, 8 Wall. U. S. R. 107, decided by the Supreme court of the United States in 1868, it was held, that where a question is asked of a witness, which is illegal only because it may elicit improper testimony, and the court permits it to be answered, against the objection of the other party; if the witness knows nothing of the matter to which he is inter-

547 rogated, *or if his answer is favorable to the objection party, it is not error of which a revising court can take notice. It works him no injury. If it does work the objecting party injury, he can show it by making the answer a part of the bill of exceptions, and unless he does this, there is no error of the sort mentioned.

In *Johnson's ex'or v. Jennings' adm'r*, 10 Gratt. 1, decided by this court in 1853, a

question was propounded to a witness, which was objected to; but the objection was overruled, and an exception was taken. The exception did not state the answer of the witness, nor that he answered the question. The answer might have been of no importance, or of no injury to the exceptant. This court would not reverse the judgment on that alleged ground of error.

In *Stoneman's case*, 25 Gratt. 887, decided by this court in 1874, an objection to a question asked and to the witnesses answering it, was overruled, and an exception taken, which did not state the answer. This court held, that an appellate court could not consider the question intended to be raised by the exception. That case was a prosecution for murder. In answer to a question of the attorney for the commonwealth, a witness said that she had received a message from the deceased. The attorney then asked her to state what the message was. To which question and the witness answering the same the prisoner objected; but the court overruled the objection, and directed the witness to answer. The bill of exceptions, however, did not state whether in fact the witness answered the question or not. In delivering the opinion of the court, Judge Staples said, on this branch of the case: "It may be that she (the witness) was unable to remember or repeat the message. And if she remembered and

548 *repeated it, we have no means of knowing what it was. The message may have related to some matter having no connection with the homicide. It may have been so entirely immaterial as to produce no impression on the mind of the jury. The bill of exceptions ought to have contained the answer of the witness, that this court may see whether it is material, and possibly may have affected the finding of the jury. The omission renders it impossible for us to consider the question raised by this bill of exceptions."

According to the principle of the foregoing cases, we are of opinion that the bill of exceptions, if it shows any error at all, shows none to the injury of the plaintiff in error. It may be said in this case, according to what was said by the court in *Stoneman's case*: it may be that the witness was unable to remember or repeat the contents of the letter; and if he remembered and repeated them, we have no means of knowing what they were. They may have related to some matter having no connection with the matter in issue; or may have been so entirely immaterial as to produce no impression on the mind of the jury. The bill of exceptions ought to have contained the testimony of the witness as to the contents of the letter, that this court might see whether it was material and possibly may have affected the finding of the jury.

Upon the whole, we are of the opinion that there is no error in the judgment of the Circuit court, and that the same ought to be affirmed.

Staples, J. was of opinion that a proper

foundation was not laid for the introduction of parol proof of the contents of the letter. Upon the other points he concurred with the other judges.

Judgment affirmed.

549 *Peters v. Neville's Trustee & als.

September Term, 1875, Staunton.

1. Receivers—Collections in Confederate Money.—

Bonds well secured are given by purchasers at a judicial sale made in 1860, and they fall due in 1861, 1862 and 1863. In 1860 P is appointed a receiver to collect the purchase money; and he collects that due in 1862 and 1863 in Confederate money, and makes no report to the court, but retains it in his own hands. He was not authorized or justified in receiving Confederate money, and it is not to be scaled.

2. Appeals—Failure to Except to Commissioner's Report.—

Where an exception is not taken to a commissioner's report, on a question which might be affected by extrinsic evidence, and the question is not made in the court below, the appellate court will not consider it.

3. Same—Amendment of Decree Appealed from.—

After an appeal has been allowed in a cause, by consent of parties a decree is made, modifying, in one respect, the decree appealed from. The appellate court may amend the decree appealed from in that respect, and affirm it.

4. Same—Same.—

A decree directing a receiver to pay certain sums to parties, which should bear interest from a certain day, will be amended, and so amended will be affirmed.

This was a suit in equity in the Circuit court of Nelson county, brought by Frederick G. Peters, to subject the real estate of La Fayette Neville to satisfy the plaintiff's judgments. Other creditors of Neville came in by petition; the land was sold by commissioners in 1860, upon a credit of one, two and three years; and in that year Peters was appointed a receiver to collect the purchase money. The only material question in the case is, whether the moneys collected during the war by Peters should be

550 scaled? The court below refused to scale them, and Peters applied to a judge of this court for an appeal; which

was allowed. The case is stated by Judge Moncure in his opinion.

Coghill and Fitzpatrick, for the appellant.

Thompson, Wm. M. Cabell, Whitehead & Wm. J. Robertson, for the appellees.

Moncure, P. delivered the opinion of the court.

The main and almost the only question arising in this case is, whether the amounts collected by the appellant, F. G. Peters, as receiver in this case, in Confederate money, ought to have been scaled?

The following is a statement of the facts and history of the case, so far as material to be stated.

This suit was brought in March 1859 by the appellant, the said F. G. Peters, to enforce his judgment liens against the real estate of La Fayette Neville, deceased, consisting of a tract of land in the county of Nelson known as "Locust Grove," containing six hundred and fifty-five acres. Other creditors of said Neville, by judgment and otherwise, afterwards came in, on petition or motion, and joined in the prosecution of the suit. On the 1st of October 1859, it appearing to the court that the sale of the said tract of land must necessarily be made, the court without deciding any other question in the case, and reserving for future decision the question how the proceeds of sale should be distributed, decreed that the said tract of land should be sold by commissioners appointed by the court for the purpose, for cash as to so much of the purchase money as was necessary to defray the expenses of sale, and on a credit of one, two and three years as to the residue, to be paid in three equal annual instalments, to be secured

551 by bonds with good security, *bearing interest from the day of sale, and the title to be retained until the purchase money should be fully paid. In August 1860, the said tract of land was accordingly sold by the said commissioners, who shortly thereafter made their report to the court.

On the 29th of September 1860, the cause came on to be heard on the papers formerly read and the said report of sale, to which report and sale there was no exception; and on consideration thereof the court approved and confirmed the sale. The decree then proceeds in these words: "And it appearing from the deeds filed in the cause, that F. G. Peters (the plaintiff and appellant) is now the owner of the dower right of Mary J. Neville in the 'Locust Grove' tract of land sold as aforesaid, which dower right the said F. G. Peters elects to commute and receive the value thereof in money; and all the parties in interest in this cause consenting to said election, the court doth adjudge, order and decree that the commissioner in chancery, who may take the accounts hereinbefore directed, (by a decree made on the 8th of May 1860,) do ascertain the money value of the dower right of Mary J. Neville in the purchase money of 'Locust Grove,' as of the 27th of August 1860, the day of its

*Appeals—Commissioner's Report—Exceptions.—In the case of Shipman v. Fletcher, 91 Va. 400, citing the principal case, the court says: "It has been uniformly held by this court that objections to a decree for errors in the report of a commissioner, not appearing on the face of it, cannot avail here unless founded on exceptions taken to the report in the court below." See especially, Simmons v. Simmons, 33 Gratt. 451, and *note*, collecting cases. Also, Cole v. Cole, 28 Gratt. 370; Livesay v. Feamster, 21 W. Va. 100; Hyman, Moses & Co. v. Smith, 10 W. Va. 298; Wyatt v. Thompson, 10 W. Va. 645; Ogle v. Adams, 12 W. Va. 215; McCarty v. Chalfant, 14 W. Va. 531; Chapman v. The Pittsburg, etc., R. Co., 18 W. Va. 185; Hill v. Bowyer, 18 Gratt. 364; Coffman v. Sangston, 21 Gratt. 271; Vance v. Kirk's Adm'r, 29 W. Va. 344, 1 S. E. Rep. 718; Barton's Ch. Pr. (2d Ed.) 698.

sale, and make report to the court; and it being suggested that the purchaser of said land desires to pay off and retire one or more of his bonds before they mature, the court doth adjudge, order and decree that F. G. Peters, who is hereby appointed a receiver for the purpose, be at liberty to withdraw the bonds of Stevens, Fulks & Harvey, for the purchase money of "Locust Grove," (upon leaving attested copies thereof,) and proceed to collect the same." But the said Peters was required first to give bond with good security for the faithful discharge of the duties of his office of receiver.

552 *No other decree or order was made in the case, and nothing further appears to have been done in it for six years, and until the 5th of October 1866, when a further order was made in regard to the taking of the accounts before directed, which had not been taken, either in whole or in part; and the said receiver was directed to report his proceedings at the next term. Nothing further appears to have been done in the case until 1870 and 1871, when commissioner Kirby settled the accounts ordered to be taken by decrees made in the cause in 1860; and on the 8th of March 1871 he made his report. From that report, it appears that the dower right of Mary J. Neville, which had been assigned to the receiver, was valued at \$1,401.68; which, with interest from August 27, 1860, to January 1871, making \$869.97, amounted to . . . \$2,271 65; and that his two judgments, with interest to the same day and costs, amounted to . . . 1,508 86;

making his whole claim against the fund, including interest, \$3,780 51.

It further appears from the report, that the receiver was charged by the commissioner with the following sums of money collected of the purchasers of said land, viz:

1860, October 5—To cash \$700; 1862, November 24, ditto \$1,500; 1863, January 3, ditto \$1,300; 1863, July 27, ditto \$1,000; 1868, September 23, ditto \$300.95. 1869, January 1, ditto \$20; making the amount of principal collected . . . 4,820 95; on which the interest to 1st January, 1871, amounted to . . . 2,271 67;

making the whole amount of principal and interest . . . \$7,092 62.

553 *From the interest the Commissioner deducted \$20 paid William Cabell, and \$8.47 costs of suit, . . . 28 47;

and the balance remaining due on that account appeared to be \$7,064 15, with interest on the principal, \$4,820.95, from January 1, 1871, till paid. The receiver did not appear and make any exception before the commissioner, but made the following exception and affidavit after the return of the commissioner's report, viz:

Exception.

"The plaintiff, F. G. Peters, receiver in

this cause, excepts to so much of commissioner Kirby's report as charges him with the full amount received by him of S. C. Stevens. All of the sums so received, except the sum of \$700, as of the 27th of August, 1860, were collections in Confederate money, and liable to scale. See affidavit of F. G. Peters filed herewith, marked 'A.'"

Affidavit.

"State of Virginia—Nelson county.

This day Frederick G. Peters personally appeared before me, a justice of the peace in and for the county aforesaid, and made oath, that all the collections made by him in the case of Peter's su'g partner v. Neville, &c., were in Confederate notes, save and except the sum of \$700 of principal and \$21.95 of interest; that he did not appear before said commissioner in said cause, and show said fact, because he was of opinion that said commissioner would, of his own motion, scale all collections made after January 1st, 1862. Given under my hand this 23rd day of March, 1871.

P. H. Cabell, J. P."

554 *On the 15th day of September, 1871, by consent of parties, the cause came on again to be heard upon the papers formerly read, the said report of commissioner Kirby, the said exception of the plaintiff and receiver thereto, and other exceptions thereto by other parties, and was argued by counsel: on consideration whereof the court overruled the plaintiff's exception, and made other rulings in regard to the other exceptions; and recommitting the report to the same commissioner, to restate the accounts according to the said rulings; who was authorized to proceed without any further notice to the parties, except reasonable notice of the time to the respective counsel engaged in the cause. In stating the account the commissioner was directed to report any other judgment claims against Lafayette Neville which might be proved before him.

On the 6th day of March, 1872, commissioner Kirby made his supplemental report in obedience to the last mentioned decree, after reasonable notice to all the counsel of all parties interested; which report he said he believed was made in conformity with all the rulings of the court in the said decree of the 15th of September, 1871. There was no exception to that report by any party.

On the 27th March, 1872, the cause came on again to be heard on the papers formerly read, with the supplemental report aforesaid, to which there was no exception, and was argued by counsel; on consideration whereof the court ratified and confirmed said report; and also ratified and confirmed the original report, in so far as it was not in conflict with, and modified by said supplemental report; said modification having been made in conformity with rulings and instructions of the court. And the court proceeded to decree a distribution of

555 the fund according to the *rights of

the parties respectively, as ascertained by said supplemental report.

From the two decrees of the 15th of September 1871, and the 27th of March 1872 aforesaid, the plaintiff and receiver, F. G. Peters, applied to a judge of this court for an appeal; which was accordingly allowed, and which is the case now before us.

The only error in the said decrees assigned in the petition for an appeal is, because the exception taken by the petitioner to the commissioner's report should have been sustained, and the Confederate notes collected by him scaled to their good money value.

Was that an error? We are of opinion that it was not. The money collected was due on account of a good money debt, created in the year 1860. That the larger portion of the debt became payable during the war, when Confederate notes constituted the only currency of the country, is a fact which did not of itself authorize the receiver to collect the debt, or any portion of it, in a greatly depreciated currency—depreciated to the extent to which Confederate notes were depreciated at the times of the collection made by the receiver in such notes.

The debt continued to be a good money debt, notwithstanding that Confederate notes became the common, or even the only currency of the country, when the deferred instalments became payable; and it was solvable only in good money. The receiver was neither justifiable nor excusable in making the collections which he did make on account of the debt in Confederate notes. The only decree or order made by the court in regard to the collection of the debt was the decree of the 29th of September 1860, appointing a receiver, and giving him liberty, after executing the bond required of him, to withdraw the bonds for the purchase money of the land, and

556 to *proceed to collect the same. At that time Confederate notes were not in existence, and there was no reason to believe they ever would be. The currency then in existence, and likely so to remain indefinitely, was a specie currency, or, what was equivalent thereto, one easily convertible into specie. When afterwards, and before the deferred instalments of the purchase money became due the currency became depreciated, it was the duty of the receiver not to collect the money in that currency, but to let it remain uncollected, or, at all events, not to collect it without the express direction of the court. The debt was perfectly secure, and was not in the least danger of becoming otherwise at any future time. Its collection was not required by any necessity or convenience of the parties entitled to it, at least other than the receiver himself. It could not be distributed, for it had not been ascertained by any settlement of accounts in the case, who was entitled to it, or in what proportion. He did not pay the money so collected, or any part of it, to any other party, nor into court; nor did he invest it either under the order of the court or on his own responsi-

bility. He did not ask the court for its instruction; nor did he ever make any report to the court on the subject. He did not consult the wishes of any of the other parties entitled to the money. It does not appear that anybody concerned, besides the debtor and himself, ever knew, before the war was over, that he had collected a dollar of Confederate money on account of the debt. He could have collected it only for his own benefit, and he no doubt used it accordingly. He no doubt believed that the amount due to him would be about equal to the amount he collected, and that the latter would ultimately be applied to the former.

At that time the widow's dower right, 557 which *had been assigned to him, had not been valued; and he probably supposed it would be valued higher than it afterwards was. "On the 3d of January 1863," it is said in the brief of one of the counsel, and no doubt truly, "Confederate treasury notes were three for one of gold; and on the 27th of July 1863 they were nine for one of gold, as per scale of Miller & Franklin, brokers, which has been adopted by the Circuit court of Nelson county." At the former period \$1,300, and at the latter period \$1,000, were collected by the receiver in Confederate notes on account of the debt. He may have been able, as was sometimes the case at that period, to use these notes in such a way as to make them worth their par amount, or nearly so to him. And, if so, it would be unjust in the last degree to charge the other creditors of Neville with the amount of the depreciation of these notes at the periods of their collection. But, whether so or not, it would be unjust and illegal so to do. That the receiver had not a right to make these collections in Confederate money, at least at the risk or loss of any other person concerned than himself, and that he is justly chargeable, and was properly charged with their amount in good money, is, we think, clear, both upon principle and authority; and it is sufficient, in support of this conclusion, to refer to what was said by this court in the cases of *Moss &c. v. Moorman's adm'r &c.*, 24 Gratt. 97, and *Hannah's adm'r v. Boyd &c.*, 25 Id. 692, cited in the argument.

We are therefore of opinion, upon this main question in the case, that the Circuit court did not err in overruling the exception of the appellant to the report of commissioner Kirby.

We now proceed to notice some other matters of minor importance in the case.

558 *Mundy's ex'r, whose claim is postponed to all the judgment liens, and cannot be fully satisfied by reason of the deficiency of the fund for distribution, complains, that he has been injured by the act of the commissioner in deducting the amount due to the appellant, including principal, interest and costs on the 1st of January, 1871, \$3,955.51, from the principal due by the receiver, \$4,820.95, leaving a balance of principal for distribution on that day among the judgment creditors amounting to \$865.44, and leaving the entire inter-

est due by the receiver on that day, to-wit: \$2,243.20, for distribution; instead of deducting the amount so due to the appellant, first from the said interest, and then from the said principal; thus leaving a balance due by the receiver of \$3,108.64, all principal, for distribution. It is contended that the effect of this error, if it be one, is a loss of interest on \$2,243.20, the amount of interest due by the receiver aforesaid, from the 1st day of January 1871, to the 27th of March 1872, the date of the decree confirming the commissioner's report and making distribution of the fund. This loss would be comparatively inconsiderable, amounting only, it seems, to \$166.78. But a complete answer to this objection seems to be, that neither Mundy's ex'or nor any of the other creditors made any exception whatever to the commissioner's report, on that or any other ground; but suffered the same to be confirmed by the court, and a decree entered in pursuance thereof, and started the objection for the first time in this court, more than three years after the decree was rendered. We are of opinion that the objection came too late, and the parties were then concluded from making it by their omission to except to the commissioner's report, and by lapse of time and acquiescence. It

559 is a general rule that a *commissioner's report, so far as it is not excepted to, is admitted to be correct, not only as regards the principles, but as relates to the evidence on which it is founded. 2 Rob. Pr., old ed., p. 353, and the cases there cited. "Reports which are erroneous upon the face of them, although not especially excepted to prior to the hearing, may, perhaps, be objected to at the hearing, or in the appellate court. But it is clear that reports not excepted to, cannot be impeached before an appellate court, in relation to matters which may be affected by extraneous testimony. Id. Whether or not interest ought to be charged to an executor in the statement of his accounts, has been considered by an appellate court to be a matter the decision of which might be affected by extraneous testimony. Id. 384, citing White's ex'or v. Johnson, &c., 2 Munf. 285. Not only is that a question here, but the subject of the objection now for the first time made, might in other respects have been affected by extraneous testimony. Suppose the parties consented that the account should be settled by the commissioner as it was, in regard to the manner of applying the fund in the hands of the receiver to the payment of the amount due to himself. Of course, if said consent had been proved before the commissioner, it would have been binding; and it might have been proved if an exception had been taken to his mode of stating the account.

Mundy's ex'or also complains, that injustice was done by the commissioner to the other creditors of Neville, in deducting the full amount due to the receiver himself from the funds in his hands before anything was paid to the other creditors; thus placing the two on unequal ground, and

subjecting the latter to the risk of possible loss from not realizing the whole residue of the trust fund. The same answer may be made to this complaint as was made to the other. The subject of it might have been fully explained by extraneous testimony. The mode of settlement adopted by the commissioner may have been assented to by all the parties concerned. They may have given such assent from motives of liberality or of policy —of liberality to the receiver, who was charged with the Confederate money collected by him at its nominal amount, while he was allowed no commission as receiver; and of policy, to induce him to acquiesce in the charge, and not appeal from the decree. This view is confirmed by what is said in some of the briefs in this case. In that of the appellant's counsel it is said: "The decree was drawn by one of the counsel of the first class creditors, and ordered to be entered by the court without any objection from any quarter." And in that of the counsel of some of the judgment creditors it is said: "In a spirit of liberality this was permitted and acquiesced in, the counsel for the judgment creditors not excepting to the report, and preparing the decree which was entered." Certainly it was too late, several years thereafter, to make the exceptions for the first time and in the appellate court.

We are therefore of opinion that the errors complained of by the appellee, Mundy's ex'or, are not well founded, and do not exist.

But there is another matter referred to in the briefs and in the arguments of counsel which requires attention. After the appeal in this case was obtained, and while it has been pending in this court, to wit: on the 17th of March 1874 a consent decree was made by the Circuit court of Nelson county in this cause, whereby the decree of the 27th of March 1872, so far as it was in favor of Elizabeth Hopkins, executrix of 561 Arthur *Hopkins, deceased, was reduced and modified as mentioned in said consent decree. The former decree ought therefore to be amended, as if the latter had been embodied in it, instead of so much thereof as was in favor of the said Hopkins' executrix as aforesaid.

The said decree of the 27th of March 1872 ought to be further so amended as expressly to give running interest from its date till payment, on the following sums of money thereby decreed to be paid as of that date to the following named parties, viz: \$218.84 to R. L. Jefferson; \$1,021.21 to Hubbard, Gardner & Co., assignees of John W. Mosby; and \$195.57 to N. R. Powell.

The court is therefore of opinion that the decrees appealed from, with the amendments aforesaid, ought to be affirmed.

The decree was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the decrees aforesaid, and the arguments of counsel, is of opinion that the decree ap-

pealed from ought to be amended, according to the consent decree made in this cause on the 17th day of March 1874, while it was pending in this court, of which consent decree a certified copy is contained in an appendix to the record of the case in this court, and was considered by the court as a part of said record; and it is accordingly ordered that the said decrees appealed from be so amended, and that the said decree of the 27th day of March 1872 be read and considered, as if so much of it as is in favor of Elizabeth Hopkins, executrix of Arthur 562 Hopkins, deceased, *were stricken out of the same, and instead thereof, the said consent decree were embodied in the said decree of the 27th day of March 1872 as part thereof.

The court is further of opinion that the said decree of the 27th day of March 1872 ought to be further so amended as expressly to give running interest from its date till payment, on the following sums of money thereby decreed to be paid as of that date to the following named parties, viz: two hundred and eighteen dollars and eighty-four cents to R. L. Jefferson; ten hundred and twenty-one dollars and twenty-one cents to Hubbard, Gardner & Co., assignees of John W. Mobsey; and one hundred and ninety-five dollars and fifty-seven cents to N. R. Powell; and it is accordingly ordered that the said decree of the 27th of March 1872 be so amended.

The court is therefore, for reasons stated in writing, and filed with the record, further of opinion that there is no error in the said decrees appealed from, amended as aforesaid; and it is decreed and ordered that the said decrees so amended be affirmed, and that the appellees recover of the appellant their costs by them about their defence in this court expended, and damages according to law; and it is ordered that this cause be remanded to the said Circuit court, for further proceedings to be had therein, in conformity with the foregoing opinion and decree; which is ordered to be certified to the said Circuit court of Nelson county.

Decree amended and affirmed.

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*Sipe v. Earman & als.

September Term, 1875, Staunton.

1. Deeds of Trust—Validity—Preference of Creditors.*—

A deed of trust to secure *bona fide* creditors, which conveys land, horses, cattle, &c., farming implements, household and kitchen furniture, growing grain and vegetables, the grantor to retain possession for three years, by paying the interest on the debts secured, is not fraudulent *per se*, though

*Preference of Creditors. — The general principle, that in the absence of statute a debtor may make such preference in paying his debts as he sees fit, is applied in *Paul v. Baugh et als.*, 85 Va. 958; *Williams v. Lord and Robinson et als.*, 75 Va. 402; *Lucas, Sergeant, etc., v. Claflin & Co.*, 76 Va. 277; *Skipwith v. Cunningham*, 8 Leigh 272; *Gordon v. Cannon et als.*, 18 Gratt. 387; *Harden v. Wagner*, 22 W. Va. 366.

made without the knowledge of the creditors secured.

2. *Same—Same—Execution Pendente Lite.*—Nor does the execution of the deed pending a suit against the grantor, by a creditor not secured by it, and a short time before the term at which it was probable judgment would be rendered against him render the deed fraudulent.

3. *Same—Same—Postponement of Sale by Provision in Deed.**—Nor does a provision in the deed, authorizing a sale of the property within the three years at the instance of the grantor, render the deed fraudulent.

4. *Same—Fraudulent Intent in Grantor.*†—If there was a fraudulent intent in the grantor in making the deed, (of which there was no evidence,) as it is not fraudulent on its face, and the trustee and creditors secured by it had no knowledge of its execution until it was done, they cannot be affected by such fraudulent intent, and the deed is valid as to them.

5. *Bill in Equity—Prayer for General Relief.*—A judgment creditor files a bill to set aside the deed for fraud, and for general relief. Though the deed is held to be valid, the plaintiff is entitled to the surplus after paying the debts secured; and the bill should not be dismissed, but under the prayer for general relief, he is entitled to an account of the debts secured by the deed, and to have a sale of the property.

In September 1869 Joseph Sipe brought a suit in equity in the Circuit court of Rockingham county, to set aside a deed made by Peter F. Earman to secure John Carpenter and others named in the deed, certain debts therein named.

The bill states, that in August 564 *1867 the plaintiff recovered a judgment in the County court of Rockingham against Peter J. Earman for \$1,676.82, with interest and costs. That a short time before said judgment was recovered, the said Peter F. Earman made a deed, by which he conveyed all of his property to John W. Earman, for the ostensible purpose of securing the payment of the debts mentioned in said deed. He charges that the deed was made with the intent to hinder and defraud the plaintiff; that the pretended debts secured in the deed, or a large portion of them, are not bona fide debts; that the deed is fraudulent upon its face, and fraud-

*Same—Same—Postponement of Sale in the Deed.

—As to what is a reasonable postponement, see *Young v. Willis*, 82 Va. 298, citing the principal case; also *Norris v. Lake*, 89 Va. 516; *Brockenbrough v. Brockenbrough*, 31 Gratt. 560, and *note*; *Cochran v. Paris*, 11 Gratt. 348; dissenting opinion of Judge SNYDER in *Landeman v. Wilson*, 29 W. Va. 723, 2 S. E. Rep. 218.

†Same—Fraudulent Intent in Grantor—Presumption.

—See collection of cases in *note* to *Brockenbrough v. Brockenbrough*, 31 Gratt. 560; also *Lewis v. Caperton*, 8 Gratt. 148; *Phippen v. Durham*, 8 Gratt. 457; *Dance v. Seaman*, 11 Gratt. 778; *Harden v. Wagner*, 22 W. Va. 364; *Landeman v. Wilson*, 29 W. Va. 723, 2 S. E. Rep. 203; *Cohn v. Ward*, 32 W. Va. 39, 9 S. E. Rep. 4. The principal case is distinguished in *Livesay v. Beard*, 22 W. Va. 590, and the Virginia doctrine criticised in *Gardner v. Johnston*, 9 W. Va. 412.

ulent in fact. And he states that Earman had since gone into bankruptcy. And making Peter F. Earman, John W. Earman, the trustee, and the creditors named in the deed, as also the assignee of Earman, parties defendants, he prays that the said deed of trust may be set aside as fraudulent and void, and the property therein conveyed applied to the payment of plaintiff's debt by a sale thereof under a decree of the court; and that he might have such other and further relief as the nature of the case may require and to equity seem meet.

The deed which was filed as an exhibit with the bill, bears date the 7th of May 1867, and conveys to John W. Earman one tract of land of one hundred and seventeen acres, lying in the county of Rockingham, with all the growing crop thereon, four horses, &c., naming cattle and sheep, two wagons, one spring wagon, one carriage, farming implements of every description, all his household and kitchen furniture, about ten acres of wheat and rye growing on an adjoining farm, also the corn growing on the same place, in which he had an interest, also his interest in ten acres of oats and in the crop of potatoes and sorghum on another place he names, and also

585 the melons on the *place where he was then living, in trust to secure John Carpenter in a debt of \$500, &c., naming the other creditors and their debts. The deed then says: It is covenanted expressly herein that the said grantor is to hold, occupy and enjoy the use and profits of the property herein conveyed for the term of three years from this time, by paying the interest on the debts herein secured annually, and then if at the end of three years all the debts herein secured are not liquidated at that time, the person or persons holding a majority of the debts then unpaid, may at any time require the trustee, upon due notice, to advertise and sell. But it is further covenanted, that at any time the said grantor may desire to sell the property herein conveyed, the parties are to allow the said sale, and receive the amount of money then due. This deed was only executed by Peter F. Earman, and was admitted to record on his acknowledgment in the office.

The creditors named in the deed, and the trustee, who was also a creditor, severally answered the bill. They all aver that their debts are bona fide, and offer the evidences of their debts. They say they had no knowledge of the execution of the deed until it was made; but when informed of it they accepted it; and they deny all fraud in procuring it, and they do not believe there was any purpose of fraud by the grantor in its execution.

Peter F. Earman also answered. He denied any fraudulent intent in executing the deed. He averred that his purpose was to secure debts he honestly owed; that the judgment of the plaintiff was recovered in his absence; that it was for the balance of an account which had not been fully ad-

justed, and he was entitled to large credits upon it, which had not been allowed him; and he asked that the court would direct a new trial of the case.

586 *Though a number of witnesses were examined by the plaintiff, there was not the slightest evidence of fraud or knowledge of fraud by the creditors; there were two or three witnesses who stated that after the deed was made Peter F. Earman spoke of Sipe's debt as unjust as to the amount, and that he would not pay it.

The cause came on to be heard on the 11th of October 1872, when the court held that the deed of trust was made bona fide, and was valid and binding, and dismissed the bill with costs. And thereupon Sipe applied to one of the judges of this court for an appeal; which was allowed.

John E. Roller, for the appellant.

Sheffey & Bumgardner and Berlin, for the appellees.

Anderson, J. delivered the opinion of the court.

The question raised by the record of this case is, was the deed of trust made by Peter F. Earman, on the 7th of May 1867 to secure his creditors therein named fraudulent?

In *Dance & als. v. Seaman & als.*, 11 Gratt. 778, Judge Allen, in whose opinion the other judges concurred, says: "If it were a question of the first impression, it would be matter for grave consideration" "whether a deed of trust executed by a debtor on the verge of insolvency, creating preference amongst his creditors, postponing the time of sale, the possession in the meantime remaining with the grantor, and the profits to be received by him, and executed without the knowledge of, or consultation with the creditors, (very much our case,) should not be treated as made with

587 a *fraudulent intent; because the reservations may tend to hinder and delay creditors in the prosecution of their legal remedies to enforce the payment of their debts. But these questions have been settled by a series of adjudications in this court. It would disturb many titles, if the principles heretofore established, and sanctioned by the practice of the country, were now to be questioned." Where the bankrupt law does not apply, preference of favored creditors is the right of every debtor, and is a doctrine so well established, and so unquestionable, that it is unnecessary to cite authorities in support of it.

But it is contended that proof of fraud in this case arises from the face of the deed. "The court cannot presume fraud unless the terms of the instrument preclude any other inference." *Dance & als. v. Seaman & als.*, supra. And as was said by Judge Allen in that case, so it may be said in this, "the fraudulent intent is denied by the grantor."—"As to the cestuis que trust, it is not pretended that they participated in any fraud. They were not consulted; and though, if the fraudulent intent clearly appeared on the

face of the instrument, they would be affected by it if they claimed under it, the reservations on the face of the deed do not raise, under the doctrines of this court, an irresistible presumption of fraud, which would, of itself, vacate the deed."

It is true that some articles of property embraced in the conveyance are reserved for the use and enjoyment of the grantor, until default in payment, which must be consumed in the use, and could not in themselves strengthen the security; just as it was in *Cochran v. Paris*, 11 Gratt. 348; and *Dance & als. v. Seaman & als.*, 11 Gratt. 778; and other cases which might be cited,

in which it was held that the deeds 568 were not *fraudulent. Whilst such articles of property could not directly strengthen the security of the deed, they might indirectly, by ministering to the improvement, and the support of the important and substantial subjects relied on as security, and thereby manifest an honest intent of the debtor to provide for the payment of his debts, as was held in *Cochran v. Paris*. But the articles of property of this description could not have been available to the judgment creditor in this case by reason of the stay law, if they had not been embraced in the conveyance. How then could the including them in the conveyance manifest an intent on the part of the grantor to defraud the judgment creditor? And his reservation of the possession and use of the whole property, conveyed for three years, is upon condition that he pay the interest in the interim annually—a condition which may be enforced by the trustee by sale if he fails in its fulfillment. The tendency of this provision is to prevent the augmentation of the debt by an accumulation of interest, whilst the use of the property by the grantor, even to the consumption of that which is perishable, which is probably not more than a compensation for the payment of interest, may improve and support and strengthen the real security of the deed if faithfully carried out. And its fulfillment does not rest upon merely the personal obligation of the grantor, but the trustee is invested with power to enforce it; as we think, upon a fair construction of the deed he is empowered to sell if it is not comolied with.

The length of time allowed the debtor to pay the debts, three years, cannot prejudice the judgment creditor. He is no worse off than he would be if the deed required an immediate sale. For whatever remains of the trust fund, after paying the deed 569 of trust *creditors, is subject to his judgment debt. And if the indulgence and forbearance extended by the former creditors to the debtor would enable him to pay the interest accruing on their debts for the period of the three years of forbearance, and perchance to reduce the principal, and to increase the value of the trust subject, it would be increasing the security for his debt. And if the intermediate rents and profits are not in fact appropriated by the deed to the trust debts,

they would be liable to his judgment, a liability which a court of equity would enforce. *Lewis & als. v. Caperton's ex'or & als.*, 8 Gratt. 148. This court has repeatedly sustained the deed, in cases where it deferred payment for a long period, and the grantor reserved the right to retain possession of the property, and to enjoy its rents and profits, though no provision was made, as in this case, for the payment of the annually accruing interest. See *Lewis & als. v. Caperton's ex'or & als.*; *Cochran v. Paris*, and *Dance v. Seaman*, supra.

Nor does the execution of the deed pending a suit by the appellant against the grantor for debt, and a short time before the commencement of the term at which it was probable judgment would be rendered against him, render it fraudulent and void. *Skipwith's ex'or v. Cunningham*, 8 Leigh 271. Nor is the provision which authorizes an earlier sale, if desired by the grantor, repugnant to and incompatible with the avowed object and purposes of the deed, so as to render it invalid and void. This provision of the deed does not authorize the grantor to sell and account to the trustee or the cestuis que trust, as in *Lang v. Lee*, 3 Rand. 410, and in *Spence v. Bagwell*, 6 Gratt. 444. Nor does it constitute him as

an agent for the trustee for that purpose. It only authorizes a sale to *be 570 made of the property before the settlement, if desired by the grantor, and an application of the proceeds to the payment of the debts. By whom? We think clearly by the trustee, who is invested with the sole power of selling and paying debts. The court is therefore of opinion that the reservations on the face of the deed do not raise an irresistible presumption of fraud, which, of itself, vacates the deed, and would be notice to the creditors who take under it, so that they would be affected by it.

The court is also of opinion that the extrinsic proofs in the cause do not establish the existence of fraud, or that the deed was made by the grantor with intent to defraud other creditors, who are not provided for by its terms. If he has a right to a preference amongst his creditors, all of whom he regarded as equally just, he surely had a right to prefer those whom he regarded as just over those whom he regarded as unjust, though he might not be able to show that they were unjust. In giving such preference, the debtor may be unjust himself; yet, having the unrestricted power of alienation, if no lien has attached, he could sell his property to any creditor or purchaser, and apply the proceeds to the payment of any creditor he pleases. And if he may do so with the property or its price, there would seem to be no good reason why he should not have the right to convey it by deed of trust for the benefit of any creditor to whom he chose to give a preference. *Brashear v. West*, 7 Peters. R. 608; *Murray v. Riggs*, 15 John. R. 571. But there is no evidence that the creditors secured by the deed, or the trustee, had any knowledge of such fraudulent intent, if it could be im-

puted to him, or that either of them had any agency or participation therein; they were purchasers without notice of fraud, and could not be affected by it if it existed. Upon the whole, the court is of opinion, that there is no error in declaring the said deed of trust to be valid and binding.

But was there error in dismissing the plaintiff's bill? The plaintiff was entitled to the surplus fund, if any, after the payment of the debts secured by the deed of trust, and an account to ascertain their amount. But it is contended for the appellees, that he did not ask for it. There is no specific prayer in the bill for an account and the application of the surplus to the payment of his debt. The main object of the bill was to set aside the deed as fraudulent, and to subject the property primarily to the payment of his debt; and it contains a specific prayer to that end. But that is not the only object of the bill. If it were, that would be the only prayer. It prays also for general relief. That would have been unnecessary, if the only object was to set aside the deed as fraudulent, and to subject the whole property first to the satisfaction of his debt. The specific prayer is sufficient for that purpose. But, lest he might not be able to make out a case which would entitle him to that specific relief, he asks for such other and further relief as the nature of the case may require, and to equity may seem meet. And whilst we think the Circuit court was right in denying to him the specific relief he asked, we think he was entitled, as adapted to the case which he made, to an order for an account and a decree for the sale of the trust subject, and an application of the surplus, if any, after satisfying the trust debts, to the satisfaction of his judgment. He was entitled to such relief under the prayer for general relief upon the case made by his bill. And so it was held in *Skipwith's ex'or v. Cunningham*, supra. President Tucker, in that case, at the close of a long and able opinion, in which he disposes

572 *of many intricate and important questions, and reaches the conclusion that the deed was not fraudulent, in which the other judges concurred, says: "I have now waded through all the questions in the case save one, and in that only do I find error. I think it very clear that the appellant had a right to an account of the trust fund, and to the payment of his debt out of the surplus, if any, after satisfying the schedule creditors and those who acceded to the composition." The court below had dismissed the plaintiff's bill; and for that error alone, the cause was sent back for an account and further proceedings. In that case there was no prayer for an account and an application of the surplus fund to the plaintiff's debt; but only as touching this point, a prayer for general relief. The court is of opinion, therefore, to reverse the decree for this cause and remand, and in all other respects to affirm the decree of the Circuit court.

The decree was as follows:

This day came again the parties by counsel, and the court having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel, is of opinion, for reasons stated in a written opinion filed with the record, that the Circuit court did not err in sustaining the deed of trust, executed by the appellee for the security of certain creditors therein named, and in giving validity to the same; but that there was error in dismissing the plaintiffs' bill, instead of directing an account to ascertain the amount of debts secured by said deed of trust, in order to a decree for a sale of the trust subject, and the application of the surplus to the satisfaction of appellant's judgment.

It is therefore ordered and decreed 573 *that so much of the decree as dismissed the plaintiffs' bill be reversed, and that the residue thereof be affirmed. And the appellees being, in the opinion of the court, the parties substantially prevailing, it is further decreed and ordered, that the appellant do pay to the appellees their cost by them about their defence in this behalf expended: which is ordered to be certified to the said Circuit court of Rockingham county.

Decree reversed.

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*Switzer v. Switzer.

September Term, 1876, Staunton.

I. *Husband and Wife—Deeds of Separation.**—A wife under the apprehension that her husband will sue for a divorce on the ground of her adultery, and anxious to avoid the scandal, unites with her husband in a deed, by which, after reciting their agreement to separate rather than seek relief by divorce, they convey to a trustee the wife's real estate worth \$12,000, in which the husband has a life-estate as tenant by the curtesy, in trust for the husband during his life, and then for their two children; and she renounces all right to the custody or control of the children. And the husband covenants with the trustee that he renounces all his marital rights and control of the wife, or claim on her earnings; and that he will annually deliver to said trustee, for the benefit of the wife,

**Husband and Wife—Deeds of Separation.*—See on this subject, *Harshberger v. Alger*, 81 Gratt. 52, and note; also, *Dooley v. Baynes*, 86 Va. 650, citing with approval the principal case.

These are the only cases in Virginia on this subject, and the court in each of them pointedly avoids passing upon the general effect of such agreements. In the principal case the deed was not declared inherently bad on account of the subject-matter, but invalid as to the wife because of her common law disability to contract. This disability now being removed by statute in Virginia, the principal case is no longer authority on the subject, and the *dicta* in *Harshberger v. Alger*, 81 Gratt. 52, and in *Dooley v. Baynes*, 86 Va. 650, for the same reason are entitled to very little weight; hence the question as to the validity of deeds of separation may still be considered as *res integra* in Virginia.

35 bushels of wheat, 30 bushels of corn, 250 lbs. of pork, and he sells to the trustee for the wife certain household and kitchen furniture, a horse, buggy and harness. And the wife is to have a lien on the land to secure the performance of the husband's covenant. The wife is privily examined, and the deed admitted to record. On a bill by the wife to set aside the deed—**Held:**

1. **Same—Same—Validity.**—*Quare:* If a wife is competent to contract with her husband on an agreement for her separation.
2. **Same—Contracts between—Validity.**—If a wife may contract with her husband on an agreement of separation, this deed is invalid, on the ground of the disability of coverture, for the want of freedom of the will in the wife in executing it, as well as the inadequacy of the consideration.
3. **Same—Same—Conveyances by Statute.**—The statute prescribing the mode by which the interests of *femes covert* in real estate may be divested, applies to conveyances executed by the husband and wife to third persons, and not to deeds executed by the wife to the husband, or for his benefit. It is the union of the husband and wife as grantors that makes the instrument operative. And this deed can derive no validity from the privy examination of the wife.

575 *4. Same—Same—As to Husband's Children.—

The deed being invalid as to the husband, is invalid as to the children. The disability, the constraint operating on the wife, and the inadequacy of the consideration, necessarily extend to them.

- II. **Same—Same—When Valid.**—A contract between a husband and wife in an agreement for a separation, cannot be sustained in any case in which it does not clearly appear, that in the negotiation which preceded the agreement, as well as at the time of executing the same, the wife was in a position in which she could act and did act, not only with perfect freedom, but with a full knowledge and appreciation of all the circumstances of her situation, and of her individual and marital rights; and the contract in itself must be fair and just, wholly free from exception, and such as a court of equity might have imposed upon the parties in a case in which their persons and their property had properly fallen under its jurisdiction and control.

This was a suit in equity in the Circuit court of Augusta county, brought in October 1865, by Mary Switzer, by her next friend, against Benjamin M. Switzer, her husband, H. P. Hahn, and the two infant children of B. M. and Mary Switzer, to set aside a deed bearing date the 20th of July 1863, and duly admitted to record in the clerk's office of the County court of Augusta, upon the certificate of the privy examination of the wife, by which Mary Switzer conveyed two tracts of land which she inherited from her father and mother, to said Hahn, in trust for the purposes declared in the deed. The provisions of this deed are sufficiently set out in the opinion of Judge Staples.

It appears that Mrs. Switzer was the only child of Joseph and Elizabeth Shank. Joseph Shank died many years since, leaving a tract of one hundred and forty acres of valuable land. After his death, B. F. Switzer married the daughter, and they

lived with the mother until her death, in 1862; and during this time Mrs. Shank bought a tract of wood land of about eighty-five acres. These tracts of land are worth from ten to twelve thousand dollars; 576 and the personal property *of Mrs. Shank, including stock on the farm, household and kitchen furniture, was worth probably about one thousand dollars.

It appears further, that by agreement between Benjamin F. Switzer and his wife, Peter S. Roller and B. F. Hahn were selected to determine upon the terms of separation; that the matter was submitted to them, and they fixed the terms as stated in the deed, which was then prepared, and at the request of the parties Hahn consented to act as trustee. Messrs. Roller and Hahn were well acquainted with the property; but they were informed that Mrs. Shank's debts at her death were between three and four thousand dollars; and there is nothing in the record on that subject. They both say that the provisions of the deed were carefully explained to Mrs. Switzer, and she agreed to them; but she was very unwilling to a separation, and as they supposed only agreed to the arrangement from apprehension of a suit by the husband for a divorce on the ground of her adultery. After this suit was brought, Benjamin F. Switzer did in fact bring such a suit, and the court decreed him a divorce a vinculo matrimonii.

The cause came on to be heard on the 3d of March 1873, when the court decreed that the said deed be set aside, vacated and annulled, as a writing void and of no effect. From this decree Benjamin M. Switzer applied to a judge of this court for an appeal, which was allowed.

A. H. H. Stuart, for the appellant.

Sheffey & Bumgardner, for the appellee.

Staples, J. delivered the opinion of the court.

This is a suit by a married woman 577 to set aside a *deed of separation between her husband and herself. This deed bears date 20th July 1863. It recites, among other things, that irreconcilable differences had arisen between the parties, which rendered it impossible for them to live together in mutual affection and harmony as man and wife, and they therefore proposed to live separate and apart by agreement, rather than seek relief by divorce at the hands of the court. Then follow certain covenants on the part of the husband, with the trustee mutually selected by the parties to act for the wife, by which the husband renounces all his marital rights, all control of his wife's person, and all claim to her earnings.

The wife, on her part, surrenders every right she may have to the custody and control of the children, not only during the life of the husband, but after his death.

She then conveys two tracts of land, derived by descent from her father and mother, to the trustee, in trust, that he will permit B. M. Switzer, the husband, to occupy the

same during his life, and at his death he will convey the same to the children of the marriage or the survivor of them.

In consideration of this conveyance, the husband covenants that he will annually deliver to the said trustee, for the benefit of Mrs. Switzer, thirty-five bushels of wheat, thirty bushels of corn, and two hundred and fifty pounds of pork, all of merchantable quality; he also sells to the trustee, for her benefit, a horse and buggy and harness, a cow, and certain articles of household and kitchen furniture of inconsiderable value. A lien is reserved to Mrs. Switzer upon the lands conveyed for the due performance of the covenants on the part of her husband. These are the *most material provisions contained in the deed of separation.

The only question we are to consider is, how far this deed is binding upon the wife's estate of inheritance. In this state, agreements between husband and wife for separation have never been passed upon by any court of the last resort. The question is, therefore, *res integra* with us. In England the subject has received the fullest consideration. It is there held that deeds of separation, when properly framed, are valid, and will be enforced. The courts will not enforce a contract between husband and wife to live apart; this they pronounce void upon grounds of public policy; but they hold that the deed is valid so far as relates to the trust and covenants by which the husband makes a provision for the wife, and the indemnity given to the husband by the trustees for the wife. In *Worrall v. Jacob*, 3 Meriv. R. 255, 268, Sir William Grant said: "The object of the covenants between the husband and the trustee is to give efficacy to the agreement between the husband and the wife; and it does seem rather strange that the auxiliary agreement should be enforced, whilst the principal agreement is held to be contrary to the spirit and policy of the law." And he expressed his entire concurrence with Lord Eldon, that "if this were *res integra*, untouched by dictum or decision, he would not have permitted such a covenant to be the foundation of an action or suit." But dicta has followed dicta, decision has followed decision, to the extent of settling the law on this point too firmly now to be disturbed.

In *Warrender v. Warrender*, 2 Clark & Fin. R. 488, 527, Lord Brougham, in discussing this question, said: "What is the legal value or force of this kind of agreement.

Absolutely none whatever, in any court *whatever, for any purpose whatever, save and except only the obligation contracted by the husband with trustees, to pay certain sums to the wife. In no other point of view is any effect given by our jurisprudence, either at law or in equity, to such a contract."

It will be found, upon examination of nearly all the English cases, that the proceedings were at the suit of the wife for a separate maintenance, agreed to be paid by

the husband. True, there are decisions enforcing the wife's covenant to pay the husband a sum of money upon an agreement for a separation. But in these cases the wife was possessed of a separate estate, as to which she is treated as a *feme sole*. Having the *jus disponendi*, she may, of course, alien or charge such separate estate, or enter into valid covenants with reference to it, unaffected by her general disability of coverture. Even here it is held, that if the agreement bears the least appearance of inequality or unfairness, the court will not assist either husband or wife in getting possession of the estate with a view to the execution of the agreement. *Durand v. Durand*, 2 Cox R. 207; *Bright v. Chapman*, 2 Anst. R. 345; *Clancy on Married Women*, 420; 2 *Bright on Husband and Wife*, 306; *St. John v. St. John*, 11 Ves. R. 526.

There is another class of cases in which the English courts have held the covenant valid for the benefit of the husband. For example, where the agreement is so framed as to be capable of being enforced against some third person acting as trustee for the wife, and agreeing to indemnify the husband against the debts of the latter. In these cases the claim of the husband is not asserted against the wife herself, but against the person who has contracted in her behalf.

The American courts have never gone as far as the English courts in sanctioning deeds of separation between husband and wife. In many of them, perhaps in a large majority, it is held that a covenant by the husband for the benefit of the wife, through the intervention of trustees, upon a valid consideration, will be enforced. In 2 *Story's Eq. Jur.* 1428, the doctrine is thus clearly expressed: "In the first place, a deed of separation does not relieve the wife from any of the ordinary disabilities of coverture. In the next place, a deed of separation entered into by the husband and wife alone, without the intervention of trustees, is utterly void. In the next place, a deed for immediate separation, with the intervention of trustees, will not be enforced, so far as regards any covenant of separation, but only so far as maintenance is covenanted for by the husband, and the trustees covenant to exonerate him from any debts contracted therefor. See *Walker v. Walker's ex'or*, 9 Wall. U. S. R. 743, 751; 1 *Bishop on the Law of Marriage and Divorce*, § 656; *Tourney v. Sinclair*, 2 How. R. (Missis.) 326.

The distinction between a covenant or conveyance by the husband, and covenant or conveyance on the part of the wife, rests upon very substantial grounds. The husband is *sui juris*; he may dispose of his estate as he pleases; he may settle it upon his wife; he may bind himself to allow her a separate maintenance. Whatever he might do, by way of making a settlement upon her if the parties were living together, he may, of course, do upon an agreement of separation. The wife on the other hand,

as a general rule, can make no valid contract, especially with her husband: her legal existence is merged in him. The exceptions to this rule grew out of the possession of a separate estate by the wife, and do not affect the subject-matter here. The wife, of course, can make no valid agreement with her husband to live separate from
 581 him. *Such an agreement is utterly void. It will scarce be maintained that by entering into a void contract to live apart from her husband, she can thereby make valid a covenant which would be entirely nugatory in the absence of such contract.

But if it be conceded that a wife is competent to contract with her husband upon an agreement for a separation, it is very questionable, to say the least, whether in any view the one now being considered can be sustained. The effect of the deed is to relieve the husband from every obligation to support the wife, to exclude her from all claim upon him or his property, to vest in him during his lifetime, and in the children after his death, her entire estate, of the value of nearly twelve thousand dollars. The consideration she receives in return consists of a small quantity of personal property of but little value, perishable in its nature, or readily consumed in the use. She is also entitled to receive annually for her support a small quantity of grain and pork, which will not exceed eighty dollars in value. With this she is expected to go through life; to supply all her wants; raiment, food, a home, and whatever she may need.

It is very true that the husband is tenant by curtesy of the estate, and as such he is entitled to the rents and profits for life. But this right is accompanied with the corresponding obligation to support his wife. He cannot, by his marital right, take her estate and turn her out of doors, to subsist by her own exertions, or upon the charity of friends.

But although he is tenant by the curtesy, upon his death the estate reverts to her, with an unlimited power of disposition. By the deed she has executed here, after the death of the husband it devolves immediately upon the children. She has
 582 surrendered every *interest, present or future. It is difficult to believe that any person of sound mind (especially one of the weaker sex) would have executed such a deed, except under influences of a potential character, influences which, if they did not destroy, must at least have affected that freedom of will so absolutely indispensable in every contract between husband and wife. This record furnishes abundant evidence that Mrs. Switzer consented to the arrangement only from a keen apprehension of the exposure and scandal of a suit for divorce. To escape this, she would have agreed to anything her husband might have proposed in regard to her inheritance or to her future maintenance.

The learned judge of the Circuit court, who first decided this case, has very properly said in this connection, "that such an agreement cannot be sustained in any case in which it does not clearly appear that, in the negotiation which preceded the agreement, as well as at the time of executing the same, the wife was in a position in which she could act, and did act, not only with perfect freedom, but with knowledge and appreciation of all the circumstances of her situation and of her individual and marital rights; and that the contract in itself must be fair and just, wholly free from exceptions, and such as a court of equity itself might have imposed upon the parties in a case in which their persons and their property had properly fallen under its jurisdiction and control. These conditions do not exist in the present case."

The learned counsel for the appellant relies, however, upon the privy examination and acknowledgment of the wife as excluding all these questions, and as effectual to pass her interest in the real estate conveyed in the deed. The statute prescribing the mode by which the interest of *femes covert* in real estate may be
 583 divested, *applies to conveyances executed by the husband and wife to third persons, and not to deeds executed by the wife to the husband, or for his benefit. It is the union of the husband and wife as grantor that makes the instrument operative. The deed here, being invalid for every purpose, the contract being void on the ground of the disability of coverture, and by reason of the want of freedom of will, as well as the inadequacy of consideration, can derive no validity from the privy examination and acknowledgment. The same principle applies to the children. The contract, being invalid as to the husband, is invalid as to them. They are affected by the channel through which they claim to hold. The disability, the constraint operating upon the wife, and the inadequacy of consideration, necessarily extend to them. The foundation being bad, the whole superstructure, the entire arrangement, must fall to the ground.

The learned counsel for the appellant, in his petition for an appeal, declares that the appellee appears as a convicted and divorced adulteress of the most profligate habits, seeking to recover the title to land which she had voluntarily and for good consideration united in settling on her innocent children, in order that she may acquire the right to squander it in vice, instead of leaving it to pass to these children as it had descended to her from her parents. All this may be true. But such considerations can have no effect upon the appellee's legal incapacity, as a *feme covert*, to make a contract with her husband. The same principles of law must apply to her agreements as to those of the most virtuous female of the land. If she is incapable as a married woman to do an act, it does not matter what is her character or her conduct. If she has

title to property, the courts cannot
584 divest her of it, however *wasteful and lewd she may be, or however unfortunate may be the condition of her children.

It has been decided in some of the states, that in all cases of divorce a vinculo matrimonii, the interest of the husband in the wife's lands at once ceases, and she is entitled to be placed in their immediate possession. In this state the whole subject would seem to be regulated by statute, which provides, that "upon decreeing from the bonds of matrimony or from bed and board, the court may make such further decree as it shall deem expedient concerning the estate and maintenance of the parties or either of them, and the care, custody and maintenance of the minor children." It seems that after this suit was brought by the wife, a bill was filed by the husband against her for a divorce from the bonds of matrimony, and a decree has been obtained accordingly. Whether under the statute just cited the court may make any order touching the lands in controversy, how far it may control the same, or dispose of the rents and profits, are questions which do not arise in this case. The suggestions of the learned counsel, in regard to the habits and character of the appellee, would be perhaps more properly addressed to the court having charge of the divorce suit.

In this suit, the only matter we have to consider is the validity of the deed of separation, so far as the wife's interests are affected. Upon the other branch of the question, whether such deeds and all the covenants therein are or are not invalid, even as regards the husband, upon grounds of public policy, no opinion is expressed. What view the Virginia courts may take of that question, must be a matter for future consideration.

Upon the whole, we are of opinion, there is no error in the decree of the Circuit court.

Decree affirmed.

585 *Rea's Adm'x v. Trotter & Bro.

September Term, 1875, Staunton.

Absent, CHRISTIAN, J.

1. **Evidence—Witnesses—Counsel.**—The fact that a person is the counsel in the cause for one of the parties does not render him incompetent as a witness for that party.

2. **Same—Receipts—Accounts.**—In an action of assumpsit by T against R to recover the value of goods stored by T with R, the receipt of R for the goods is competent evidence for T, and an account of the sales of the goods copied from the books of R with his assent and in his presence, and acknowledged by him to be correct, is competent evidence for T; as original and not secondary evidence.

3. **Storage of Goods—Compensation—Implication.**—T stores goods with R, and nothing is said as to the

compensation which R is to receive for their storage. The law implies a contract that R shall be paid a reasonable compensation therefor, unless there be something in the relation of the parties or the circumstances of the case which precludes the idea of such compensation, in which case there would be an implied agreement or understanding that no such compensation was to be paid.

4. **Instructions.**—An instruction which in part is not based upon any evidence before the jury is erroneous, and is grounds for reversing the judgment.

5. **Bailees—Liability.**—In assumpsit by T, a resident of Staunton, against R to recover the value of certain manufactured tobacco which T had stored with R in Winchester in July 1864, and which R had sold for Confederate money. If the tobacco was deposited by T with R, who received the same into his warehouse on storage for a compensation to be paid him by T, and agreed in consideration thereof to keep the same in store on account of T, and subject to his order, until T should demand the same, and then deliver it to T or his order; and if R failed to keep the tobacco and deliver it up he thereby became liable to pay to T the damages sustained by such breach of the contract; though

586 R before demand by T sold the tobacco of T as well as his *own, because of his apprehension that the Union forces were about to occupy said town, and would search his house and seize said tobacco; and said forces did, after their occupation of said town, search R's house for tobacco.

6. **Appeals—Erroneous Instructions in Lower Court.**—When an appellate court is of opinion that an instruction given to the jury by the court below is erroneous, the appellate court cannot undertake to determine that the verdict, notwithstanding the erroneous instruction, is right upon the evidence, and therefore to affirm it. But the judgment must be reversed, and the cause remanded for a new trial.

This was an action of assumpsit in the Circuit court of Frederick county, brought in September 1869 by Trotter & Brother, partners, against William J. Rea, to recover the value of certain manufactured tobacco which the plaintiffs had stored with Rea in July 1864. There was a trial of the cause in June 1872, when Rea was examined as a witness; but after the case had been submitted to the jury to consider of their verdict, and they had been adjourned over to the next day, one of them failed to appear, and the cause was continued. At the October term of the court the death of Rea was suggested and the suit was revived against his administratrix.

The cause came on again to be heard in November 1873. The plaintiffs, to sustain their action, proposed to introduce John J. Williams as a witness; and the defendants objected to him, on the ground that he was the counsel of the plaintiffs. But the court overruled the objection; and the defendant excepted.

able compensation as implied. See *Armstrong v. Walkup*, 9 Gratt. 372; *Lucas v. Ins. Co.*, 23 W. Va. 282; *Hurst v. Hite*, 20 W. Va. 205.

Instructions.—See *note* on "Instructions Generally," to *Womack v. Circle*, 20 Gratt. 192.

***Compensation—Implication.**—In a contract for services, where there has been no agreement for compensation, the law will generally consider a reason-

In the progress of the trial the plaintiffs proved by John J. Williams, that in January 1869 he was employed by the plaintiffs, through A. D. Trotter in person, to collect their claim against William J. Rea, and was furnished by him with the paper marked A, as evidence of the claim, which 587 paper was in the handwriting *of Rea; and that he in person, and as attorney for the plaintiffs, presented said claim and paper A to Rea, who admitted the paper, and that he had received the tobacco therein specified; but stated, he had sold the same for Confederate money, because of the Federal troops, and did not think he was responsible for anything but that money. After this, witness went to see Rea, and asked for an account of sales of tobacco; whereupon Rea produced a book and handed it to witness, and directed his attention to the account; when witness, with Rea's consent first asked, copied the same; and paper C is that copy, and a correct one of said book, which remained in Rea's possession. That when, at a former trial of this cause, Rea was on the witness stand, said Williams, then counsel in the cause, handed said paper to Rea and asked him if he admitted it to be correct; to which he replied, he did: and thereupon the production of the book alluded to was dispensed with at the trial.

The paper A commences:

Received in store on account of —
Trotter by Wm. J. Rea, July 25th, 1864.

It then sets out, 7 boxes Oreta Brand tobacco; stating the weight of each box, and making together net 449 lbs. 4 boxes Fora; setting them out in the same way, and making net 243 lbs.

The paper C was a statement of the sales of the tobacco, shewing sales for Confederate money, commencing August 2 and ending September 15—the whole amount \$2,665.

The defendant objected to the introduction of these papers as evidence: but the court overruled the objection; and the defendant excepted.

After the evidence had been introduced the plaintiffs moved the court to give 588 to the jury five instructions, *which the court gave, with four asked for by the defendant. To the granting of the instructions asked for by the plaintiffs and the defendant, or any of them, the defendant objected: but the court overruled the objection; and the defendant again excepted. These exceptions are numbered from one to nine, and they are given in the opinion of the court.

The jury found a verdict in favor of the plaintiffs for five hundred and seventy-nine dollars and seventy-five cents, with interest from July 1st, 1865. And thereupon the defendant moved the court for a new trial, on various grounds; which motion the court overruled, and rendered a judgment upon the verdict. And thereupon the defendant excepted. There was a second motion for a new trial, which was overruled; and the

defendant again excepted. These exceptions are stated in the opinion of the court.

The material facts of the case seem to be, that the plaintiffs, Trotter & Co., were the carriers of the mail in stages between Staunton and Winchester, under a contract with the Confederate government. They resided in Staunton. That they could not purchase supplies at Winchester to carry on their business with Confederate money, and they had to use other articles to get them, and among them tobacco. That, with the consent of the Confederate authorities, they, shortly prior to July 25, 1864, brought a considerable lot of tobacco to Winchester: and M. Brannon, their local agent at that place, advised them to store a part of it with a Union man and part with a Southern man, and he named John Higgins as the Southern man, and William J. Rea as the Union man. That, in consequence of this advice, plaintiffs directed Brannon to make the said arrangement with those persons for the storage of the tobacco. That, accord-

589 ingly, Brannon *called upon Rea, and informed him that the plaintiffs had the tobacco, and what they had been advised to do, and that he, Rea, had been recommended to the plaintiffs as a Union man, and that he came to him by the direction of the plaintiffs, and because he was such. That Rea thereupon consented to receive the tobacco. That upon Brannon reporting that fact to the plaintiffs, A. D. Trotter, one of the plaintiffs, together with Brannon and — Rutter, who was driving the plaintiff's wagon on that night, about dark took the tobacco, less the part which they deposited with Higgins, to Rea's warehouse, opening on the alley at the rear of his lot whereon was said Rea's dwelling, and in a front room of which was his store-room, in which warehouse he, Rea, received in person the tobacco; and then and there wrote and delivered to Trotter a receipt for it, which is the paper A before mentioned. That for years before 1864 Rea had been trafficking and trading, having a store-room and back store-room in his dwelling, and a warehouse on the alley; that he continued his business through the war, and dealt in tobacco, produce, &c., and had tobacco exposed in the windows of his store at various times whilst the Union forces were in Winchester, including the year 1864.

In addition to the evidence of Williams, as hereinbefore given, the witness gave a further statement of Rea's testimony at the former trial, viz: That he received the tobacco in question in store without making any charge for storage, and that he never intended or expected to make any charge therefor; but that nothing passed between him and the plaintiffs on the subject of such charge at any time. That in September 1864, three or four days after the 19th, when General Sheridan of the Union forces took possession of Winchester, 590 *Major Young, of General Sheridan's scouts, searched Rea's house, in which was his dwelling and store-room, as he said, for tobacco and contraband goods,

and found a small piece of choice tobacco in Rea's secretary (a piece of furniture in his dwelling), and took it, as he said, for his own use; that Rea after the tobacco was left, and before the 19th of September 1864, did meet Joseph Andrews, general stage agent for plaintiff's line, and gave him some message about the tobacco—what the message, as stated by Rea was, the witness, Williams, could not remember; that he, Rea, sold the tobacco of plaintiffs as well as his own, because of his apprehension, after the Confederate troops burned Chambersburg, that the Union troops would be hard on Winchester.

There is no evidence that anything was said at the time or afterwards as to the terms on which the tobacco was received by Rea. Rea proposed several times to Andrews, the general agent of the plaintiffs, to purchase the tobacco, but was told by Andrews that he had no authority to sell it. There was proof that the tobacco was sold by Rea for Confederate money and Virginia treasury notes, and that he offered the money to Trotter after the war.

Upon the application of Rea's administratrix a supersedeas was awarded.

Holmes Conrad, for the appellant.

Williams & Williams, for the appellees.

Moncure, P. delivered the opinion of the court.

The court is of opinion, that Mr. John J. Williams was a competent witness for the plaintiffs, notwithstanding *his relation to them as their attorney in the cause; and therefore the Circuit court did not err in overruling the defendants' objection to the competency of said witness, and in admitting the said witness, as stated in the defendants' bill of exceptions, No. 1.

The court is further of opinion that the Circuit court did not err in overruling the defendants' objection to the papers marked A and C, referred to in the defendants' bill of exceptions, No. 2, offered in evidence by the plaintiffs, through the witness, John J. Williams, in the order and connection appearing from his testimony, as stated in the certificate of facts proven, and in admitting the said papers in evidence, as stated in the said bill of exceptions. Paper A was the defendants' receipt for the tobacco mentioned in the declaration, and was not only admissible, but was most important evidence in the case, though not all the evidence. It does not set out the terms on which the tobacco was received, which, however, appeared from the other evidence in the case in connection with the receipt. The receipt was a link in the chain of evidence, tending to prove the plaintiff's case. Paper C was, in effect, an account rendered by the defendant to the plaintiffs of the sale made by the former of the latter's tobacco, and was original and not secondary evidence, although it was copied from the book of Rea. The copy was made in the presence and by the consent of Rea, though made by

the plaintiff's counsel, whose act was, in effect, the act of Rea. It was an account rendered, and was no more secondary evidence, than is any other account rendered, which is almost always copied from a book. The evidence consists in the rendition of a certain account, which fact is original evidence, though the account be a copy from a book.

592 *The court is further of opinion, that the Circuit court did not err in giving to the jury the instruction No. 1, moved for by the plaintiff's counsel, viz: "That they must determine from the acts, agreements, conversations and writings, circumstances and relations of the plaintiffs and William J. Rea; in short, from the whole evidence, what the contract was between said parties." The effect of the instruction was the same as if it had been: "the jury must determine from the whole evidence what the contract was between said parties." Had it been in that form, the propriety of it would not have been denied.

The court is further of opinion, that the Circuit court did not err in giving to the jury the instruction No. 2, moved for by the plaintiff's counsel, viz: "That when one receives from another goods in store, and nothing is said between the parties as to pay for such storage, the law implies a contract that the party who receives the goods in store shall be paid a reasonable compensation therefor." Where service is performed by one, at the instance and request of another, and especially where that other is personally benefited by the service, and nothing is said between the parties as to compensation for such service, the law implies a contract, that the party who performs the service shall be paid a reasonable compensation therefor, unless there be something in the relation of the parties or the circumstances of the case which precludes the idea of such compensation; in which case there would be an implied agreement or understanding that no such compensation was to be paid. This is an undeniable principle of law, which applies to almost every case of assumpsit on a quantum meruit. The court in such case charges, that the service was performed by

the plaintiff at the special instance and request of the defendant *who, in consideration thereof, promised to pay to the plaintiff as much as he reasonably deserved to have therefor. And proof that such service was performed at such instance and request, without more, will sustain the court, and entitle the plaintiff to recover in damages whatever amount he may prove the service to be reasonably worth. If it appear from the evidence that the service was to be performed gratuitously, of course nothing would be recovered. But in the absence of such proof, or proof of the like kind, the plaintiff's right to recover as aforesaid is undeniable. Now the case before us is precisely such a case. To receive and keep goods in storage for another, at the latter's special instance and request, is certainly to render him a service; that the

party who renders it is not a "warehouseman," so to speak, can make no difference. The service may, in fact, be greater on that account. A warehouseman is prepared to receive and keep goods on storage, and may do so at less inconvenience than one who is not a warehouseman, and is not so prepared. It is not admitted that Rea was not in fact a warehouseman. The plaintiffs contended, and the evidence tended, to prove that he was. But that is immaterial to the question we are now considering, which assumes that, technically speaking, he was not.

Instruction No. 3, is in these words: "If the jury, in the light of the first and second instructions, believe from the evidence that William J. Rea, on the 22d of July 1864, received from the plaintiffs the tobacco sued for, and agreed for, or was entitled to compensation to keep the same in store on account of the plaintiffs and subject to their order, until they should in person, by agent or order, demand the same, and then to deliver up the same to them, their agent

594 or order, and so *agreed in view of the fact, that said Rea resided in the town of Winchester, and had his store-house there, and against any risk to said tobacco that might arise from the occupation of said town by the Federal forces, and that Rea said did not so keep the tobacco as agreed as aforesaid, nor deliver the same as agreed as aforesaid, but upon demand if the plaintiff's failed to deliver the same, or to pay, or to offer to pay in money the fair value of the same at the time of such demand, then they must find for the plaintiffs, even though they may believe from the evidence, that said William J. Rea, before said demand, sold the plaintiff's tobacco, as well as his own, because of his apprehension that the Union forces were about to occupy said town of Winchester, and would search his house and seize said tobacco, and that said forces did, after their occupation of said town, search said Rea's house for tobacco, and that one of them did take from the secretary (being a piece of furniture) of said Rea a small piece of choice tobacco for his own use."

The court is of opinion, that this instruction was calculated to mislead the jury; that there was nothing in the facts proved on the trial, as certified in the record, tending to prove that the defendant warranted the tobacco against any risk that might arise from the occupation of said town by the Federal forces, which is one of the facts, on the supposed existence of which the said instruction was based, and, therefore, that the court erred in giving the said instruction, No. 3, to the jury. There would have been no substantial objection to the instruction if the words: "And against any risk to said tobacco that might arise from the occupation of said town by the Federal forces," contained in the instruction, had been omitted. If the tobacco, as the instruction supposed, and as the evidence tended

595 to prove, was deposited by the plaintiffs in the hands of the

said Rea, who resided in the town of Winchester, and had his store-house there, and who received the same on storage for a compensation to be paid him by the plaintiffs, and agreed in consideration thereof to keep the same in store on account of the plaintiffs, and subject to their order until they should demand the same, and then deliver it up to them or their order; and if the said Rea failed so to keep the tobacco and to deliver it up, he thereby became liable to pay to the plaintiffs the damages sustained by them from such breach of the contract, and of course the jury ought to have found for the plaintiffs. The questions for them to decide upon all the evidence were—1st. What was the contract between the parties? 2dly. Was it broken by the defendant, or rather by Rea, her intestate? And if so, 3dly, What damages did the plaintiffs sustain from such breach? Whether Rea had authority, under any circumstances, to sell the tobacco, depended upon the nature and terms of the contract, express or implied. If the tobacco was deposited in his hands for a special purpose, and with an understanding or agreement between the parties, that he was not to sell it at all under any circumstances, and especially not for Confederate money; and that the plaintiffs were fully aware of the risk to the tobacco from seizure and capture by the Union forces, and intended and agreed to incur that risk themselves; then, of course, Rea had no authority to sell it on account of any apprehension by him, however well grounded it may have been, that the tobacco would otherwise have been seized and captured as aforesaid. If, on the other hand, the agreement or understanding between the parties was, that Rea should take the best care he could of

596 the tobacco *with a view to its safety, and to preserve it from being seized and captured by the Federal forces, and should have authority to sell it for Confederate money if he had good reason to apprehend that it was necessary to do so to prevent its total loss by such seizure and capture, then if Rea did take such care of the tobacco, and did have good reason for such apprehension, he had such authority; and if he sold the tobacco accordingly, he is not liable to the plaintiffs for any damages sustained by them on account thereof. Now all these questions depend upon the evidence, on the meaning and effect of which the jury alone had to consider and decide. Instruction No. 3, without the objectionable words aforesaid, would have sufficiently embodied the former of the foregoing alternatives, and if given in that form would have been a good instruction, and well warranted by the evidence. The court ought therefore to have given it in that form or to that effect if any instruction at all were given on the subject.

The court is further of opinion, that the court did err in giving instruction No. 4; "that the fact that William J. Rea's house was searched after the 19th September 1864, is not competent evidence to show what a

contract (if such was made) of date July 26th, 1864, was."

The court is further of opinion, that the Circuit court erred in giving instruction No. 5, for the same reason for which it erred in giving instruction No. 3 as aforesaid; that is, for the reason that there was no evidence before the jury tending to prove an agreement by the defendant to protect the tobacco from seizure and capture by the Union forces. No. 5 is in these words: "If the jury believe from the evidence, that the tobacco in controversy was stored with
597 the *defendant, to be kept by him, and with an agreement to protect it from seizure and capture by the Union forces, then the court instructs the jury, that a sale of the same, because of a fear that the same would be seized by the Union forces, or because its possession would endanger the defendants' property, was a violation of the contract under which the same was stored; the sale of the same was unauthorized, and they must find for the plaintiffs, although they may believe that the defendant sold his own tobacco about the same time for the same price and for the same reasons."

Instruction number six is in these words: "Although the jury may find from the evidence, that Rea received Trotter's tobacco in store, to hold subject to Trotter's order, and that Rea, without authority from Trotter, did sell said tobacco; yet if they find that such sale was made from the peculiar necessities of the case, and to prevent total loss of said tobacco, then Rea is not liable, except for the proceeds of said sale, provided said sale was fairly made and for a reasonable price under the circumstances; unless they further find from the evidence, that said tobacco was deposited with the defendant Rea with reference to its care and keeping, in the possession of said Rea, in the event of the presence of the Federal forces in Winchester; and if the jury so further find, then they are instructed that said Rea was not authorized to sell said tobacco, and they must find for the plaintiff the value of the tobacco when demanded. But the burden of proof, as to the character of the contract, is upon the plaintiffs." The court is of opinion, that this instruction is vague and uncertain, and was calculated to mislead the jury, and therefore ought not to have been given.

Number seven is in these words: "The court instructs the jury, that if they
598 find from the evidence, *that Trotter deposited his tobacco with Rea, and that such deposit was for the benefit of Trotter alone, and without compensation to Rea, then Rea was only bound to use slight diligence, and was only answerable for gross negligence." Without deciding whether the Circuit court erred or not in giving this instruction, it is enough to say that the error, if any, is not to the prejudice of the plaintiff in error, who has therefore no right to complain of it.

Number eight is in these words: "If the jury believe from the evidence, that the

defendant Rea received the tobacco without charge in store for Trotter, and that he, Rea, afterwards, to prevent total loss of said tobacco by a force against which he had not insured it, sold it; that then Rea is only responsible for the value of the consideration received by him for the tobacco." That would depend upon the meaning and effect of the evidence and the purpose for which the tobacco was stored; of all which matters the jury were to judge. If the agreement and understanding of the parties was that the tobacco was to be kept by Rea until demanded by Trotter, and was not to be sold by the former, then Rea is responsible for the value of the tobacco when sold, even though it may have been received and sold under the circumstances stated in the instruction. The court therefore erred in giving this instruction; but the error was not to the prejudice of the plaintiff in error.

No. 9 is in these words: "If the jury believe from the evidence that Trotter deposited his tobacco with Rea, and that Rea, without insuring it against the Federal forces, afterwards, and before the Federal forces came in, sent word to Trotter by Trotter's general agent, that he, Trotter, must take the tobacco away, and that

Trotter failed to do so, and that then
599 *Rea sold said tobacco to prevent total loss thereof, then Rea is liable only for the value of the consideration received by him."

This instruction is objectionable, on the ground, if no other, that there is no evidence tending to prove that he, Rea, sent such a message to Trotter as is stated in the instruction, which, therefore, ought not to have been given; but the error was not to the prejudice of the plaintiff in error.

The instructions given by the court on the trial are all set forth in the defendant's bill of exceptions No. 3. Two other bills of exceptions were taken by the defendant in the case, which yet remain to be noticed, viz: Nos 4. and 5. Defendants' bill of exceptions, No. 4, was to the action of the court in overruling the motion of the defendant to set aside the verdict and award a new trial, upon the grounds, 1st, that the jury had been misled by erroneous instructions; 2d, that improper testimony had been allowed to go before the jury; and 3d, that the verdict was contrary to law and to the evidence. And defendants' bill of exceptions, No. 5, was to the action of the court in overruling the motion of the defendant made four days after the verdict of the jury had been rendered and recorded, to set aside the verdict and grant a new trial, on the ground that a certain paper, which was not in evidence, had been conveyed to the jury room, and read by the jury in their retirement. If the judgment in this case is to be reversed for the errors of the court in giving instructions as aforesaid, it is unnecessary to consider and decide the questions presented by the two last mentioned bills of exceptions, as they will, in that event, become immaterial, a new trial

being the necessary result of such reversal. It is contended, however, by the counsel for Trotter & Bro., that even
 600 *though there be such error, it is not material, and does not require a reversal of the judgment, if, notwithstanding such error, the defendant is not thereby aggrieved, and justice has been done by the verdict and judgment. Without undertaking to decide whether justice has been done by the verdict and judgment, the court is of opinion that the judgment ought to be reversed for the errors aforesaid, and the verdict set aside, and a new trial awarded. The case seems to be governed by that of *Wiley &c. v. Givens &c.*, 6 Gratt. 277, in which it was held by this court, that when an appellate court is of opinion that an instruction given to the jury by the court below is erroneous, the appellate court cannot undertake to determine that the verdict, notwithstanding the erroneous instruction, is right upon the evidence, and therefore to affirm it. But the judgment must be reversed, and the cause remanded for a new trial.

The court is therefore of opinion, that the judgment is erroneous for the reasons aforesaid, and ought to be reversed, and the verdict set aside, and the cause remanded for a new trial to be had therein, in conformity with the foregoing opinion.

The judgment was as follows:

This day came again the parties by their attorneys, and the court having maturely considered the transcript of the judgment aforesaid, and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the Circuit court did not err in the following rulings:

1st. In overruling the defendants' objection to the competency of John J. Williams, as a witness for the plaintiffs, notwithstanding his relation to them as
 601 their *attorney in the cause, and in admitting the said witness, as stated in the defendants' bill of exceptions No. 1.

2ndly. In overruling the defendants' objection to the papers marked "A" and "C," referred to in the defendants' bill of exceptions No. 2, and in admitting said papers in evidence, as stated in that bill of exceptions.

3rdly. In giving to the jury instructions "No. 1.," "No. 2.," and "No. 4.," set out in "defendants' bill of exceptions No. 3."

The court is further of opinion, that the Circuit court did not err to the prejudice of the defendant, if at all, (who has therefore no ground to complain of any such error) in giving to the jury instructions "No. 7.," "No. 8.," and "No. 9.," set out in the last mentioned bill of exceptions. The last two at least might well have been objected to by the plaintiffs: "No. 8" upon the ground that its propriety depended upon the meaning and effect of the evidence, and the purpose for which the tobacco was stored, of all which matters the jury were to judge; "No. 9" upon the ground (if no other) that there was no evidence before the jury tending to prove that such

a message was sent by Rea to Trotter, as is stated in the instruction.

The court is further of opinion, that the Circuit court erred in giving instruction "No. 3.," on the ground that it was calculated to mislead the jury, and that there was nothing in the facts proved on the trial, as certified in the record, tending to prove that Rea warranted the tobacco against any risk that might arise from the occupation of the town of Winchester by the Federal forces; which is one of the facts on the supposed existence of which the instruction was based. There would have been
 602 no substantial objection to the instruction if the words "and against any risk to said tobacco that might arise from the occupation of said town by the Federal forces," contained in the instruction, had been omitted.

The court is further of opinion, that the Circuit court erred in giving instruction "No. 5.," for the same reason for which it erred in giving instruction "No. 3.," as aforesaid; that is for the reason that there was no evidence before the jury tending to prove an agreement by Rea to protect the tobacco from seizure and capture by the Union forces, and the instruction was calculated to mislead the jury.

The court is further of opinion, that the Circuit court erred in giving instruction "No. 6.," which is vague and uncertain, and was calculated to mislead the jury.

The court is further of opinion, that for the errors aforesaid, and without deciding or considering whether the Circuit court erred in overruling the motion of the defendant to set aside the verdict and award a new trial, on the ground stated in "the defendants' bill of exceptions No. 4.," or in overruling the motion of the defendant to set aside the verdict and grant a new trial on the ground stated in "the defendants' bill of exceptions No. 5.," or whether the verdict, notwithstanding the erroneous instructions aforesaid, is right upon the evidence; the judgment ought to be reversed, the verdict set aside, and a new trial awarded in the case.

Therefore, it is considered by the court, that the said judgment is erroneous, and be reversed and annulled; and that the plaintiff in error recover against the defendants her costs by her expended in the prosecution of her writ of supersedeas aforesaid here; and it is ordered that the verdict of the jury
 603 be set aside, and *the cause remanded to the said Circuit court, for a new trial to be had therein in conformity with the foregoing opinion and judgment; which is ordered to be certified to the said Circuit court of Frederick county.

Judgment reversed.

604

*Evans v. Pettyjohn.

September Term, 1875, Staunton.

1. Practice—Attempts to Delay.—P, as assignee of L, brought debt upon two notes against E. At the September term 1873 of the court E appeared and

filed pleas of payment and *nil debet*, and three special pleas: on which issues were made up. The case was continued until the next March term of the court; when the defendant tendered another special plea, stating an agreement with L before the assignment, which, if true, constituted a good defence to the action. But the court being satisfied that it was merely intended for delay, rejected it. And the appellate court, concurring with the court below, affirmed the judgment.

This was an action of debt in the Circuit court of the county of Amherst, brought in August 1873, by Joseph Pettyjohn against William M. Evans. The case is sufficiently stated in the opinion of the court, delivered by Judge Christian. There was a judgment for the plaintiff; and Evans obtained a supersedeas.

Coghill, for the appellant.

Mundv, for the appellee.

Christian J. delivered the opinion of the court.

This case is before us upon a writ of error to a judgment of the Circuit court of Amherst. It is an action of debt, brought by the defendant in error against the plaintiff in error, on two promissory notes in the following form:

605 *First note \$1,647.27.

New York, Nov. 1st, 1870.

On or before the 1st day of November 1872 I promise to pay to S. Otis Livingston or order sixteen hundred and forty-seven dollars and twenty-seven cents, for value received, with interest at the rate of seven per cent. per annum, having deposited with him as collateral security, with authority to sell the same at the brokers' board, or at public or private sale, at his option, on the non-performance of this promise, and with ten days' notice, seventy (70) shares of the capital stock of the Livingston Manufacturing Company.

Certificate No. 84.

(Signed,)

Wm. M. Evans.

Second note \$1,352.73.

New York, Nov. 1st, 1870.

On or before the 1st day of November 1872 I promise to pay to William H. Daly or order thirteen hundred and fifty-two dollars and seventy-three cents for value received, with interest at the rate of seven per cent. per annum, having deposited with him as collateral security with authority to sell the same at the brokers' board, or at public or private sale at his option, on the non-performance of this promise, and with ten days' notice, sixty shares of the capital stock of the Livingston Manufacturing Company.

Certificate No. 78.

(Signed,)

Wm. M. Evans.

Both of these notes, by endorsement made thereon, were assigned without recourse, by the payees respectively, to the defendant in error.

On these notes suit was brought to the September term 1873 of the Circuit court of Amherst. At that term the plaintiff in error appeared by his counsel and pleaded payment, *nil debet*, and by leave of the court filed three special pleas in writing. Upon all these *pleas the plaintiff (defendant in error) replied generally; and the case was continued until the next term.

The first of these special pleas avers that the deposit of the shares of the capital stock of Livingston Manufacturing Company, in the notes mentioned, were made with the payees of said notes, with the understanding and agreement, made at the time of the execution of said notes, that they were to be sold by the payees, and the proceeds applied to the payment of said notes before action brought thereon for the balance thereon, if any balance remained; and that said stock was worth in market, before the bringing of this suit, the full amount of these notes, to wit, the sum of \$3,000.

The two other pleas, in different forms, in substance were, that after maturity of the notes, and before commencement of this suit, the payee thereof sold the stock mentioned in said notes for a sum sufficient to pay and satisfy the same.

Issue was taken upon these pleas, as well as upon the pleas of payment and *nil debet*. The defendant (plaintiff in error) also filed at the September term, with his pleas, an account of offsets, in which he estimates the value of the stock deposited with payee at \$50 per share, amounting in the aggregate to \$6,500.

At the March term of said Circuit court the defendant (plaintiff in error) offered another special plea in the following words:

And the said defendant, for a further plea in this behalf, saith: That after maturity of said notes, to-wit, on the 15th January 1873, and before the assignment thereof to the plaintiff, by an agreement then made by the parties, the value of the said collaterals (stock) was estimated between them at \$23 per share, or the full amount of said notes; and **607** that when *exposed to sale, that the

same was to be bidden in by or for the said persons, Daly & Livingston, unless the said collaterals sold for an amount equal or greater than the amount of the notes held by the said payees; and if the said collaterals were bidden in by said payees, that the same were to be sold to the said plaintiff or the Livingston and Cherry-tree Manufacturing Company for a sum equal to the amount of said notes. And the said defendant further avers, that the said collaterals were sold before the commencement of this suit, and the said payees failed to carry out their agreement aforesaid in reference to said sale; and that he is entitled to a credit and offset to the full amount of said notes: and this he is ready to verify."

This plea was rejected by the court. The defendant then moved a continuance of

the case till the next term. This motion was overruled; and a jury being waived by the parties, the case was heard by the court. A judgment was entered for three thousand dollars, with seven per cent. interest from 1st November 1872 till paid, subject to a credit of \$228.64, that being the amount for which the collaterals were sold at the brokers' board in New York.

From this judgment a writ of error was awarded by one of the judges of this court.

In the petition for a writ of error three grounds of error are assigned:

1. That the court erred in rejecting the defendant's special plea number four, copied above.

2. That the court erred in refusing to grant the defendant a continuance. And

3. That the court erred in giving judgment for the plaintiff on the plea of nil debit and the three special pleas in the case.

The court is of opinion, that the 608 Circuit court did *not err in rejecting said plea. The plea itself, and the time at which it was offered, were well calculated to raise a suspicion in the mind of the court that it was tendered merely for delay, and that in truth no such defence as was therein set up could be sustained. At a former term of the court the defendant had relied upon the defence (in addition to the pleas of payment and nil debit): first, that the shares of stock deposited as collateral were worth \$3,000 in the market; and, second, that the plaintiff had actually sold said collaterals for the sum of \$3,000.

The plea avers that on the 15th of January 1873, by an agreement between the parties made on that day, the value of said collaterals was estimated at \$23 per share; and that they should be bidden in by Daly & Livingston at that price, unless they sold for an amount equal or greater than the amount of the notes held by the payees.

Now it is impossible to conceive, that if on the 15th January 1873, there had, in fact, been any such contract as that set out in the plea No. 4, it would not have been pleaded at the September term 1873. It is most natural to suppose, that a defence so vital to the interests of the defendant, that a contract so important, should have been at once relied upon as soon as the controversy came. Why was this plea setting up so important a contract not filed at the first term of the court when the case was called, and when five pleas were put in by the defendant? If such a contract as the plea sets forth was really made on the 15th January 1873, how is it to be explained that on the 21st September 1873 no such defence was offered or pretended could be made? Could the defendant, when called upon to answer the action, have forgotten this most important and vital defence?

609 Is it possible that a contract *of such importance could have been ignored or forgotten then. If it had any existence, it would have been the very first defence offered to the action. The fact that the plea was not offered at the Sep-

tember term, when so many defences were put in, was well calculated to impress the Circuit court with the suspicion that the plea was offered merely for delay. The plea upon its face made it liable to such suspicion; for it avers, that if the stock was not bid in at \$23, it was then to be sold to the plaintiff, or to the Livingston and Cherry-tree Manufacturing Company, for a sum equal to the amount of said notes; thus bringing into the alleged agreement, as set out in the plea, outside parties who had nothing to do with the original contract, which by its terms declared that if the notes were not paid at maturity the collaterals should be sold at the brokers' board, at New York. The court was well warranted, under the circumstances, in rejecting this plea, inasmuch as the plea itself, and the time of offering it, was well calculated to raise the suspicion that it was not offered as a valid defence, but merely for delay.

The subsequent developments in the trial fully confirm this view, and show that no injustice was done by rejecting this plea for it is conclusively shown from defendant's own letter, that no such defence as that set up in plea No. 4. could have been sustained. The pretence is, that the agreement set out in the rejected plea was made on the 15th January 1873; and yet in a letter to the plaintiff, who, as asserted in the plea, was a party to the agreement, dated February 17th, 1873, he makes no allusion to any such agreement; but on the contrary, says: "I did not succeed in making any arrangements with old Daly to save the stock, but agreed with them that I would release

610 all my interest, *if the Livingston Company or yourself wanted the stock, for the amount due them. I have not yet heard what had been done. * * * Western and other losses to large amounts make it impossible to save the stock." This letter is utterly inconsistent with his plea. According to his plea, there was an arrangement on the 15th January 1873, that the stock should be estimated at twenty-three dollars—a sum sufficient to pay his notes. If this was true, why should he say in his letter of the 17th February, that he did not succeed in making any arrangement to save the stock; and that he had not yet heard what was done. Why say that Western and other losses to large amounts made it impossible for him to save the stock, if it was true, as alleged in his plea, that by special agreement, stock sold on the New York market at two dollars per share was to be taken at twenty-three dollars per share? Especially if as alleged in his plea, the stock was to be taken by Pettyjohn at twenty-three dollars if no higher bid was made, according to the agreement of 15th January 1873? Why is no allusion made to this agreement in his letter to Pettyjohn on the 17th February 1873. The whole record shows that the Circuit court was right in rejecting the plea. The Circuit court was well warranted in looking with suspicion upon the plea as

one offered merely for delay, and the evidence introduced under the other pleas fully justifies that conclusion.

Upon the second ground of error, that the court erred in refusing a continuance, the court is of opinion, that upon the facts stated in the bill of exceptions, the defendant was guilty of such laches and want of diligence as not to entitle him to a further continuance of the case.

Upon the third error assigned, that 611 the court ought *to have entered a judgment for defendant upon the plea of nil debit, this court is of opinion, that there was no error in the judgment of the Circuit court. The contract of the parties in writing was that if the notes were not paid at maturity, the collaterals (the stock) deposited should be sold at the brokers' board at New York, after ten days' notice. They were so sold, and the Circuit court in its judgment gives credit for the net proceeds of that sale. There is nothing in the record to show that they did not bring their full market value; nor is there anything in the record to show that at the time the contract was entered into there was any further or different agreement than that expressed by the written contract, or that the terms of that contract were afterwards varied by subsequent agreement.

The court is of opinion that there is no error in the judgment of the said Circuit court, and that the same must be affirmed.

Judgment affirmed.

612 *Meade v. Grigsby's Adm'rs.

September Term. 1875. Staunton.

1. *Novations—Bond Given for Debt on Account—At Law—in Equity.**—M and D, as his surety, execute a bond to G. upon a settlement of an account for articles furnished by G to M. Though at law the account is merged in the bond, in equity the debt on the account will be held as still subsisting if necessary to do justice between the parties.

2. *Same—Same—No Merger—Principal and Surety.*+—After the articles were furnished by G to M, but before the execution of the bond, M conveys all his property in trust for M's wife and children, subject to his then existing debts. G sues M and D on the bond, recovers judgment, and sues out execution, which is levied on the property of D. The debt of M to G, for the articles furnished him, was a subsisting debt at the date of the deed, and the trust property is liable for it.

3. *Suit in Equity—Enjoining Sale under Execution—Subrogation.*—In the court in which G recovered

**Novations—Discharge.*—See *Gilbert v. W. C. & V. M. R. Co.*, 33 Gratt. 586, and *note*, also *Coles v. Withers*, 33 Gratt. 186, and *note*.

+*Principal and Surety.*—"The creditor is under no obligation to look to the principal debtor or to his property, or to exhaust his remedies against the latter before resorting to the surety." See *Penn v. Ingles*, 82 Va. 68; *Southall v. Farish*, 85 Va. 409.

**Subrogation.*—For the right of a surety to subrogation to rights of the creditors of his principal, see *Harnsberger et al. v. Yanecy et al.*, 33 Gratt. 527, and *note*, collecting cases; 2 Minor's Inst. (4th Ed.) 840-41.

his judgment there is a suit in equity by R's administrator, against M and others and G, to ascertain the indebtedness of M at the date of the deed, and adjust the accounts between the trust estate and G, who is largely indebted to said estate for rents. A bill by D, stating the facts as to the debt of M to G, the execution of the bond and deed of trust, the judgment and execution, the suit and G's indebtedness for rents, and asking for an injunction to a sale under the execution, makes a case for relief, and therefore cannot be dismissed upon demurrer.

In August 1872 David Meade applied to the judge of the Circuit court of Clarke county for an injunction to restrain the levy of an execution upon his property, which had issued upon a judgment recovered in that court by John R. Grigsby's administrators against N. B. Meade and the plaintiff. The bill states the recovery of the judgment for one thousand dollars, with interest from January 2d, 1861, and 613 costs; and *that an execution thereon had been sued out and levied on the property of the plaintiff. That said judgment was based upon a single bill which was executed by N. B. Meade and the plaintiff as his surety, upon an adjustment made in 1860 of said Grigsby's account for articles obtained at his store. Said single bill, according to plaintiff's recollection and belief, was made payable twelve months after date, and so was dated January 2, 1860. That prior to that time N. B. Meade had executed to the plaintiff a deed for all his real and personal estate, in trust for the benefit of his wife and children, subject, however, to all his then existing debts and liabilities; that this deed bears date February 5th, 1859, and was soon after duly recorded.

The plaintiff further charged, that the store account, in settlement of which this single bill was given, had been contracted to a very large extent, certainly, he believes, to an amount exceeding said single bill, before the said 5th of February 1859; and thus was an indebtedness of N. B. Meade existing at the date of said deed, and was therefore binding on said property, which should be held liable therefor in relief of the plaintiff.

The plaintiff further states, that there is pending in the same court a suit in equity, of Rebecca S. Meade's administrator &c. v. N. B. Meade and others, among whom are the personal representatives of J. R. Grigsby deceased; that in this suit orders have been made to ascertain the indebtedness of N. B. Meade at the date of the deed aforesaid, and also to adjust the accounts between said trust estate in favor of Mrs. Meade and her children and the estate of John R. Grigsby; and plaintiff is informed and believes that this latter estate is indebted in a large amount for rents 614 &c. to the said *trust estate, in fact to an amount exceeding the amount of said judgment. He insists that these accounts should be adjusted, and that only the balance remaining after such adjust-

ment is the amount due to the one or the other of the parties. That the debt, so far as it was the debt of N. B. Meade at the time of the execution of the deed of trust, is a charge upon said trust property, and the same should be settled in the suit aforesaid. And making the administrators of Grigsby and the sheriff who had levied the execution defendants, he prayed for an injunction, and for general relief.

The injunction was granted; and Grigsby's administrators appeared and demurred generally to the bill, and also answered.

On the 11th of November 1872 the cause came on to be heard upon the bill and the demurrer thereto; when the court sustained the demurrer and dissolved the injunction, and dismissed the bill with costs. And thereupon David Meade obtained an appeal to this court.

Parker and Dandridge & Pendleton, for the appellant.

Conrad & Son, for the appellees.

Staples J. delivered the opinion of the court.

A demurrer admits the allegations in the bill to be true, and raises the question, whether those allegations afford a sufficient ground for equity to interfere. Ordinarily, it is considered premature upon a general demurrer wholly to dismiss the bill, unless the complainant's case is from his own showing radically such, that no discovery or proof properly called for by, or founded upon the allegations in the bill, can possibly make it a proper subject of equitable

615 jurisdiction. *Pryor v. Adams, 1 Call 382; Le Roy v. Veeder & als., 1 John. Cas. 427; 2 Rob. Pr. 302.

Let us apply these rules of pleading to the case before us. The bill alleges that the defendant, Grigsby, had recovered a judgment, and sued out execution upon a bond for one thousand dollars, given by N. B. Meade, with the complainant, David Meade, as his surety; that this obligation had been given by N. B. Meade upon an adjustment made in the year 1860, of Grigsby's account for articles purchased in his store.

The bill further alleges, that previous to the execution of this bond, N. B. Meade had given a deed of trust to the complainant as trustee, upon all his estate, real and personal, for the benefit of his wife and children, subject, however, to all his then existing debts and liabilities; that the account for which the bond was given having been contracted prior to the date of the deed of trust, was secured by it, and the property therein conveyed should be held liable to the relief of the surety.

Upon these averments the defendant raises by his demurrer the point that the store account was extinguished by the bond, and the debt thereby fully discharged, and consequently the bond constitutes a new debt, and as such is not embraced by the trust deed.

The principle here asserted may be correct as applied to the common law courts. In those courts the acceptance of a higher security for the debt is regarded as an extinguishment of a lower security for that debt. A bond extinguishes the simple contract, the latter being merged in the former. The debtor cannot be liable on both instruments. And as there is no remedy on the inferior security, it is regarded at law as no longer subsisting. But with courts of equity a different rule prevails. Those 616 courts, not regarding the *form so much as the substance, treat the debt as still subsisting, unless the parties clearly intended a satisfaction. It must be made to appear that the creditor intended by accepting the higher security to abandon all recourse upon his original demand. Niday v. Harvey & Co., 9 Gratt. 454, 466.

This rule of the equity courts was applied in the case just cited to an obligation executed by one member of a firm, the others not joining in the instrument; but the principle is equally applicable to the present, and, indeed, to every case involving the question of the effect of a higher security upon a previously subsisting indebtedness.

Another doctrine of the equity courts is the doctrine of subrogation. The surety is entitled to enforce every remedy and every security the creditor has against the principal debtor, to stand in the place of the creditor, and to have all the securities of the latter transferred to him. These securities cannot be released or in any manner impaired by the creditor to the prejudice of the surety. The rights of the latter do not rest upon contract, but upon the principles of natural justice. So far as this doctrine carried, that if the surety pays the bond and thereby utterly extinguishes the debt, a court of equity will nevertheless keep it alive for his benefit, in order to substitute the surety to all the rights and remedies of the creditor.

The rule of marshalling assets depends upon the same principles. If a bond binding the heirs is paid out of the personality, the debt is gone; but the equity courts permit a simple contract creditor to stand in the shoes of the bond creditor, and charge the debt by simple contract upon the realty. Numerous other illustrations of the same doctrine may be found in the books.

617 *In the present case, there is not the shadow of a doubt but that the store account was one of the debts secured by the deed of trust. The bill contains no averment from which it can be fairly inferred that Grigsby, the creditor, if he knew of the deed at all, intended to release the security it afforded him when he accepted the bond. Nor is there any averment which leads to the conclusion that N. B. Meade, the principal debtor, and the complainant as his surety, intended, or even desired, to take the debt out of the operation of the deed of trust. The complainant was the trustee; was no doubt well aware of all the provisions of the deed; knew that

the store account was one of the debts therein provided for; and it is fair to presume was mainly influenced by that fact in becoming surety for the debt. It is very probable that his only hope of indemnity is in the deed. But the creditor here seems not only willing to throw the entire burden of paying the bond upon the surety, but to deprive him also of his only resource for repayment. A court of equity, before adopting any such conclusion, will require very clear proof that the intention of the parties, in the execution of the bond, was to abandon the security of the deed. Nothing in the bill warrants any such idea.

It is very clear, therefore, that upon this branch of the case the demurrer was not well taken.

A point of greater difficulty is yet to be considered. As already stated, the creditor has recovered judgment on the bond against principal and surety, sued out execution, and has it levied on the property of the latter. Can the surety compel the creditor to abandon his execution and rely upon a fund provided by the principal debtor. The general rule is, that the creditor is under

no obligation to look to the principal
618 *debtor or to his property; he is not bound to exhaust his remedies against the latter before resorting to the surety. But the rule is not universal. It is not necessary now to attempt to define the exceptions to it. *Hays v. Ward*, 4 John. Ch. R. 127.

The only matter we have to consider is, whether the facts relied on by the complainant are sufficient to take his case out of the operation of the rule as stated.

It appears that there is now, or was when the bill in this case was filed in the Circuit court of Clarke county, a suit pending in the same court, in which the administrator of Mrs. Rebecca Meade is plaintiff, and N. B. Meade, the principal debtor, and the personal representative of Grigsby the creditor, and others, are defendants. In this suit orders and decrees have been made with a view to ascertain the indebtedness of N. B. Meade at the time of the execution of the trust deed already mentioned, and also to adjust the accounts between the trust estate, in favor of Mrs. N. B. Meade and her children, and the estate of the defendant Grigsby. It appears also, that the estate of the latter is indebted to the trust estate for rents to an amount exceeding the judgment against the surety.

These are substantially the allegations of the bill, and upon a demurrer they are to be taken as true. Upon this state of facts the complainant insists that as the debt due to Grigsby's estate constitutes a charge upon the trust estate, and as Grigsby is himself indebted to that estate for rent in a sum equal to the debt due him, the matter ought to be adjusted by way of mutual set-off and compensation. This proposition seems to be eminently just and satisfactory.

If Grigsby himself was attempting to collect his debt out of the trust property, he

would be told that he, being a debtor to that property, could have no just
619 *claim upon it until he had accounted for all he had received. The equities are not changed by the fact that complainant first pays Grigsby's estate, and then proceeds against the trust property for his indemnity. The creditor is doing indirectly, through the agency of the surety, what he would not be permitted to do directly. The surety is forced to pay when he ought not, and the trust property subjected to forced sales in order to satisfy a debt already discharged by the use of that property. This is not only unjust to the complainant, but oppressive to Mrs. Meade and her children, whose reliance for support is upon the trust estate. Substantial justice is attained and litigation ended by requiring Grigsby's estate to apply the rents and profits received by him to the satisfaction of the debt due that estate.

Whether the case made by the bill will be sustained by the evidence, we have no means of determining. We express no opinion upon the merits. All that we mean to affirm is that the defendant ought to be put to his answer. He does not waive a single advantage in being required to answer that he would have upon the demurrer. The injustice done the complainant is, that by the decree he is without a hearing denied every inquiry into the equities which may attach to the parties. The court has in effect decided, that the case made by the bill is radically so defective that no discovery of proofs properly founded thereon can possibly make it a subject of equitable jurisdiction. The decision is in this respect premature. For that reason the decree must be reversed and the demurrer overruled, the case remanded to the court below, with liberty to the defendant to plead or answer as he may be advised.

620 *The decree was as follows:

This day came again the parties by counsel, and the court having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the complainant's bill is sufficient in law, and the demurrer thereto ought to have been overruled. It is therefore decreed and ordered, that, for the error aforesaid, the decree of the said Circuit court be reversed and annulled; and that the said Bettie M. Grigsby, administratrix, and David H. McGuire, administrator of J. R. Grigsby deceased, out of the assets of their intestate in their hands to be administered, do pay unto the appellant his costs by him expended in the prosecution of his appeal aforesaid here.

And this court proceeding to pronounce such decree as the said Circuit court ought to have rendered, it is further decreed and ordered, that the defendants' demurrer to the plaintiff's bill be overruled; and leave is given the defendants to plead or answer the bill of the plaintiff, as they may be advised. And this cause is remanded to

the said Circuit court for further proceedings to be had therein in conformity with this order: which is ordered to be certified to the said Circuit Court of Clarke county.

Decree reversed.

621 *Ammon's Adm'or v. Wolfe & al.

September Term, 1875, Staunton.

Guardian and Ward—Investments in Guardian's Name.

—Land of infants is sold in 1859, upon credits extending to January 8th, 1862. Their guardian collected a part of the money in May 1862, and he invested it in March 1863, \$3,500 in seven *per cent.* Confederate bonds, which were found after his death enclosed in a paper endorsed Wolfe's heirs; but the bonds were taken in his own name. **Held:**

1. **Same—Same.**—There is no sufficient evidence that the investment when made was intended for his wards.

2. **Same—Same—In Confederate Money.**—The debt due to the wards being a good ante-war debt, well secured, he was not authorized to collect in Confederate money, and he could not be authorized under the statute so to invest it.

This was a suit in equity in the Circuit court of Rockingham county, brought in February 1870, by Alfred L. Wolfe and Sallie C. Wolfe, infants, by their next friend, against the administrator of Y. C. Ammon deceased. Ammon had been the guardian of the plaintiffs, and the bill was for an account, and payment of what might be found due.

It appeared that Alfred L. Wolfe, the father of the plaintiffs, died in March 1858, leaving a widow and eight children, all of whom but one were minors, and the plaintiffs were the youngest of them. He left some personal property and a tract of land, which was sold under a decree of court, in February 1859, for \$12,011.00, upon credits extending to January 8th, 1862. Y. C.

Ammon was one of the administrators **622** *of Wolfe, and also one of the commissioners to sell the land, and he was appointed guardian of the plaintiffs.

A commissioner of the court was directed to take the accounts; and it appeared that the guardian had received the property of the wards. All but the last payments to him for the land seem to be in good money. The last was received in Confederate money on the 28th of April 1862; and this the commissioner scaled as of that date. The only question on the accounts was, whether Ammon should be credited for \$3,500 of Confederate bonds. And this question depended upon—first, whether he had ever made the investment for his wards; and second, whether if it was made, it was a proper case for such an investment. The

***Investments by Fiduciaries in Confederate Securities.**—For the proposition that a fiduciary had no authority to receive Confederate money in satisfaction of ante-war debts due the trust estate, see *Carter v. Dulaney et al.*, 30 Gratt. 192, and *note*; also *Leake v. Leake*, 76 Va. 799; *McClure v. Johnson*, 14 W. Va. 432.

evidence, as well as the answer of the defendant, are stated in the opinion of the court.

The cause came on to be heard on the 26th of September 1873; when the court made a decree in favor of the plaintiff A. L. Wolfe for \$2,123.41, with compound interest thereon from the 19th of July till paid, or until said A. L. Wolfe attained the age of twenty-one years, and in favor of Sarah C. Wolfe for \$2,220.95, with like interest.

This decree was rendered at the previous May term of the court, and by inadvertence was not entered of record; and it was ordered to be spread upon the records at the next term, to have the same effect in all respects as if entered at the last term.

Upon the petition of Ammon's administrator, an appeal was allowed to him. And after the case was brought to this court, another decree of the May term of the court, which modified the one previously pronounced, though not entered, by stopping the compound interest at the date of the death of Ammon, was produced.

623 *C. A. Yancy and Compton, for the appellant.

John Paul and Robert Johnston, for the appellees.

Moncure, P. delivered the opinion of the court.

This is an appeal from a decree in favor of infants, suing by their next friend, against the personal representative of their guardian, to recover a balance claimed to be due them on the guardianship account. The defence relied on is, that the money due by the guardian to the wards was by him duly invested in Confederate bonds in pursuance of the act of the General Assembly of Virginia passed on the 5th day of March 1863; Acts of Assembly, 1862 and 1863, page 81. It is contended that the defence is unsustainable, on two grounds: 1st, that it does not sufficiently appear that any investment was in fact made by the guardian of the money due by him to the wards, or any part thereof in Confederate bonds; and if any such investment was in fact made; 2dly, that it was not made in pursuance of the terms and provisions of the said act, which does not therefore absolve the guardian and his estate from liability for the said money.

1st. Was any investment made by the guardian of the ward's money in Confederate bonds?

The representative of the guardian in his answer states, he is "informed, and believes, that about the year 1863 the said Y. C. Ammon (the guardian), in pursuance of an act of the general assembly passed March 5th, 1863, entitled an act authorizing fiduciaries to invest funds in their hands in certain cases, and for other purposes, did invest \$3,500 of the amount in his hands in seven five hundred dollar seven per cent. Confederate bonds, which said bonds were pre-

served by said Ammon as the property of his said wards up to the time of his death (in 1866 or '7), and were found by this respondent after his administration, among the papers of said Ammon, with the indorsement that now appears on each:—"Wolfe's heirs \$500," made in the handwriting of said Ammon. "(The wards being two of said heirs.) These bonds are herewith filed, marked exhibit 'XX,' and asked to be taken and read as part of this answer. This respondent has always been willing to, and has tendered to the complainants through their attorney the said bonds in discharge of that much of the amount due them; but such tender has been rejected. This respondent claims that his intestate is entitled to credit for the amount of said bonds."

These bonds bear date on the 13th of February 1863, and appear to have been obtained by Y. C. Ammon on the 2d of March 1863, before the date of the act of assembly aforesaid. They are payable to him individually, and not as guardian of the complainants. They are the same in form with a large amount of other Confederate bonds issued during the war, and found also by the said administrator among the papers of his intestate, and claimed to be the property of the said intestate. The endorsement, "Wolfe's heirs \$500," made by said Ammon on each of the seven bonds of that amount as aforesaid, may have been made, so far as appears from the record, long after the bonds were issued, and even long after the war, as the guardian did not die until 1866 or '7; and it is of course not evidence that the ward's money was invested in the said bonds. The guardian was first deputy sheriff, and then sheriff of Rockingham county, from January 1857 to January 1865; and he was probably, during that period, largely engaged in speculations, which his office afforded him an opportunity of making. The guardian's administrator in his deposition, states his belief that the sheriffs of said county and their deputies had been in the habit of shaving executions placed in their hands for collection, and that the office was regarded desirable by some persons on that account. The guardian seems to have amassed a large amount of Confederate money, as he invested a large amount of it in Confederate bonds on his own account.

If the seven bonds of \$500 each, endorsed as aforesaid, had been obtained for money invested for the wards, the presumption is, they would have been payable to the guardian as such, so as to show on their face that they were given for the ward's money. This would have been proper, whether the investment was made in pursuance of the act of the 5th of March 1863 aforesaid, or under a decree of a court of chancery in the exercise of its ordinary jurisdiction, or by the guardian making the investment on his own responsibility, without any decree or order of court for the purpose. There was an express provision in the said act that "the bonds, when practicable, shall be taken

in the name of such fiduciary or trustee in his fiduciary character. By taking them in the guardian's own individual name it would have been in his power to claim them as his own individual property if Confederate bonds had appreciated, instead of becoming, as they did, of no value.

There is evidence in the cause tending to show that the guardian applied to the Circuit court of the said county for authority to invest the money belonging to his wards, and that such authority was accordingly given. But such evidence is insufficient to prove even that such authority was given or applied for, much less to prove that such an investment, even if authorized, was ever actually made. It appears from the evidence that a portion of the records of said court was destroyed by the Federal troops in June 1864; and if any order for the investment had been made by the said court or the judges thereof, it may possibly have been destroyed in that way. But it is probable if such an order had been made, that its importance to the guardian would have induced him to obtain a copy of the order and keep it with the bonds, especially as they were payable to himself individually, or, at least, did not show on their face that they were for the money of the wards.

The court is therefore of opinion, that it does not sufficiently appear that any investment was in fact made by the guardian of the money due by him to the wards, or any part thereof, in Confederate bonds. But if any such investment was in fact made, then,

2ndly, was it made in pursuance of the terms and provisions of the said act of assembly of the 5th of March 1863? and does that act therefore absolve the guardian and his estate from liability for the said money?

In Campbell's ex'ors v. Campbell's ex'or, 22 Gratt. 649, 684, and in Crickard's ex'or v. Crickard's legatees, 25 Gratt. 410, 421, it was held by this court, that "to authorize investments under the act of March 5th, 1863, three conditions must concur: 1st, the money must be in the hands of the fiduciary; 2nd, it must have been received in the due exercise of his trust; 3rd, for some cause, he must be unable to pay it over to the parties entitled. If they do not all exist, the order of the court or judge purporting to authorize such investment is null, and the fiduciary is responsible for the money." If any of these conditions existed in this case, which is not admitted, we think the first and second certainly did not. The

money was not in the hands of the guardian when Confederate bonds were taken by him; and if it was, it had not been received in the due exercise of his trust. The estates of the wards consisted of their distributive portions of their father's estate, real and personal, who died several years before the war. That estate had been converted into money before the war, and the distributive portions of the wards were due to them in money, and con-

stituted ante war debts which were perfectly secure. The guardian before the war received a large part of the money thus due to his wards, and thereby became himself debtor to them in the amounts so received. That debt, as well as the debts for the residue of the ward's estate remaining unpaid at the commencement of the war, were good, ante war, specie debts, which the guardian had no right to collect in depreciated Confederate currency, and no right to convert into Confederate bonds in March 1863, when Confederate money was greatly depreciated in value, and was still depreciating. There was no necessity for collecting these debts, their collection not being required for the support of the wards, not as much as the accruing interest on said debts having been applied to that purpose, and the money, as before stated, being perfectly secure. A large portion of the money was actually due by the guardian before the war, and all of it might have been well and safely invested by him for his wards. Instead of that, it does not appear that he said anything about making an investment for them until March 1863, when it is contended, but not proved, that he made the aforesaid investment for them in Confederate bonds. It would have been a breach of trust and a waste of his ward's estate for him to have done so. As to the Confederate bonds amounting to seven hundred dollars which appear to have been

628 received by *the guardian of Thos. K. Miller on the 28th of April 1862, in part payment of the purchase money of land sold to Miller before the war, the guardian ought not to have received such payment in that medium. But it does not appear that he held or claimed to hold those bonds as an investment for the benefit of his wards, and he no doubt converted and applied them to his own use, as he only claimed to have made an investment in Confederate bonds on account of his wards in March 1863.

The court is therefore of opinion, that even if such an investment was in fact made as claimed by the guardian on account of the wards, it was not made in pursuance of the terms and provisions of the said act of assembly of the 5th of March 1863, and the said act does not absolve the guardian or his estate from liability for the money so claimed to have been invested.

Whether the Circuit court erred or not in scaling the sum of \$277.14 received by the guardian for each of the wards on the 28th of April 1862, being received in payment of an ante war debt, is a question which this court need not, and therefore does not, decide. The appellees complain of no such error, and the appellant cannot, as it is certainly not one to his prejudice.

The decree appealed from, though rendered at the spring term 1873 of the said Circuit court, was, by inadvertence, not then entered of record, and was afterwards, to wit: on the 26th day of September 1873 ordered to be spread upon the record at that term, to have the same effect, in all respects,

as if entered at the said spring term 1873; and it was accordingly so entered of record, though it professes on its face to be a decree of the 26th day of September 1873.

629 After *the said decree was so rendered, though not entered at the spring term 1873 as aforesaid, the cause came on again to be heard during the same time, to wit: on the 7th day of May 1873, when it was decreed "that the decree entered in this cause during the present term" being the decree rendered, but by inadvertence not entered of record at the spring term 1873 as aforesaid, "ascertaining the liability of the estate of Y. C. Ammon, deceased, to the plaintiffs, be, and the same is hereby, so far modified as not to charge said estate with compound interest on the amounts due the plaintiffs from and after the death of the said Y. C. Ammon, and the cause is recommended to a master commissioner to report the amount due the plaintiffs after making the deductions aforesaid." Afterwards, to wit: on the 26th day of September 1873, when the said decree rendered, but by inadvertence not entered of record at the spring term of that year, was ordered to be spread upon the records as aforesaid, no notice was taken of the said decree of the 7th day of May 1873, modifying the decree previously rendered during the same time as aforesaid. And in the copy of the record which was brought up on the petition for an appeal and supersedeas in this case, the said decree of the 7th day of May 1873 was accidentally omitted. But a copy of that decree has been since supplied, and by an endorsement thereon signed by the counsel in this case, it has been agreed that the same shall be read in its proper place as a part of the record of the case, which has accordingly been done.

The court is therefore of opinion, that the decree appealed from should be so amended as to be modified according to the said decree of the 7th day of May 1873; that there is no error in the said decree so

630 *amended, at least to the prejudice of the appellant, and that the same ought to be affirmed.

The decree was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid, and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the decree appealed from in this case, being the said decree of the 26th day of September 1873, ought to be so amended as to be modified according to the decree made in this cause on the 7th day of May 1873, of which latter decree an official copy, by consent of the parties by counsel, has been made a part of the record in this cause, and accordingly so considered by this court, that there is no error in the said decree appealed from, amended as aforesaid, at least to the prejudice of the appellant, and the same ought to be affirmed.

Therefore it is decreed and ordered that

the said decree appealed from be amended as aforesaid, and as so amended be affirmed, and that the appellant, out of the estate of his said intestate, Y. C. Ammon, pay to the appellees thirty dollars damages and their costs by them about their defence in this behalf expended. And it is further decreed and ordered that this cause be remanded to the said Circuit court for further proceedings to be had therein in conformity with the foregoing opinion and decree, which is ordered to be certified to the said Circuit court of Rockingham county.

Decree amended and affirmed.

631 *Tardy, Trustee, v. Boyd's Adm'or & als.

September Term, 1875, Staunton.

I. Promissory Notes—Steps, Necessary to Bind Endorsers, Prevented by Public Enemy.*—A note discounted at the bank in B, was to fall due on the 18th of June 1864. On the 10th, from apprehension that the Union forces would come into B, the valuables of the bank, including this note, was sent away about two miles. The Union forces did enter B on the 12th, and left on the 14th of June. The note was not brought back to the bank until after the 18th, and was not presented and protested for non-payment, nor was notice of non-payment given to the endorsers. **HOLD:**

1. Same—Same—No Excuse.—The facts do not excuse the failure to have the note presented and protested, and to give notice to the endorsers.

2. Same—Same—Same.—But if the bank was not guilty of laches in not having the note presented and protested for non-payment, and notice of dishonor on the day it fell due, to bind the endorser, all this should have been done within a reasonable time after the hindering cause was removed.

III. Same—Same—New Promise to Pay.—A promise to pay, by an endorser of a note, with full knowledge of all the facts, and of the laches of the holder in not protesting the note, may be held in point of law to amount to a waiver of the right to notice. But such a promise to be obligatory, must be deliberately made, in clear explicit language, and must amount to an admission of the right of the holder, or of a duty and willingness of the endorser to pay. If, therefore, the conduct or acts of the endorser be equivocal, or the language used be of a qualified or uncertain nature, the endorser will not be held responsible.

III. Same—Same—Non-Acceptance.—B was the endorser of a note made by his brother A, which fell due in June 1864, but there was no protest for or notice of non-payment. B afterwards, with the knowledge of these facts, proposed to the holder, to pay the note in Confederate money; which was refused by the holder; the note being for good money. The proposition of B having been refused, it does not constitute a promise to pay, or a recognition of his liability, which will bind him to pay the debt.

***Promissory Notes—Steps, Necessary to Bind Endorsers, Prevented by Public Enemy.**—See on this subject, *McVeigh v. Bank*, 26 Gratt. 851, and *note*; *Bank of Old Dom. v. McVeigh*, 29 Gratt. 546, and *note*.

632 *IV. Scaling Debts.—A note made in January 1863 is the last renewal of notes given for a debt due before 1861. It is not to be scaled.

V. Same—Renewal of Notes.*—The act of March 3, 1866, for scaling debts, does not apply to a case where the money loaned was a sound currency, and the note sued upon was a renewal of notes accepted as an accommodation to the debtor, and only as evidence of a pre-existing debt due in good money.

This was a suit in equity in the Circuit court of Botetourt county, brought in June 1866, by John W. Johnston, administrator of Wm. W. Boyd, deceased, for the purpose of having the direction of the court in the administration of the estate. Boyd died in April 1866, leaving a large estate in lands, and largely indebted both on his own account and as surety. In the progress of the cause his creditors were called in, and reports of debts and their priorities were directed and made. Among the creditors who presented their claims was S. C. Tardy, surviving trustee of the Bank of Virginia; and among the claims presented by him were two: one a note for \$2,695, made by A. L. Boyd and O. W. Kean, and endorsed by Wm. W. Boyd. This note bears date the 26th day of January 1863, and was payable at sixty days from its date. It was, however, a renewal of former notes commencing some time before 1861. The note was not protested, but a waiver of protest was endorsed upon it by Wm. W. Boyd on the day it fell due. The other was a note for \$5,000, made by A. L. Boyd, and endorsed by Wm. W. Boyd. This note bears date April 16th, 1864, and was payable at sixty days from its date. It also was a renewal of former notes commencing before 1861; and William W. Boyd had been the sole endorser on the former notes. This note was not protested, and there was no written waiver of protest upon it, and there was no proof of a regular notice of non-payment. To *prove an excuse for not protesting the note, and a waiver of notice, and a promise by William W. Boyd to pay the note, a number of witnesses were examined.

A. L. Boyd, the maker of the note, was the brother of William W. Boyd, a prominent lawyer, and the note for \$5,000 was given originally for several smaller debts which had been discounted for A. L. Boyd at the Branch Bank of Virginia at Buchanan, of which the said William W. Boyd was a director. This note had been continued by successive renewals down to the date of

***Renewal of Notes—Discharge.**—In the case of *Bank v. Good*, 21 W. Va. 466, the court, citing the principal case, said: "It is well settled both in Virginia and West Virginia that a note will not be regarded as an absolute extinguishment or payment of a precedent note or pre-existing debt, *unless it be so expressly agreed.*" See also, *Farmers' Bank v. Mutual Asso. So.*, 4 Leigh 88; *Lewis v. Davisson*, 29 Gratt. 225; *Moses v. Trice*, 21 Gratt. 556; *Lazier v. Nevin*, 3 W. Va. 627; *Miller v. Miller*, 8 W. Va. 550; *Poole & Co. v. Rice*, 9 W. Va. 78; *Dunlap v. Shanklin*, 10 W. Va. 662; *Sayre v. King*, 17 W. Va. 562.

that above mentioned. A. L. Boyd died in 1864, but whether before or after the note became due does not appear; and his estate proved to be insolvent.

A few days before the 12th of June 1864, it being apprehended that the Federal troops would come to Buchanan, by an order of the directors of the bank, its valuables, including this note, were removed for safety to the house of a gentleman about two miles from the town, where they remained until some days after the note fell due. In the meantime General Hunter entered Buchanan on the 12th of June, and remained there until the 14th, when he moved on to Lynchburg. He did not return through the town on his retreat. The cashier of the bank at Buchanan, in his testimony, states that he had a conversation with William W. Boyd relative to the non-protest of the note. That witness told him the note had not been protested, and that he was not bound for the debt. And he replied, whenever he endorsed a note he always intended to bind himself for the debt. That the note was handed to him either by witness or the teller, for a waiver of protest, and witness thought he had done so, and did not

634 know to the contrary until after *his death. At this time Mr. Boyd neither refused nor agreed to make the waiver, but took up the pen and made the remark aforesaid. Another witness, the teller of the bank, says: There was no fixed rule as to protesting or not protesting notes which lay over, on which William W. Boyd was endorser. Notes that the officers of the bank felt sure he would waive protest, we sometimes withdrew, and did not protest them. In regard to A. L. Boyd, witness always felt certain he would do so. When Mr. Boyd had been in the habit of waiving protest we felt certain he would continue to do it. He had been in the habit of renewing his endorsements for his brother on new notes covering the same loans and amounts, after the old note had lain without protest. And we were in the habit of withdrawing notes made by A. L. Boyd and endorsed by William W. Boyd, which were not paid at maturity; though sometimes we protested them, more with the view of making A. L. Boyd attend to his business than anything else. It was proved that sometime after the note fell due Mr. Boyd proposed to the directors of the bank, to pay the note in Confederate money, which they declined to receive in payment of it; and that he afterwards complained of the action of the board.

This cause came on to be heard on the 12th of April 1872, when the court rejected the claim of Tardy, trustee, for the debt of \$5,000; and held that William W. Boyd's estate was liable upon the note for \$2,695; but that the debt was to be scaled as of the date at which it was payable. And thereupon Tardy applied to a judge of this court for an appeal, which was allowed.

E. Pendleton, for the appellant.

635 *J. W. Johnston, for the appellees.

Christian, J. delivered the opinion of the court.

The court is of opinion that the Circuit court did not err in declaring by its decree of the 12th day of April 1872 that W. W. Boyd was not responsible as endorser of the negotiable note made by Andrew L. Boyd for \$5,000, payable at the bank of Virginia at Buchanan.

It is admitted that the note was not presented for payment and protested for non-payment on the day of its maturity. Excuse for this is offered by the holder that it could not have been done on the day of maturity because of the presence of the public enemy, which made the removal of the valuable effects of the bank, and among them this note, necessary, and that on the day of maturity the said note had not been returned from the place of safety where it had been secreted with other effects of the bank.

The note under consideration matured on the 18th June 1864. The Federal army under General Hunter, in its march on Lynchburg, reached Buchanan on the 12th June, and left on the 14th. On its retreat from Lynchburg the army did not pass through Buchanan. They were not present in the town, or near it, at any time after the 14th of June. It is not clearly shown that on the day of maturity of the note it was not protested and due notice of dishonor given in consequence of the presence of the public enemy. It was certainly possible on that day, four days after the enemy left the town, to have made presentment and protest, and given notice of the dishonor of the note.

On the day when this note ought to have been presented and protested Hunter's army was at Lynchburg, fifty miles from 636 Buchanan. The cashier was in *Buchanan, and had the books at the bank. The place where the effects of the bank was secreted were but two miles from the town. It was certainly possible, if not an easy matter, to have gotten possession of this note, and had it presented and protested at the day of maturity.

But conceding that under the circumstances then existing, the bank was guilty of no laches, and that it was indeed impossible to have had presentment, protest and notice of dishonor on the day of the maturity of the note, yet in order to bind the endorser, all this should have been done within a reasonable time after the hindering cause was removed.

It is conceded this was never done; but, on the contrary, it is attempted to show a waiver of protest by the endorser, and also a promise after maturity that he would pay the debt. The evidence fails to establish either fact. And the record does not show any notice of non-payment within a reasonable time. The loose conversations testified to by the cashier, if they can be regarded as notice, are not fixed at such time as would be considered reasonable, after the hindering cause was removed; nor indeed is any time fixed by witness when these conversations occurred.

That there was no waiver of protest is clearly shown; and the only evidence of any recognition of a legal liability to pay the note by Boyd was a proposition to pay his brother's note in Confederate money, then so greatly depreciated as to be refused by the bank.

The offer to pay in Confederate money was an act of favor to his brother, for he might well be willing to pay for him a few hundred dollars in order to extinguish his debt to the bank, and not be either willing or able to pay five thousand dollars for that purpose. The bank having refused

637 to accept Confederate money, *it cannot now treat that offer as a promise to pay five thousand dollars, or in any manner at a recognition on the part of the board of his liability as endorser. The Confederate money being rejected, the matter then stood just as if Boyd had never said one word about paying the note.

Although a promise to pay by an endorser, with full knowledge of all the facts, and of the laches of the holder may be held in point of law to amount to waiver of the right to notice, yet this rule must be taken with this qualification; the promise to be obligatory must be deliberately made in clear explicit language, and must amount to an admission of the right of the holder, or of a duty and willingness of the endorser to pay. If therefore the conduct or acts of the endorser be equivocal, or the language used be of a qualified or uncertain nature, the endorsee will not be held responsible. *Story's Prom. Notes*, § 363.

A conditional promise to pay, or an offer to pay in a certain manner, is not binding as a waiver of the rights acquired by the laches of the holder if the terms be not accepted. *Bayley on Bills* 300; 2 *Rob. Pract.* 212, and cases there cited; *Newberry v. Trowbridge*, 13 *Mich. R.* 263. In the last named case it was held that an offer to pay a note in depreciated bank bills did not constitute a waiver of demand and notice. It is not an acknowledgment of liability to pay the note, but an offer of compromise, by way rather of set-off or accord and satisfaction than of payment.

It is clear that the offer by Boyd to pay Confederate money, which was rejected, cannot be regarded either as a waiver of his right to notice, or as a promise to pay the debt, or as in any manner showing that he acknowledged his liability as endorser.

We are therefore of opinion that the **638** decree of the *Circuit court, so far as it declares that Boyd's estate was not liable for the \$5,000 note, should be affirmed.

But the court is further of opinion, that the decree of said Circuit court is erroneous in scaling the debt of \$2,695, as a debt due in Confederate currency. The said Circuit court was right in holding Boyd's estate responsible for this note. Upon this note endorsed by W. W. Boyd, there was an express waiver, endorsed in writing and signed by Boyd on the day of maturity. But the error of the Circuit court is in declaring

this note to be payable in Confederate money, and in scaling its nominal to its specie value at the time the note became payable. It is clear from the evidence, that the debt (of which the note is evidence), was contracted prior to the year 1861, and before Confederate currency came into circulation. It was a loan by the bank, to the maker of the note, of gold or its equivalent. As an accommodation loan to the maker, it was renewed from time to time with the same endorser. The note was a renewal note. When the note was renewed the debt was not paid, but the debt remained the same. As was said by Judge Tucker, in *Farmers Bank v. Mutual Assurance Society*, 4 *Leigh* 88, "Equity looks to the substance, not the form of things. Equity sees that when a dealer at bank pays off a note by renewal the debt is the same; the debt remains unpaid, the credit only is extended." See also *Moses v. Trice*, 21 *Gratt.* 556. Here the debt, contracted before 1861, and in a sound currency, still remains unpaid; the renewal is but an extension of the credit, the debt remains the same.

The scaling act is only applicable, by its terms, to a case where "the contract was according to the true understanding and agreement of the parties, to be fulfilled or performed in Confederate States **639** treasury *notes, or was entered into with reference to said notes as a standard of value." The act certainly does not reach a case like this, where the money loaned was a sound currency, and the note sued upon was a renewal note, accepted as an accommodation of the debtor—and only as evidence of a pre-existing debt in a sound currency. This is certainly not such a debt as the scaling act was intended to apply to, and it would work the greatest injustice to apply it to such a case.

The court is therefore of opinion, that the decree of the Circuit court scaling the note of \$2,695 is erroneous, and must be reversed; but that the decree in all other respects be affirmed.

The decree was as follows:

This day came again the parties by counsel; and the court having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the decree of said Circuit court in so far as it declares that the estate of W. W. Boyd is not liable for the note of five thousand dollars, endorsed by said W. W. Boyd; it appearing to the court that said W. W. Boyd had no legal notice of the presentment and dishonor of said note, and that he never received notice thereof, nor that he ever after maturity and dishonor promised to pay the same.

But the court is further of opinion, that the decree of said Circuit court was erroneous in scaling the note for \$2,695 from its nominal value to its value in gold at the day of its maturity; this court being of opinion, that the said note was a renewal note (renewed

from time to time) for a debt due in gold or its equivalent; that it was for money
640 loaned by the bank to the maker *in 1861, before Confederate money came into circulation; and it cannot be said in such a case, that "according to the true understanding and agreement of the parties, the contract was to be performed and fulfilled in Confederate States treasury notes, or was entered into with reference to such currency as a standard of value." It is only such a contract that can be scaled under the "adjustment act." The said Circuit court therefore erred in applying the scale to the note of \$2,695, and should have entered a decree for its face value. And for this error it is decreed and ordered, that said decree of said Circuit court be reversed, and that the appellant recover against the appellees his costs by him expended in the prosecution of his appeal here, and that the cause be remanded to said Circuit court for further proceedings to be had therein in accordance with this decree: which is ordered to be certified to the said Circuit court of Botetourt county.

Decree reversed.

641 *Mauzy v. Sellars & als.

September Term, 1876, Staunton.

1. Mistake in Written Agreement—Reformation—Parol Evidence.—A court of equity will correct a mistake, clearly proved by parol evidence, in an agreement for the sale and purchase of real estate; and this, whether the contest is between the vendor and purchaser, or the vendor and creditors of the purchaser.

This was a suit in equity in the Circuit court of Rockingham county, instituted in September 1872, by T. N. Sellars and three others, sureties of Joseph N. Mauzy, to subject his real estate to satisfy a judgment which had been recovered against him and the plaintiffs. They set out in their bill that Joseph N. Mauzy owned one undivided half of a tract of land called the "Nicholas farm," one-fourth of which tract he inherited, and another fourth he purchased from Thomas G. Mauzy; and that the said Joseph owned a half interest in what is known as the "Montevideo store-

house," one-fourth of which he inherited, and another fourth he purchased from the said Thomas G. Mauzy; and he also owned another tract. And they say he has no personal property. They therefore pray that the interest of said Joseph N. Mauzy in the "Nicholas farm" and the "Montevideo store-house," and the tract he owned, may be subjected to the payment of the judgment which had been rendered against him and them. They make Joseph N. Mauzy, Thomas G. Mauzy, and the other owners of the "Nicholas farm," and the "Montevideo store-house," *with other defendants, pray for a sale of the property, &c.

Thomas G. Mauzy answered the bill. He admitted his sale of his one-fourth of the "Nicholas farm," and of some mountain lands to Joseph N. Mauzy; but he denied most positively, that he had sold his fourth of the "Montevideo store-house;" and averred that if the written agreement between them can be construed as embracing it, it was a mistake made by the scrivener, R. M. Mooney; that it was well understood by the said Joseph N. Mauzy and himself, and by the said Mooney, at the time the agreement was written, that the plaintiff only sold, and said Joseph N. only bought, plaintiff's interest in the "Nicholas farm" and in several tracts of mountain land held by the same parties; and if the language of the agreement can be construed as including plaintiff's interest in the "Montevideo store-house," it was a mistake on the part of all of them.

The agreement between Thomas G. Mauzy and Joseph N. Mauzy bears date the 21st of August 1868, and is certainly very inartificially drawn. The description of the property sold seems to be the interest of Thomas G. Mauzy in the land "known as the 'Jno. Nicholas farm,' together with all his undivided interest in all the lands now owned by the said parties." Thomas G. Mauzy bound himself to give a good and sufficient deed as soon as Joseph N. complied with his part of the contract; but no deed had been made by him: and it appears that a part of the purchase money was still due.

Robert M. Mooney, the draftsman of the agreement between Thomas G. and Joseph N. Mauzy, made a written statement, which it was agreed by the plaintiffs that he would swear to if an opportunity was
643 *afforded, and they consented it might be read as a deposition. He says that he wrote the agreement. That he heard and fully understood the contract between the parties, and knows that it did not embrace the "Montevideo store-house" and mansion, but had reference alone to the mountain land and "Nicholas farm;" and that if in law the word "land" or "lands" embraces a store-house and mansion on a small lot, almost covered by the buildings, he uses the word in that contract by mistake, or by mistake failed to except the Montevideo property, as it was not intended to be embraced in that contract. But

*Mistake in Written Agreement—Reformation.—That equity will reform a written agreement executed under a mistake of fact, see *Grayson v. Buchanan*, 88 Va. 256; *Pulaski Iron Co. v. Palmer*, 89 Va. 384; *Carter v. McArtor*, 28 Gratt. 366, and *note*.

Same—Parol Evidence.—For the rule that parol evidence is admissible to prove the mistake, see *French v. Chapman*, 88 Va. 321; dissenting opinion of JUDGE LACY, in *Reynolds v. Reynolds*, 88 Va. 163; *Shen. Val. R. R. Co. v. Dunlop*, 86 Va. 352; *Donaldson v. Levine*, 93 Va. 476; *Hoback v. Kilgore*, 26 Gratt. 442, and *note*.

Same—As to Third Parties.—Equity will reform such mistakes, not only as against the other party, but against third parties claiming through him. See *Irvine v. Greever*, 22 Gratt. 417; *Borst v. Nalle*, 28 Gratt. 487.

his recollection is clear, that he did not understand the word land or lands, as used in that contract, as embracing anything but the mountain land jointly owned by said parties, and if it means more than that, it is the result of a mistake on his part in so writing it.

The affidavit of Joseph N. Mauzy was also received as testimony by consent. He says, that in his purchase from Thomas G. Mauzy, under their contract of August 21st, 1868, he did not purchase Thomas G. Mauzy's one-fourth interest in the Montevideo property. That this is a large store-house and dwelling-house, with out-buildings nearly covering the small lot upon which they stand. That the words in the contract, "together with all his undivided interest in all the lands now owned by said parties," alone referred to three tracts of mountain land in which he and T. G. Mauzy had each one-fourth interest. That Robert M. Mooney wrote the said contract somewhat carelessly; but it was not supposed by any of them, that these words embraced the Montevideo store-house and mansion, and the sale did not, nor was the contract intended to, embrace the Montevideo property.

The cause came on to be heard on 644 the 5th of February *1874; when the court held, that Thomas G. Mauzy did sell to Joseph N. Mauzy his interest in the Montevideo store-house property; and the commissioner who was appointed to sell the real estate of Joseph N. Mauzy was directed to sell one-half thereof as the property of the said Joseph N. Mauzy. And the parties holding the other half of said store-house property were authorized to take the interest of said Joseph N. at a fair price which had been fixed upon it by commissioners, upon terms stated in the decree. And thereupon Thomas G. Mauzy applied to a judge of this court for an appeal; which was allowed.

G. W. & F. A. Berlin, for the appellant.
Yancy, for the appellees.

Staples J. delivered the opinion of the court.

This is a controversy growing out of an alleged mistake in a written agreement for the sale of certain real property. By the terms of this agreement, Thos. G. Mauzy sold to his brother Joseph N. Mauzy, "his interest in the property known as the 'John Nicholas farm,' together with all his undivided interest in the lands now owned by the said parties." At the date of the sale the vendor and vendee each owned an undivided fourth in "the Nicholas farm," in several tracts of mountain land, and also in a small lot upon which was situated a mansion house and store-house, known as the "Montevideo property."

It is claimed by the vendor, that the "Montevideo property" was not included in the sale. This is admitted by the purchaser; and the fact is fully proved by the

draftsman of the instrument. He 645 states that "the contract was well understood by him; that it did not include the 'Montevideo property,' but related exclusively to the Nicholas farm and the mountain lands; that if in law the word 'land or lands' embraces a store and mansion house on a small lot almost covered by the buildings, he used the word in that contract by mistake, or by mistake failed to except the 'Montevideo property,' as it was not intended to be embraced in the contract. And his recollection is clear that he did not understand the word land or lands as embracing anything but the mountain lands.

It will thus be seen that there is no controversy between the vendor and the purchaser. But the latter, it seems, is insolvent, and his creditors having liens by judgment, insist that the terms of the contract necessarily include the "Montevideo property," and that parol testimony is inadmissible to vary or contradict the plain language of the instrument.

It will perhaps conduce to a clearer understanding of the merits of the question, to consider the case as if the controversy was between the vendor and purchaser exclusively—the one seeking to reform the written agreement by parol proof of the mistake, and the other resisting it. That it is competent for a court of equity to correct a mistake in a deed or other writing upon parol evidence, cannot now be questioned. No branch of equity jurisdiction is more fully established than this: none is sustained by a greater array of authorities, English and American.

In 1 Story Eq. Ju., s. 152, the doctrine is laid down as follows: "One of the most common classes of cases in which relief is sought in equity on account of mistake of facts, is that of written agreements, either executory or executed. Sometimes by mistake the written agreement contains less than the parties intended; 646 *sometimes it contains more; sometimes it simply varies from their intent by expressing something different in substance from the truth. In all such cases, if the mistake is clearly made out by proofs entirely satisfactory, equity will reform the contract so as to make it conformable to the precise intent of the parties.

A court of equity would be of little value if it could suppress only positive frauds, and leave mutual mistakes, innocently made, to work intolerable mischiefs, contrary to the intention of the parties. It would be to allow an act originating in innocence to operate ultimately as a fraud, by enabling the party who receives the benefit of the mistake to resist the claims of justice under the shelter of a rule framed to prevent it. In a practical view, there would be as much mischief done by refusing relief in such cases as there would be introduced by allowing parol evidence in all cases to vary written contracts." § 155.

In Gillespie v. Moon, 2 John. Ch. R. 585, 596, Chancellor Kent said: "I have looked

into most if not all of the cases on this branch of equity jurisdiction, and it appears to me to be established, and on great and essential grounds of justice, that relief can be had against any deed or contract in writing, founded on mistake or fraud. The mistake may be shown by parol proof, and the relief granted to the injured party, whether he sets up the mistake affirmatively by bill or as a defence. Accordingly he gave relief against a deed conveying two hundred and fifty acres by metes and bounds, upon parol proof that the vendor only contracted for the sale of two hundred acres.

The English authorities on this subject are no less decisive than the American. The cases of *Calverley v. Williams*, 1 Ves.

R. 210; of *Thomas v. Davis*, cited in 647 *1 Sugd. on Ven. 172-3, margin, are very similar to the present case in their main features.

These, and a multitude of other cases which may be cited, show it is the constant practice of the equity courts to admit parol evidence of mistake of fact, and though such evidence is in direct contradiction of the express terms of the deed or other writing. *Kerr on Fraud and Mistake*, 418-423. The only limitation upon this doctrine is, that the evidence in all such cases must be very strong and clear, such as to leave no fair and reasonable doubt upon the mind, that the writing does not correctly embody the real intention of the parties. If therefore the controversy here was between the vendor and purchaser, parol evidence is clearly admissible to establish the alleged mistake in the written agreement, even against the answer of the purchaser.

There is however no contest in this case between vendor and purchaser. As already stated, they are agreed in their version of the contract. The question is, whether the appellees as creditors can object to the admission of the parol proof, when the parties to the contract make no such objection. It is true that the judgments constitute a lien upon the interests of Joseph N. Mauzy in the real estate. But the question still recurs, what is the extent of that interest? The appellees may rely upon the instrument of writing as very strong and satisfactory evidence upon that point; they may require that the mistake shall be very clearly established; but they cannot rely upon the writing as conclusive when the parties to it do not insist upon it. They cannot claim the benefit of an estoppel by which they are not bound. Upon this point the case of *Strader v. Lambeth*, 7 B. Mon. R. 589-90, is

648 a direct *authority. In that case the Supreme court of Kentucky was of opinion that in an action at law, in a controversy with strangers to the writing, the parties to it are not themselves estopped to explain or contradict by parol its terms or recitals.

In *Alexander & Co. v. Newton & als.*, 2 Gratt. 266, it was held that parol evidence was admissible, to show that it was the intention of the grantor, in a deed of trust,

that the deed should be so drawn as to secure a preference in the payment of the debts to particular creditors, and the omission to insert such a provision proceeded from the mere mistake of the draftsman. The mistake was accordingly corrected against bona fide creditors claiming an equal participation in the trust subject.

The great difficulty encountered by courts of equity, in reforming written agreements upon parol proof, is the weight justly due to the answer of the defendant denying the mistake. But this difficulty is removed when the adverse party admits the existence of the mistake, and is willing to its correction. In such case it is said the court does not overturn any rule of equity by varying the deed, because it is an equity *de hors* the deed. 1 Story's Eq. Jur. 156; *Attorney General v. Sitwell*, 1 Younge & Coll. R. 559-582. Had the vendor here sued the purchaser to reform the agreement before the creditor's suit was instituted, a court of equity, upon the answer of defendant admitting the mistake, would have no difficulty in decreeing the correction. In such case the decree, if not conclusive, would certainly have furnished *prima facie* evidence of the rights of the parties even against the creditors. The latter might show collusion or fraud between the vendor and purchaser. Whether they would

649 be permitted *to re-open the whole case, in order to show by extrinsic evidence that in fact no mistake was committed, it is unnecessary now to decide.

Such evidence would perhaps, in its very nature, tend to the establishment of fraud or collusion.

Here the question arises in a suit by the creditors, asserting their liens upon the property. The vendor, in a bill filed by him, treated by consent of parties as an answer, claims that the written agreement does not express the real contract. The affidavits of the purchaser and the draftsman, by like consent treated as depositions regularly taken, fully sustain the answer. No suspicion or discredit is thrown upon these witnesses, nor is it even attempted. Their version of the matter derives some confirmation from the language of the agreement. "The Montevideo property" was as well known by its appellation as the "Nicholas farm." And yet the latter is expressly mentioned by name, while no reference whatever is made to the former.

It is difficult to understand the reason of this omission, except upon the assumption that this property (the Montevideo) was not included in the sale, and the word "lands," used in the article of agreement, referred to the mountain lands, jointly owned by the parties.

The appellees have adduced no evidence whatever upon the matter in issue. They have not attempted to impeach the testimony of the appellant; they have not even attempted to throw any light upon the conduct, the pretension or claims of the vendor, since the sale was made. This may have resulted from an undue confidence in their

position, that parol evidence is wholly inadmissible in such cases; or, it may
650 be, "they cannot successfully controvert the evidence adduced by the appellant.

Whatever may have been the reasons, the cause is regularly before us for a hearing as it was before the Circuit court, and we must decide it upon the pleadings and proofs as they appear in the record.

The decree must be reversed with costs, and the case remanded for further proceedings in accordance with the views herein expressed.

The decree was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid, and the arguments of counsel, is of opinion, for reasons stated in writing, and filed with the record, that the Circuit court erred in holding that the appellant, Thomas G. Mauzy, sold to Joseph N. Mauzy his one-fourth interest in the real estate known as the "Montevideo property." This court being satisfied, from the proofs taken and filed in the cause, that said property was not included, nor intended to be included, in the sale evidenced by the written agreement, dated 21st August 1868. It is therefore adjudged, ordered and decreed, that the decree of the said Circuit court be reversed and annulled, and that the appellees do pay to the appellant his costs by him expended in the prosecution of his appeal aforesaid here.

And this court proceeding to render such decree as the Circuit court ought to have rendered, it is ordered and decreed, that so much of the bill of the complainants as seeks to subject to sale the one-fourth interest in the "Montevideo property" now

claimed by the said Thomas G. Mauzy,
651 as belonging to Joseph N. *Mauzy under the agreement aforesaid, be and the same is hereby dismissed; and that the complainants pay to the defendant, Thomas G. Mauzy, his costs by him expended in this suit; all of which is ordered to be certified to the said Circuit court of Rockingham county.

Decree reversed.

652 *Shands' Ex'x v. Grove & als.

September Term, 1876, Staunton.

I. Creditor's Suits.—G brings a creditor's suit against the executrix of S, to subject the estate of S to satisfy a judgment. The order book of the court was destroyed, but some of the papers were preserved; and it was proved by a witness that G recovered a judgment against the R. T. Co. and issued execution upon it; and then, at the instance of S, sued out a suggestion against him as a debtor of the Co., and that S appeared in court and acknowledged his indebtedness to the Co., and judgment was rendered against him. The proceedings in both cases to the judgments are endorsed on the papers preserved. An account taken in the

cause showed the executrix indebted to the estate for considerably more than the claim of the plaintiff, beside large assets in her hands; and an inquiry ordered as to the debts of S was not acted on, no other creditor making claim. **HOLD:**

1. Same.—G is entitled to recover his debt from the estate of S.

2. Same—Parties.—The proceeding being against the estate of S as the debtor of G, the Co. was not a necessary party.

3. Objection First Made in Appellate Court.—No other creditor having presented a claim, and the executrix not having insisted upon the enquiry, a personal decree against her will not be reversed for the want of such enquiry, upon the objection first made in the appellate court.

In July 1870 Emanuel Grove and Richard F. Omohunder filed their bill in the County court of Rockingham, in behalf of themselves and all other creditors of E. A. Shands, deceased, who should come in and contribute to the expense of the suit. They say that at the May term 1859 of the Circuit court of Rockingham, said Grove, suing for the benefit of said Omohunder, recovered a judgment against E. A.

653 *Shands for \$760.25, with interest on \$753, part thereof, from the 15th of December 1855, and \$3.36; and they exhibit a copy of the judgment certified by the then clerk, and say the original record of the judgment was burned with the order books, &c., by the United States troops in 1864. That execution issued on this judgment in June 1859, but was never levied, and no part of it had been paid. That said judgment was duly docketed in 1861. That Shands died in 1861, leaving a widow and several children, and leaving a will which was admitted to record, and his widow qualified as executrix thereof, and took possession of his estate both real and personal. They make Mrs. Martha Shands, in her own right and as executrix of E. A. Shands, deceased, a party, and call upon her to say whether the personal estate in her hands is sufficient to pay the debt of the plaintiffs, and pray for a settlement of her accounts, an account of the debts and liabilities of the estate, that their debt may be paid, and for general relief.

Mrs. Shands answered the bill. She says she had understood that Grove, prior to June, 1857, had some pecuniary claim against the Rockingham Turnpike Company, and transferred it to Omohunder. That said company being largely indebted, on the 13th of June 1859 conveyed its property, franchises, &c., to E. A. Shands, in trust to secure its creditors, and among others Omohunder. That subsequently some irregular proceedings were set on foot by the complainants or one of them, in the Circuit court of Rockingham county, whereby they pretend they have obtained in the year 1858, a judgment upon said claim against the company. That they subsequently, on the 28th of December, 1858, sued out of the clerk's office of said Circuit court, a suggestion against said E. A. Shands,

654 *founded upon said supposed judgment, whereby they sought to bring

into the court of law rendering the judgment, the control of the funds and property of said company, conveyed in trust to said Shands. They now pretend that upon this suggestion they obtained a personal judgment against said Shands, for the whole amount of their claim against the company; when in truth the said Shands, in his lifetime, never owed the complainants anything, nor has his estate since his death become liable to pay them anything. She denies that Shands owed the company anything, either before or after their deed. But how he administered that trust she presumes is not a proper enquiry in this cause, as it is drawn in question in another suit pending in the Circuit court of the county, in which the defendant and the said Omohunder are parties.

The defendant further answers, that there is no sufficient record to show Grove's recovery against the Rockingham Turnpike Company; nor is there any record of a judgment against E. A. Shands in favor of the complainants or either of them. That it would appear that a suggestion as a foundation of a proceeding to obtain a judgment against Shands, was sued out of the clerk's office of the Circuit court of Rockingham on the 28th of December 1858; but he had neither actual nor constructive notice, so far as appears. That the sheriff's return upon the suggestion is that he delivered and explained a copy of said suggestion to the wife of E. A. Shands, "a white woman over sixteen years of age, he not being found at his usual place of abode;" but it by no means appears by the said returns or by any other evidence, either that the wife of E. A. Shands was a member of his family, or was found at his usual place of abode. She denies the rendition and docketing of said supposed judgment

855 *against her testator, and denies that any execution, in the sense of the law, was ever issued thereon. And she claims the benefit of the statute of limitations applicable to such cases.

Defendant admits that a considerable amount in value of real and personal property came into her hands as executrix, but the greater part thereof was embraced in a deed of trust executed by said E. A. Shands to William B. Shands, on the 22d of March 1861, to secure certain creditors. That no sale had ever been made under this deed; and the greater part of the liabilities intended to be secured thereby have been paid off by Shands in his lifetime, or defendant since his death; some of them however remain unsatisfied—that to Thomas J. Michie, and perhaps some others; she thinks the personal property, including debts, which has or will come into her hands, will be amply sufficient to pay the remaining indebtedness of the said estate. She insists that at most, Shands was only a security for the plaintiff's debt, and that the company, or at least their trustee who had been substituted in the place of Shands, should be a party.

It was in proof that the order books of

the court and other papers in the office, had been destroyed by the United States troops in 1864; but there were found in the clerk's office some of the papers in the case of Grove for the use of Omohunder, against the Rockingham Turnpike Company. These were the writ with the return of the sheriff of the service thereof, the declaration, and the negotiable note on which the action was founded, with the protest for non-payment and proof of notice; and on the writ was an endorsement of the name of the case, the initials of plaintiff's counsel, the nature of the action, and the proceedings in the case to the judgment. There was

856 also a summons *to E. A. Shands, on a suggestion stating that Grove, for the use of Omohunder, had sued out, &c., a writ of fieri facias against the Rockingham Turnpike Company for, &c., reciting the judgment, &c. And on this summons there is a return of the sheriff in the words stated in the answer. Upon this summons there are similar endorsements of the names of the parties and counsel, the nature of the case, and the proceedings in the cause to the judgment. And there is a copy of an execution upon this judgment, against the goods, &c., of E. A. Shands, which is endorsed—"to lie."

It was in proof by one of the counsel who brought the suit of Grove against the Rockingham Turnpike Company, that after that judgment had been recovered, Shands requested him to sue out a suggestion upon the judgment against him; that he was indebted to the company, or had money belonging to it in his hands; witness did not remember which. Witness had the suggestion issued, Mr. Shands appeared in court in person and admitted his liability, and that witness took a judgment against him.

In August 1870 Mrs. Shands was directed to settle her accounts as executrix before a commissioner of the court; and the commissioner returned his report, bringing down the account to March 1871; at which date he reported the executrix to be indebted to the estate \$1,969.83, of which \$127.74 was interest. And that there were yet in her hands to be accounted for, county bonds \$8,500, judgment v. county of Rockingham \$6,500, and two other debts due to the estate from individuals, the amounts of which were not given.

In October 1873 the report was by consent recommitted to the commissioner, to **857** allow the executrix to *prove, if she could, some extraordinary charges sustained by her in the settlement of the estate of Shands. And in August 1874, in vacation, on the motion of Andrew J. Rader, it was decreed that a commissioner of the court should take an account of the debts and liabilities of the estate of Shands, and their priorities, if any, of what real estate said Shands died possessed, and any other and further reports as any party in interest may require; four weeks' notice to be given by publication.

The cause came on to be heard on the 3d

of October 1874; when, nothing having been done under either of the two last orders, the court set them aside; and there being no exception to the report of the commissioner, it was confirmed, and there was a decree that Grove, for the benefit of Omohunder should recover of the defendant, Martha Shands, the sum of \$763.36, with interest, &c. And thereupon Mrs. Shands, in her own right and as executrix of E. A. Shands, applied to this court for an appeal; which was allowed.

Robert Johnston and T. C. Elder, for the appellant.

Compton and William J. Robertson, for the appellees.

Anderson J. delivered the opinion of the court.

This was a creditor's bill brought by the appellee Grove, for the use of Omohunder, against the appellant Martha E. Shands, in her own right and as executrix of E. A. Shands deceased, to obtain satisfaction, out of the personal or real estate of said decedent, of a judgment which he obtained against him in his lifetime.

The said E. Grove held a negotiable note of the Rockingham Turnpike Company, which he transferred *to Omohunder; upon which note suit was brought against the said company, and judgment obtained in favor of Grove for the use of Omohunder. And afterwards, upon suggestion of the plaintiff that E. A. Shands had effects in his hands belonging to, or was indebted to, the said Rockingham Turnpike Company, which were liable by the *fieri facias* lien to satisfy his said judgment against the said Company, judgment was rendered in his favor for, &c., against the said E. A. Shands, in his lifetime, for the amount of his said judgment against the company; for the satisfaction of which judgment out of the estate of E. A. Shands, personal or real, or by the appellant in her own right, this suit was brought. Upon the settlement of the accounts of the appellant as executrix of E. A. Shands, it appeared that there was a balance due from her to the estate of \$1,969.83; and a decree was rendered against her, in favor of the appellee E. Grove, for the use, &c., of Omohunder, for \$763.36, the amount of the judgment, with interest and costs; from which decree she was allowed an appeal to this court.

The court is of opinion there is no error in said decree. It seems that the suggestion was made by the plaintiff at the instance of E. A. Shands, and that he was present in court and admitted his liability; and thereupon judgment was rendered against him. It is too late for his executrix now to object to the enforcement of the judgment by a court of equity, upon the ground that there is not sufficient evidence of either judgment, after the acknowledgment of her testator of his liability to satisfy the judgment against the company, and allowing

judgment against himself. Part of the records of the suit were destroyed by the public enemy during the late war, but it seems that enough of the record was preserved to enable the clerk to *certify copies of both judgments; and the court is of opinion that the evidence is sufficient.

Nor can she now object that no *fieri facias* ever issued upon the judgment against the company, so as to authorize the proceeding against her testator by suggestion, he having admitted his liability in open court when the judgment was rendered. But if a *fieri facias* had not issued, and her testator were not estopped, nor his personal representative, to object to the judgment on that ground, the objection could not be made in a court of equity. Her remedy was in the court of law, and the error, if it existed, might have been corrected on motion in the court which rendered the judgment, under chapter 177 of the Code of 1873.

If there was any defect in the service of the summons, which was awarded upon the suggestion, it could not avail the appellant, as it is in proof that the suggestion was made at the instance of the testator, who appeared in court and admitted his liability when the judgment was rendered.

The objection for want of parties, the court is of opinion, is not error for which the decree should be reversed. They were not necessary parties in this suit.

E. A. Shands was not proceeded against as the surety of the Rockingham Turnpike Company, but as its debtor. So there is nothing in the objection if it be law, that the appellee should have been compelled to exhaust the assets of the Rockingham Turnpike Company, before resorting to the estate of E. A. Shands.

The court is further of opinion that this proceeding was not barred by the statute of limitations.

We have thus, we believe, noticed all the assignments of error by the appellant in her petition. But her counsel in argument insists, that it was error to decree against the executrix, without first ascertaining

*that the fund was sufficient to pay all the debts of her testator. This objection to the decree is first made in the appellate court, and in a supplemental brief of appellant's counsel. The suit was brought by the plaintiffs, for themselves and all other creditors who should come in and contribute to the expense of the suit. No other creditors came in. And the appellant admits, in her answer to plaintiffs' bill, that the personal property, including debts, which have and will come into her hands, will be amply sufficient to pay the remaining indebtedness of the estate. The court is of opinion, therefore, that the decree should not be reversed on that ground.

Upon the whole, we are of opinion to affirm the decree.

Decree affirmed.

into the court of law rendering the judgment, the control of the funds and property of said company, conveyed in trust to said Shands. They now pretend that upon this suggestion they obtained a personal judgment against said Shands, for the whole amount of their claim against the company; when in truth the said Shands, in his lifetime, never owed the complainants anything, nor has his estate since his death become liable to pay them anything. She denies that Shands owed the company anything, either before or after their deed. But how he administered that trust she presumes is not a proper enquiry in this cause, as it is drawn in question in another suit pending in the Circuit court of the county, in which the defendant and the said Omohunder are parties.

The defendant further answers, that there is no sufficient record to show Grove's recovery against the Rockingham Turnpike Company; nor is there any record of a judgment against E. A. Shands in favor of the complainants or either of them. That it would appear that a suggestion as a foundation of a proceeding to obtain a judgment against Shands, was sued out of the clerk's office of the Circuit court of Rockingham on the 28th of December 1858; but he had neither actual nor constructive notice, so far as appears. That the sheriff's return upon the suggestion is that he delivered and explained a copy of said suggestion to the wife of E. A. Shands, "a white woman over sixteen years of age, he not being found at his usual place of abode;" but it by no means appears by the said returns or by any other evidence, either that the wife of E. A. Shands was a member of his family, or was found at his usual place of abode. She denies the rendition and docketing of said supposed judgment

655 *against her testator, and denies that any execution, in the sense of the law, was ever issued thereon. And she claims the benefit of the statute of limitations applicable to such cases.

Defendant admits that a considerable amount in value of real and personal property came into her hands as executrix, but the greater part thereof was embraced in a deed of trust executed by said E. A. Shands to William B. Shands, on the 22d of March 1861, to secure certain creditors. That no sale had ever been made under this deed; and the greater part of the liabilities intended to be secured thereby have been paid off by Shands in his lifetime, or defendant since his death; some of them however remain unsatisfied—that to Thomas J. Michie, and perhaps some others; she thinks the personal property, including debts, which has or will come into her hands, will be amply sufficient to pay the remaining indebtedness of the said estate. She insists that at most, Shands was only a security for the plaintiff's debt, and that the company, or at least their trustee who had been substituted in the place of Shands, should be a party.

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In August 1870 Mrs. Shands was directed to settle her accounts as executrix before a commissioner of the court; and the commissioner returned his report, bringing down the account to March 1871; at which date he reported the executrix to be indebted to the estate \$1,969.83, of which \$127.74 was interest. And that there were yet in her hands to be accounted for, county bonds \$8,500, judgment v. county of Rockingham \$6,500, and two other debts due to the estate from individuals, the amounts of which were not given.

In October 1873 the report was by consent recommitted to the commissioner, to 657 allow the executrix to *prove, if she could, some extraordinary charges sustained by her in the settlement of the estate of Shands. And in August 1874, in vacation, on the motion of Andrew J. Rader, it was decreed that a commissioner of the court should take an account of the debts and liabilities of the estate of Shands, and their priorities, if any, of what real estate said Shands died possessed, and any other and further reports as any party in interest may require; four weeks' notice to be given by publication.

The cause came on to be heard on the 3d

of October 1874; when, nothing having been done under either of the two last orders, the court set them aside; and there being no exception to the report of the commissioner, it was confirmed, and there was a decree that Grove, for the benefit of Omohunder should recover of the defendant, Martha Shands, the sum of \$763.36, with interest, &c. And thereupon Mrs. Shands, in her own right and as executrix of E. A. Shands, applied to this court for an appeal; which was allowed.

Robert Johnston and T. C. Elder, for the appellant.

Compton and William J. Robertson, for the appellees.

Anderson J. delivered the opinion of the court.

This was a creditor's bill brought by the appellee Grove, for the use of Omohunder, against the appellant Martha E. Shands, in her own right and as executrix of E. A. Shands deceased, to obtain satisfaction, out of the personal or real estate of said decedent, of a judgment which he obtained against him in his lifetime.

The said E. Grove held a negotiable note of the Rockingham Turnpike Company, which he transferred *to Omohunder; upon which note suit was brought against the said company, and judgment obtained in favor of Grove for the use of Omohunder. And afterwards, upon suggestion of the plaintiff that E. A. Shands had effects in his hands belonging to, or was indebted to, the said Rockingham Turnpike Company, which were liable by the fieri facias lien to satisfy his said judgment against the said Company, judgment was rendered in his favor for, &c., against the said E. A. Shands, in his lifetime, for the amount of his said judgment against the company; for the satisfaction of which judgment out of the estate of E. A. Shands, personal or real, or by the appellant in her own right, this suit was brought. Upon the settlement of the accounts of the appellant as executrix of E. A. Shands, it appeared that there was a balance due from her to the estate of \$1,969.83; and a decree was rendered against her, in favor of the appellee E. Grove, for the use, &c., of Omohunder, for \$763.36, the amount of the judgment, with interest and costs; from which decree she was allowed an appeal to this court.

The court is of opinion there is no error in said decree. It seems that the suggestion was made by the plaintiff at the instance of E. A. Shands, and that he was present in court and admitted his liability; and thereupon judgment was rendered against him. It is too late for his executrix now to object to the enforcement of the judgment by a court of equity, upon the ground that there is not sufficient evidence of either judgment, after the acknowledgment of her testator of his liability to satisfy the judgment against the company, and allowing

judgment against himself. Part of the records of the suit were destroyed by the public enemy during the late war, but it seems that enough of the record was preserved to enable the clerk to *certify copies of both judgments; and the court is of opinion that the evidence is sufficient.

Nor can she now object that no fieri facias ever issued upon the judgment against the company, so as to authorize the proceeding against her testator by suggestion, he having admitted his liability in open court when the judgment was rendered. But if a fieri facias had not issued, and her testator were not estopped, nor his personal representative, to object to the judgment on that ground, the objection could not be made in a court of equity. Her remedy was in the court of law, and the error, if it existed, might have been corrected on motion in the court which rendered the judgment, under chapter 177 of the Code of 1873.

If there was any defect in the service of the summons, which was awarded upon the suggestion, it could not avail the appellant, as it is in proof that the suggestion was made at the instance of the testator, who appeared in court and admitted his liability when the judgment was rendered.

The objection for want of parties, the court is of opinion, is not error for which the decree should be reversed. They were not necessary parties in this suit.

E. A. Shands was not proceeded against as the surety of the Rockingham Turnpike Company, but as its debtor. So there is nothing in the objection if it be law, that the appellee should have been compelled to exhaust the assets of the Rockingham Turnpike Company, before resorting to the estate of E. A. Shands.

The court is further of opinion that this proceeding was not barred by the statute of limitations.

We have thus, we believe, noticed all the assignments of error by the appellant in her petition. But her counsel in argument insists, that it was error to decree against the executrix, without first ascertaining *that the fund was sufficient to pay all the debts of her testator. This objection to the decree is first made in the appellate court, and in a supplemental brief of appellant's counsel. The suit was brought by the plaintiffs, for themselves and all other creditors who should come in and contribute to the expense of the suit. No other creditors came in. And the appellant admits, in her answer to plaintiffs' bill, that the personal property, including debts, which have and will come into her hands, will be amply sufficient to pay the remaining indebtedness of the estate. The court is of opinion, therefore, that the decree should not be reversed on that ground.

Upon the whole, we are of opinion to affirm the decree.

Decree affirmed.

December 1872, by George Harnsberger and N. K. Trout, executors of Jacob Harnsberger, deceased, against Samuel Simmons, John H. Moore and others, to subject a tract of land sold by the executors to Samuel Simmons, and by Simmons afterwards sold to the other parties. The defendants insisted that the land was sold with reference to Confederate money as the standard value, and that the purchase money should be scaled.

It appears that Jacob Harnsberger died in 1861, and that the tract of land in question, which contained one hundred and forty acres, was appraised by appraisers appointed for the purpose, at thirty-five dollars per acre as its cash value in good money. It was sold by the executors at public auction on the 17th of October, 1862, upon the 668 terms of one-fourth cash, and *the balance on a credit of one, two and three years, without interest, a lien for the deferred payments to be reserved in the deed, and it was purchased by Samuel Simmons. The terms seem to have been in writing and read at the sale, but the writing was lost. Nothing seems to have been said in them as to the kind of money which would be received in payment of the purchase money. On this question and as to the value of the land a great many witnesses were examined by both plaintiffs and defendants. It appears that the land was cried for some time and thirty-five dollars had been bid, when the bidding ceased for ten or fifteen minutes, when the enquiry was made by a bidder in the crowd as to the kind of money which was paid, and an answer was given by one of the executors, the other being present and hearing it. Of the precise form of the question and the answer the witnesses differ. The executors were examined as witnesses, and their testimony is stated by Judge Moncure in the opinion of the court. They and the crier say that they said they would take Confederate money for the cash payment, but they did not say they would take it for the deferred payments. A number of witnesses understood them as consenting to take Confederate money for the whole. After this enquiry was made and answered, the bidding was renewed, and the land was knocked off to Samuel Simmons, at fifty-five dollars per acre. And he thereupon paid the cash payment in Confederate money, and executed his three bonds, each for \$1,931.87½, payable in one, two and three years; and the land was conveyed to him, reserving a lien for the purchase money.

As to the value of the land in good money the witnesses, and they were numerous, differed greatly. A number of them fixed it at \$35 per acre cash; others 669 *thought it was worth, on the terms of credit given at the sale, from fifty-five to sixty dollars, and this especially if the cash payment was to be made in Confederate money.

There was evidence that after the first bond fell due Moore, one of the purchasers from Simmons, proposed to N. K. Trout,

one of the executors, to pay it, but Trout declined to receive it. He however, showed no money to Trout.

The cause came on to be heard on the 4th day of February 1874, when the court held that the bonds sued on in the cause were not, according to the true understanding and agreement of the parties, to be fulfilled and performed in Confederate States treasury notes, and were not entered into with reference to such notes as a standard of value. And it being agreed that the defendants or some of them were entitled to credits on the notes, the cause was referred to a commissioner to take an account of any payments or set-offs to which they or any of them might be entitled. And the commissioner, was also directed to ascertain the order of priority in which the lands purchased by Simmons were subsequently sold to the other defendants.

The commissioner made his report, showing that after allowing the parties their credits, there was due on the 15th of April 1874, on said bonds \$4,245.65½, all principal, and also showing the order in which the other defendants had purchased from Simmons. And the cause came on to be heard on the 25th of April 1874, when the court confirmed the report, and made a decree against Samuel Simmons for the said sum of four thousand two hundred and forty-five dollars and sixty-five and a half cents, with interest and costs. And if the said sum was not paid within ninety days, 670 *the lands were directed to be sold, selling the lands last sold first, and so on. And thereupon John H. Moore and the other purchasers from Simmons, applied to this court for an appeal, which was allowed.

John E. Roller, for the appellants.

Compton, for the appellees.

Moncure, P. delivered the opinion of the court.

The court is of opinion, that the contract made on the 17th day of October 1862, between N. K. Trout and George Harnsberger, executors of Jacob Harnsberger deceased, and Samuel Simmons, for the sale by the former to the latter of a tract of land situated in Rockingham county, containing about one hundred and forty and one-half acres, at \$55 per acre, on the terms of one-fourth in hand and the balance in three equal annual payments, with a vendor's lien to secure them, was made and entered into with reference to Confederate States treasury notes as a standard of value. That the hand payment of one-fourth of the purchase money was agreed to be paid, and was actually paid, in Confederate States treasury notes, is admitted by all parties. And the only question is, as to the deferred instalments of the purchase money, whether they are payable according to their par amount, in good money, or according to the amount due, on the supposition that the contract was made in reference to the said standard

of value, as well in regard to the deferred instalments, as in regard to the hand payment of the purchase money. Our opinion, as has already, in effect, been stated, is, that in regard to both, the contract was made with reference to said standard of value.

671 *Beyond all question, if the sale had been entirely for cash, the whole amount of the purchase money would have been received in Confederate States treasury notes, and the contract in that case would have been made in reference to them as a standard of value. But the difficulty arose from the fact, that the payment of three-fourths of the purchase money was by the contract deferred, and there was danger of the depreciation of the currency before the money became payable, and there was doubt as to what the amount of the depreciation would be. In this state of things, it was difficult, if not impossible, to fix upon a certain medium of payment of the deferred instalments which would do justice to both parties. The purchaser was of course unwilling to agree to pay specie or its equivalent, having contracted in reference to a lower standard of value; and the vendors were no doubt unwilling to agree to receive Confederate States treasury notes at par in payment, without reference to the extent of depreciation at the time of the maturity of the deferred instalments respectively. Had the bonds been, in terms, for the payment of Confederate States treasury notes, they might, and no doubt would, have been construed as contracts for the delivery of a commodity, and would have been soluble by the payment of the amount in such notes, however greatly depreciated they might have been at the time of the maturity of the bonds. All that could be done therefore, in justice to all parties, was to make their contract in reference to Confederate States treasury notes as a standard of value. If they remained of the same value at the maturity of the bonds there would be no difficulty. But if they materially depreciated in value by the time of the maturity of the bonds, then justice could be done by the payment of the value of the same

672 amount of *Confederate States treasury notes at the date of the contract, to be ascertained by the best rule that could be adopted for the purpose.

That the contract was made with reference to Confederate States treasury notes as a standard of value, is, we think, very obvious; whether we look at the time at which it was made and the surrounding circumstances, or to the evidence in the case. The sale was made on the 17th day of October, 1862, when the only, or almost only, currency which existed was Confederate States treasury notes, and that had been almost the only currency for a long time before. The 1st day of January 1862, nearly ten months before the date of the sale, was the day prescribed by law as the day between which and the 10th day of April 1865 it was made lawful for either party to a contract to show, by parol or other

relevant testimony, what was the true understanding and agreement of the parties thereto, either express or to be implied, in respect to the kind of currency in which the same was to be fulfilled or performed, or with reference to which as a standard of value it was made and entered into. Such was the rarity of making a sale of real estate for anything else than Confederate States treasury notes, or, at all events, for specie or its equivalent; and such was the difficulty, if not impossibility of making such a sale for specie or its equivalent, at or about the time of the sale in this case, to-wit, the 17th of October 1862, that strong and clear evidence of an intention to make such a sale at or about that time ought to be required to prove the fact. A sale at such a time, under such circumstances, and in the absence of any such evidence, ought to be construed to be a sale in reference to Confederate States treasury notes as a standard of value. So far

673 from there being in this *case strong and clear evidence of such an intention, the great mass and weight of the evidence sustains the contrary. A great number of witnesses were examined in the case, some fifteen or twenty on each side. And most of them examined on the side of the purchaser testify to the fact that the sale was made in reference to Confederate States treasury notes as a standard of value, as well in reference to the deferred instalments of the purchase money as the hand payment. Indeed, as we have seen, in regard to the hand payment, it is admitted on all sides that such was the case, and that the money was paid and received accordingly. While many witnesses testify that the sale was according to the same standard of value in reference to the deferred instalments also, only one or two of them testify to the contrary. The most important of these is certainly one of the executors themselves, N. K. Trout, who, no doubt, and as we happen to know, was in all respects worthy of confidence. He admits, however, that his co-executor, a son of the testator, was the chief actor in making the sale; and he testifies as to what was said and done at a sale which transpired many years before he gave his testimony. This witness testifies that "after the land had been up some time, the impression seemed to prevail that we would not take the then currency (Confederate money); there was a suspension of probably ten to fifteen minutes, and we had a conference with the legatees, and announced that we would take the payment of that day, the down payment, in Confederate money, but would not agree to bind ourselves to take the deferred payments in Confederate money. I recollect with great distinctness, while standing by the auctioneer, being asked by some person in the crowd: 'Will you take the payment which is to be made to-day in Confederate

674 *money?' I responded: 'Yes, we will.' The interrogator then said: 'Will you require the deferred payments in gold or

silver?" I responded, rather playfully, probably—"No, it is heavy to carry; we will take its equivalent or a legal tender for it." This is the evidence mainly relied on to show that the sale, as to the deferred instalments, was to be for good money or a legal tender. But Mr. Trout no doubt only intended to make a playful remark, not only about specie, but about legal tender, and what he said was no doubt so regarded by those who heard him, if anybody heard him. This is shown by a subsequent part of his testimony. "I remember," he says, "Moore's coming to my office before the first bond was due, and asking me if I would receive the money for Simmon's bond, and I told him I would when it was due, unless I received instructions from the legatees not to. He came again some time after it was due, and I refused to take the money, because I had received orders from the legatees, through George Harnsberger, not to receive it; he showed me no money on either occasion. I supposed at the time of these interviews with Moore, that the money spoken of, in which he wished to pay the bond, was Confederate money. I did not see it." Now this payment was offered to be made about the 17th of October 1863, when Confederate money was very greatly depreciated: and is it likely that this executor would have been willing, as he seems to have been, so far as he was concerned, to receive this payment in Confederate money at par, if he had considered the purchaser as under an obligation to make payment in specie or in legal tender money? The testimony of his co-executor strongly tends to prove that there was no agreement to make the deferred payments in good money.

"The question was asked," he says, 675 "what kind of money would be received? We, in the outset, agreed to take Confederate money for the down payment—that was stated in the terms of sale—the one-fourth in hand was to be paid in Confederate money. As to the bonds, I told them, it was out of my power to say what kind of money we would take by that time."

The contract having been made in reference to Confederate States treasury note as a standard of value, as well in regard to the deferred instalments as the cash payment, it follows, as a necessary consequence, that the balance of the purchase money now due must be ascertained by scaling the nominal amount due upon the bonds; and the question now is, what mode of scaling should be adopted in this case—whether the gold standard or the property standard. This is a case to which the property standard may be applied, the Code providing "that, when the cause of action grows out of a sale or renting or hiring of property, whether real or personal, if the court (or where it is a jury case the jury) think that under all the circumstances the fair value of the property sold, or the fair rent or hire of it, would be the most just measure of recovery, instead of the express terms of the contract." Code p. 980, chap. 138, § 1. The court is of opinion, under all the circumstances of this

case, that the fair value of the property sold at the time of the sale, or a due proportion thereof according to the balance of the purchase money remaining unpaid, would be the most just measure of recovery in this case, and ought to be adopted as such measure of recovery accordingly.

And now the question is, as to the value of the land sold at the time of the sale, to-wit, the 17th day of October 1862. The court is of opinion, that the value

676 *of the land at the time was thirty-five dollars cash per acre. Without reviewing all the evidence on this subject, of which there is a great deal, such, we think, is its decided preponderance. Even one of the witnesses introduced by the complainants, the executors of Harnsberger, testifies that such, in his opinion, was its value. William P. Sites, one of those witnesses, being asked, on cross-examination, "In October 1862, what was the Harnsberger land worth, to have been paid for in gold and silver or United States currency? What was it worth per acre?" answered: "From what little acquaintance I have with it, I know it very slightly, my figures on it would be \$35 per acre." And being asked, on re-examination in chief, "Do you mean \$35 cash?" he answered: "Yes, sir." And being asked, what difference certain terms of credit named in the question would make, he answered: "My figures have been \$35 per acre as cash. What difference the terms of payment stated in the question would make, I cannot say." The testimony as to such value varies between \$50 per acre and \$30 per acre. None of the testimony introduced by the defendants fixes it at more than \$35 per acre; while some of the testimony fixes the value at that sum as a cash price, and some as a price on the ordinary terms of credit. In fact, the executors were anxious to effect a sale of the land in December 1861 at forty dollars per acre, and tried to do so, but did not succeed. But the most important testimony in the case on that subject (to-wit, the value of the land in good money) is that of the three appraisers of the land appointed by the court for that purpose. They were no doubt selected for their impartiality, sound judgment and experience in such matters. They performed their duties upon oath, and

677 ante litem motam, *also before the sale was made or perhaps thought of. They were all examined as witnesses in the case, and all concurred in testifying that \$35 per acre was, in their opinion, the fair value of the land at the time of the sale, on the 17th of October 1862.

The court is therefore of opinion, that the decree appealed from is erroneous, and ought to be reversed, and the cause remanded to be further proceeded in to a final decree in conformity with the foregoing opinion.

The decree was as follows:

This day came again the parties by counsel; and the court having maturely considered the transcript of the record of the

decree aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the contract in the proceedings mentioned, made on the 17th day of October 1862, between N. K. Trout and George Harnsberger, executors of Jacob Harnsberger deceased, and Samuel Simmons, for the sale by the former to the latter of a tract of land situated in Rockingham county, containing about one hundred and forty and a half acres, at fifty-five dollars per acre, on the terms of one-fourth in hand, and the balance in three equal annual payments, with a vendor's lien to secure them, was made and entered into with reference to Confederate States treasury notes as a standard of value, not only in regard to the hand payment, but also in regard to the deferred payments aforesaid.

The court is further of opinion that no valid or legal tender was made of the amount of the bond for the first deferred payment, which became payable on the 17th day of October 1863.

The court is further of opinion that, 678 under all the *circumstances of the case, the fair value of the property sold at the time of the sale aforesaid, would be the most just measure of recovery in this case, and ought to be adopted as such measure of recovery accordingly, subject to all just credits to which the defendants may be entitled.

The court is further of opinion that the fair value of the said land at the time of the said sale, to wit, on the 17th day of October 1862, was thirty-five dollars cash per acre, with three-fourths of the amount of which value, with interest from that day, the purchaser is chargeable on account of the deferred payments, he having properly discharged the hand payment in Confederate money. The court is therefore of opinion that the decrees rendered by the Circuit court in the cause on the 4th day of February 1874, and on the 25th day of April 1874, are erroneous, and it is decreed and ordered that the same be reversed and annulled, and that the appellees, N. K. Trout and George Harnsberger, executors of Jacob Harnsberger, deceased, do out of the estate of their said testator in their hands to be administered, pay to the appellants their costs by them expended in the prosecution of their appeal aforesaid here. And it is further decreed and ordered that this cause be remanded to the said Circuit court for further proceedings to be had therein to a final decree in conformity with the foregoing opinion; which is ordered to be certified to the said Circuit court of Rockingham county.

Decree reversed.

679 *Marshall & al. v. Cross & al.

September Term. 1875. Staunton.

Contracts for Sale of Land—Unrecorded—Priority.*—
In August 1867 M sold to C a tract of land for \$5,500.

*Unrecorded Contracts for Sale of Land.—See March,

on credits extending to 1870, for which M had not obtained the title, and \$2,100 was to be retained until the death of F upon the payment of the interest. C paid in cash \$500, and of the payment of \$1,000 due the 1st of March 1868, C paid in July \$425. M obtained a deed for the land on the 5th of May 1868, and on the same day conveyed it to W in trust to secure the amount due F's heirs. This debt falling due in 1869, W advertised and sold the land to J for \$4,228, one-third cash, and the balance in one and two years; and in March 1870 J was put in possession, and complied with the terms of sale. On the 28th of April 1870 M assigned to T, trustee in a deed from M to secure debts he owed J, the balance of the purchase money, after the payment of the debt to F's heirs, for the purpose of his trust; and on the 2d of May W, the trustee, acknowledged notice of the assignment. On the 9th of September 1870 M and C had a settlement, when by writing under seal M acknowledged he owed C \$778.36, on account of C's payments on the land. C files his bill against M, J and W, to subject the balance of purchase money in W's hands after satisfying the trust in favor of F's heirs; and J and W answer, denying all notice, actual or constructive, of C's contract or claim. HELD: C not having had his contract with M for the purchase of the land recorded, and J and M denying all notice, actual or constructive, of C's contract or claim, J's right to the surplus of the trust fund in the hands of W is superior to that of C.

Some time before December 1860, Dr. H. H. McGuire purchased a tract of land of about one hundred and seventy acres, lying in the county of Clarke, of one or more of the heirs of David Funsten, deceased. He seems to have paid the purchase money, except a sum retained to meet the dower 680 interest of Mrs. Funsten *in the land.

In December 1860 he sold the land to Isaac Pidgeon, for twenty-five dollars per acre, in payments bearing interest, of \$600 a year for five years, and the balance of the purchase money to be divided into five annual payments, to commence when the first five ended; and a deed was to be executed when the purchase money was paid. Pidgeon was put into possession of the land in January 1861, and executed his notes for the several payments, and in January 1862 he paid off the first note. He continued in possession of the land by himself, or those claiming under him, down to 1865, without making any further payment. In September 1865 Dr. McGuire gave a written notice to Pidgeon that if his notes then due were not paid in ninety days he would proceed to take possession of the farm; and he seems to have done it.

In August 1867 Dr. McGuire entered into a written contract with J. L. Cross to sell to him the land for the sum of \$5,500, payable \$500 in cash, \$1,000 on the 1st of March 1868, \$500 on the 1st of September 1868, with interest from the 1st of March 1868, \$500 on the 1st of March 1869, with like interest,

Price & Co. v. Chambers *et al.*, 30 Gratt. 299, and *note*, collecting cases; also Eldson v. Huff, 29 Gratt. 338. The present Virginia statute, V. C., § 2465 is identical with that of 1873 on this subject, hence these cases are still authority.

and \$500 on the 1st of September 1869, with like interest, and \$400 on the 1st of March 1870, with like interest, and \$2,100 to be retained as a lien on the land for and during the life of Mrs. Funsten, widow of David Funsten, deceased, on which interest was to be paid annually, on the 1st of January during her life, and at her death to be paid in two instalments to the heirs of David Funsten; all of which deferred payments were to be secured by deed of trust on the land when the deed conveying the same was made to Cross.

In March 1868 Cross was put in possession of the land, which was occupied by his father and his family, he, himself, living in Florida, where he was a professor
681 *in a school. He paid the cash payment of \$500, and in July 1868 he paid \$425.

It seems that Dr. McGuire did not receive a deed conveying him the land from the heirs of David Funsten until the 5th of May 1868, and on the same day he conveyed the same to George W. Ward in trust to secure the payment of the sum of \$1,265.45, with interest from the 30th of August 1856, to the heirs of David Funsten; and it was provided that if the said McGuire did not pay this debt and interest within six months after demand made, Ward, the trustee, should proceed to sell the land at public auction, and out of the proceeds pay the debt and expenses, and the remainder pay over to H. H. McGuire.

Dr. McGuire not having paid the debt when demanded, Ward proceeded to sell the land on the premises, when it was purchased by James Marshall, who complied with the terms of the sale, and was put into possession of the land.

In November 1868 Isaac Pidgeon filed his bill in the Circuit court of Clarke county, which was afterwards removed to the Circuit court of Frederick, in which he set out his purchase of the land from Dr. McGuire, and his payment of \$636 of the purchase money, the taking possession of the land by Dr. McGuire in 1865, and his sale to Cross; and he insisted that he was entitled, if Cross took the land, to have the difference between what he was to pay and what Cross was to pay for the land, or to have the land himself, and to pay the balance of the purchase money which he owed. And, making Dr. McGuire and Cross defendants, he prayed that he might have what he had insisted on, and for general relief.

In June 1870 Pidgeon amended his bill, and made George W. Ward and James
682 Marshall defendants; *stated the sale by Ward to Marshall, and charged that they had actual or constructive notice of his equitable lien; or, if the sale and purchase was lawful, he was entitled to be paid his claim out of the funds in their hands.

Cross answered the original and amended bill. He set out his purchase of the land in 1867 from Dr. McGuire, and his payments of \$500 and \$425; and having been deprived of his farm, fairly purchased, he prays that Ward, the trustee, and Marshall,

the purchaser, may be required to repay him out of the purchase money of the land, after discharging the debt to Mrs. Funsten, the amount he had paid McGuire. He filed with his answer a paper under seal, executed by Dr. McGuire, dated the 9th of September 1870, by which McGuire acknowledged that, upon settlement, he owed Cross \$778.36.

Marshall and Ward answered. Marshall said he purchased the land at the sale made by Ward; paid the cash payment of \$1,412.65, and gave his bonds for the deferred payments, and was put in possession of the land; and he avers that he had no actual notice of the plaintiff's equity, nor, so far as he knows or believes, was there any constructive notice affecting him at the date of said purchase.

Ward states his sale of the land to Marshall under the deed of trust for \$4,238, of which one-third was paid in cash, and the balance was to be on a credit of one and two years. And he says that Dr. McGuire on the 28th of April 1870 assigned to Edward M. Tilball, in trust to secure certain debts due to James Marshall and W. D. McGuire by said Dr. McGuire, the balance due to him, after payment of his liability under the aforesaid deed of trust; notice of which assignment was accepted by him
683 (Ward) on the 2d of May 1870. *And he exhibits the assignment. He denies having actual notice of the plaintiff's equitable lien as charged in the bill; and says he did not know the plaintiff had filed his bill until January 1871.

A number of witnesses were examined in the case, an account of the claim of the plaintiff was taken, to which there were various exceptions, and the cause came on to be heard, when the court refused to confirm the report, and making a statement of Pidgeon's claim, rendered a decree in his favor for \$346.97, with interest from the 1st of April 1865, and in favor of Cross for \$778.36, with interest from the 9th of September 1870; and it appearing that the fund had been paid under a previous order in the cause, to the general receiver of the court, he was directed to pay first to Pidgeon the amount due to Pidgeon, and then to Cross the amount due to him. From this decree Marshall obtained an appeal to this court; and in October 1873 it was reversed. And the court says the bill of Pidgeon should have been dismissed; but they send the cause back with leave to Cross to file a cross-bill, for the purpose of litigating between himself and Marshall, his co-defendant, their respective equities, and their priorities with respect to the said tract of land sold by McGuire to Cross, and afterwards purchased by Marshall at the sale made by Ward, trustee.

When the cause went back Cross filed his cross-bill. He set out his purchase of the land from Dr. McGuire, and his payments as before stated. That he purchased the farm as a home for his father. He says he lived in Florida, and only returned to Virginia during his vacations in the summer. That in the summer of 1868,

and after he had paid \$425 to Dr. McGuire, he heard of the claim of Pidgeon, which alarmed him. He was very poor, his only means being his salary as
684 *professor. He was purchasing the farm as a home for his father, and he was much disturbed at the prospect of being disappointed, as well as suffering pecuniary loss. Nothing however was done whilst he was here. That he returned to Florida, and did not come back until July 1869. In the meantime Dr. McGuire had gotten his title through the Circuit court of Clarke county; but he had gotten it with a deed of trust for the benefit of Mrs. Funsten, which could be closed at any time, not only necessitating him, Cross, to pay the debt long prior to the terms of the agreement with Dr. McGuire, but changing the whole character of the agreement itself, by reason of that debt being larger than was then supposed. Moreover Gardiner, a purchaser of twenty-two acres of the land from Pidgeon, was still upon it, and Pidgeon still asserted his claim. Under these circumstances he was afraid to pay any more money. So matters rested; and when he returned again to Virginia, in July 1870, he found that the land had been sold by Ward, trustee, for the benefit of Mrs. Funsten.

He further says, he is informed and verily believes, that it never was the intention of Dr. McGuire to assign to Mr. Marshall, &c., anything more than the surplus (which is a considerable amount) of the fund arising from the land sold by the trustee, Ward, over and above what was required to satisfy the Funsten lien and also plaintiff's just claim to have refunded to him the amount paid on his purchase from Dr. McGuire; and this, he insists, abundantly appears from the face of the assignment itself, considered in connection with the facts of the case, especially the adjustment and settlement between Dr. McGuire and the plaintiff of the exact balance due to the plaintiff of the date September 9th, 1870. But

685 however this may *be, he contends that such a simple and indefinite assignment (and that too in trust, without the instrument having been recorded) cannot be made superior to plaintiffs' paramount claim and lien upon the surplus fund in the hands, or rather to come into the hands, of the trustee under the Funsten lien. And making Dr. McGuire, James Marshall, Titball, trustee in the alleged assignment, and Ward, defendants, he prays that he may have a decree for the amount of his claim, as ascertained in the cause, out of the trust fund now under the control of the court, and for general relief.

Marshall answered the cross-bill. He referred to the record in the original case of Pidgeon v. McGuire, especially to the answer of Ward and his own, and to the assignment by McGuire to Titball. He says, he knows nothing in the world of the matters alleged in the bill, whether correct or not, and he therefore calls for full proof of each and every allegation of fact therein made. He avers that he became the pur-

chaser of the land referred to at a sale by G. W. Ward, trustee in a deed of trust from Dr. McGuire, a copy of which he files. That the records of Clarke county disclosed the fact, that Dr. McGuire had acquired the legal title to the land only on the day this deed was made by him. He denies that he had any actual notice of any prior equities in or to said land or its proceeds; and he does not believe he had any constructive notice of such equity. The deed of trust provides that any residue, after the debts secured, shall be paid over to said Dr. McGuire; of this residue respondent, after his purchase, took in good faith and innocence the assignment before referred to. Certainly respondent knew nothing of the alleged claim of Mr. Cross: the records
686 of Clarke county furnished *no notice; the trustee, George W. Ward, knew nothing of it, as would appear from his acknowledgment of notice of the assignment.

Ward was examined as a witness. He says, the debt for which the trust was executed became due and was not paid; and he advertised the property to be sold, the first time, he thinks, in September 1869, to be sold on the premises. He went to the place of sale, and found Mr. James Cross there, and also his son, as he supposed, in possession of the property. The property was not sold, for want of bidders. He afterwards advertised the property to be sold in October 1869, he thinks, at which time a sale was made to Dr. William McGuire, who bought for James Marshall. He went to Winchester, and Mr. Marshall would not comply with the terms of sale, pay the cash payment, until witness gave him possession. Witness saw Mr. James Cross, and asked him to give possession, which he declined doing; and witness instituted proceedings in Clarke county, where the land lies, to turn him off. After some one or two months, witness found that they claimed that the suit had been improperly brought, and the proceedings had to be renewed; and about the last of March or first of April 1870 possession was given him, and Mr. Marshall complied with the terms of sale and took possession.

The cause came on to be heard on the 13th of November 1874; when the court held that Cross was entitled to receive, out of the fund in the hands of the receiver of the court, the sum of \$778.36, with interest thereon from the 9th of September 1870, and his costs; and the receiver was directed to pay to him that amount, and to pay the residue of the fund to Titball, trustee under the assignment in trust of April 28th, 1870, for the benefit of James Marshall, &c.
687 *And from this decree Marshall applied to this court for an appeal; which was allowed.

Holmes Conrad, for the appellant.

Holliday and Andrew Hunter, for the appellee.

Anderson, J. delivered the opinion of the court.

The question is, in this case, whether James Marshall, the appellant, or J. L. Cross, the appellee, is entitled to a certain fund in the hands of George W. Ward, the trustee of Dr. H. H. McGuire. The fund consists of the balance of the proceeds of the sale of a tract of land, which was made by the trustee, Ward, under a deed of trust to him by Dr. McGuire, after satisfying the balance of purchase money due upon it to the widow and heirs of David Funsten, deceased.

The land was first offered for sale in September 1869. The trustee says he went to the place of sale, and found Mr. James Cross there, and also his son in possession. It was put up, but not sold for want of bidders. It was sold in October following, and was bought by Dr. William McGuire for James Marshall for the price of \$4,238. It does not appear that the sale was objected to, or any claim of right made to the property by the appellee, James L. Cross, or his father, either in October 1869, when it was sold, or in September when it was put up, but not sold for want of bidders, though both the father and the son were present when it was first offered. If the appellee had any claim at that time to the property, the presumption is he would have asserted it, or would have forbidden the sale. There is no proof that he did either. If he had done so, it was easy for him to have proved it. He took the deposition of his father; but not a syllable of such notice or demand does he prove by him. Nor

688 *does he even allege it in his answer to the original bill or in his cross-bill. He made no attempt to prove it by Ward, though he was represented by counsel when his deposition was given. No inquiry was made of him if such were the fact. It must be presumed that such was not the fact, or the inquiry would have been made. And it is not easy to reconcile the conduct of the appellee, except with the abandonment of his contract and all claim upon the land. And this is not improbable.

His contract was a bad one for him. He was to pay for the land \$5,500, with interest on deferred payments from 1st of March 1868—a great deal more than it had sold for before to Pidgeon, or afterwards to Marshall. And it was an injudicious contract for him, because he was evidently unable to fulfil it. He was in default in meeting the very first deferred instalment of purchase money, of \$1,000, due March 1st, 1868; of which he paid only \$425; and that not until the 15th of July 1868. Interest was accumulating on that instalment; another was due in seven or eight months, with accruing interest from the 1st of March 1868; and another the year following; and so on. And he might very soon be called on to pay the whole amount due the widow and heirs of David Funsten, deceased, which amounted, with interest to April 6th, 1870, to \$2,321.47; and his only resource for making payments was what he could save from his salary as a teacher: as he tells us himself, he was very poor. He had evidently

assumed obligations which he was unable to discharge. He was involved in an onerous contract, which he could not fulfil, and from which it would be to his advantage to be released. If it had been in the power of McGuire to have fulfilled it, and to have made him a good title, it is 689 evident he could not have *fulfilled it on his part. He had already failed to make, as we have seen, the very first deferred payment. He had evidently undertaken more than he could accomplish, and if held to his contract, it would in all probability have involved him in inextricable ruin. He had agreed to give for the land twelve hundred and sixty-two dollars more, with interest on the deferred payments, than could afterwards be got for it in open market on terms of one-third in cash, and the residue in two equal annual instalments, without interest, when it was purchased by Marshall. If he had been held to his contract it is more than probable that he could not have met his payments, and the land would have been forced to sale, and it is not reasonable to suppose would have brought more than it sold for to Marshall, in which event his loss would have been \$1,262, with an accumulation of interest. It was most probably to his advantage, that McGuire was not in condition to insist upon the execution of the contract on his part. And if he had been, it would have been better for Cross, if necessary in order to be released from the contract, to have surrendered the \$778.36 which he claims to be the amount due from McGuire on account of the purchase money he had paid, than to have gone on with the contract. It is not surprising, therefore, that he did not insist upon his contract, and object to the sale when it was made under the deed of trust.

But why did he not demand that he should be refunded what he had paid for the land out of the proceeds of the sale after the Funsten debt was satisfied? There is no proof, as we have seen, that he asserted any such claim at the time of sale. The presumption is he did not. That was the time for him to have asserted it if he ever intended to make such claim. The deed of trust was executed on the 5th of May 1868, 690 *and admitted to record in Clarke county on the 22nd of June following. By its terms it requires the trustee after satisfying the Funsten debt and expenses of sale, &c., to pay the remainder to McGuire. Cross must be presumed to have notice of that deed, it being of record. And the land was put up to sale under it, in his presence in September 1869, more than a year after its recordation. If he intended to assert a lien on the land or the proceeds of the sale, for what was due him from McGuire, he surely would then have notified the trustee of his claim.

And if, against his own interest, under the circumstances which I have detailed, he intended to insist upon his contract, or to hold the land bound for the purchase money he had paid, why did he not have his contract with McGuire recorded? He

must be presumed to have known the law, that any contract made in respect to real estate, &c., shall be as valid, as against creditors and purchasers, from the time it is recorded, as if it were a deed conveying the estate or interest in the contract—Code of 1873, p. 897, § 4; and that by § 5, "Every such contract," &c., "shall be void as to creditors and subsequent purchasers for valuable consideration without notice, until and except from the time that it is duly admitted to record," &c. Mr. Cross must be presumed to have known the law, and all other persons are justified in dealing with the subject under such presumption. If upon searching the records, they find no evidence of such equity, they have a right to presume that there is none, if otherwise without notice of its existence. If Mr. Cross intended to insist upon his contract, or to hold the land bound for the money he had paid on it why did not he have the contract recorded? It would have been in ample time if it had been recorded

691 when the land was offered *for sale in September or October, 1869, or any time before the purchase was confirmed by Marshall in the spring of 1870. That would have been notice to all the world. It would have been notice to the purchaser, and the land, or the proceeds of the sale, in the purchaser's hands, would have been bound for his claim.

That he did not forbid the sale, or notify the trustee of his claim upon the land, or notify James Marshall, the purchaser, that he held this claim on the land, or have his written contract for the purchase recorded, can only be accounted for, it seems to me, upon the ground, that he had determined at that time, to abandon his contract, and all claim upon the land, and look to McGuire personally (in whom it appears from his cross-bill, he not only reposed confidence, but of whom he had a very exalted opinion), to refund the purchase money he had paid. Could he thus remain silent, and allow Marshall to purchase, and pay for the land, and then hold him liable for the claim which he had upon Dr. McGuire? A person who, having an interest or claim upon property, stands by and sees another sell it as his own, without objection, will not be allowed afterwards to assert his title. His silence, when in good conscience he ought to speak, shall close his mouth when he would speak (2 Sugd. Vend. with American notes, chap. 23, § 1, p. 507; 8 Amer. ed. note u, citing numerous cases).

In his answer to the original bill, which was sworn to on the 30th of July, 1870, but not filed until the October term of that year, whilst he recognizes his loss of the farm, he prays that the trustee Ward may be ordered to refund to him the purchase money he had paid on the land with interest, after discharging the Funsten debt;

or that James Marshall who was the 692 *purchaser should pay it. But this was after Marshall had paid the whole purchase money; or at least after McGuire, who, as we have seen, was entitled to the

residue of the proceeds of sale after satisfying the Funsten debt, &c., had assigned it for the benefit of Marshall and another, by deed of assignment, bearing date April 28, 1870, of which the trustee had been duly notified. This assignment was perfected three months prior to the date of Cross' answer, and nearly six months before it was filed—and that is the first intimation we have of the claim of Cross to hold the proceeds of the sale liable.

It appears that between the preparation of his answer, and the filing of it in court, he and McGuire had a settlement of this claim, and as auxiliary to it had an arbitration of some matters about which they were not agreed, and that a certificate was given by McGuire under his hand and seal, that he was due him a balance of \$778.36, for money advanced on said contract of purchase. This certificate is dated September 9th 1870. But, as we have seen, long before this adjustment and certificate McGuire had assigned for value his whole interest under the deed of trust in the proceeds of the sale made by Ward.

But it is contended that said assignment was made subject to the claim of Cross upon the proceeds of said sale. The assignment is of "any balance due me under deed of trust," and the trustee Ward is directed to pay to Edward M. Tidball, trustee, any balance due to me after the payment of my liabilities under the trust in which he is trustee."

The deed in which Mr. Ward is trustee, conveys the land in question upon trust, to secure the payment of \$1,265.45, with legal interest thereon, from the 30th of August 1856 until paid, to O. R. Funsten and

693 the other *heirs at law of Elizabeth Funsten deceased; being the balance of purchase money for the said tract of land, due from, and unpaid by, the said Hugh H. McGuire, to the said O. R. Funsten and the other heirs at law as aforesaid, for the use of said David Funsten's widow and children. And the trustee, in default of payment, six months after default of payment is made, is upon request, &c., required to make sale, and out of the proceeds "to pay all the necessary expenses, and the said debt and interest, and the remainder to pay over to the said Hugh McGuire." There is no mention of, nor allusion to any claim of James L. Cross. What was due under that deed of trust to Hugh McGuire, if it was not the balance of the proceeds of sale after satisfying the Funsten debt and expense of sale, &c.? Whatever that balance was, whatever McGuire was entitled to demand of the trustee Ward, under the terms of that deed, was transferred and vested by his said deed of assignment, in Tidball trustee, to secure the debts due from the assignee to Marshall, and to certain debts for which said Marshall and William D. McGuire are his endorers and security. It is very clear that the assignment is not made subject to any claim of Cross against McGuire, and that Ward the

661 *Wash., Cin. & St. Louis R. R. Co. v. Switzer.

September Term, 1875, Staunton.

1. **Eminent Domain—Appraisalment by Commissioners—Testimony.**—When commissioners are appointed by a County or Corporation court, under § 6, ch. 56, of the Code of 1860, for the purpose of ascertaining what will be a just compensation to the tenant of the freehold for land taken for a work of internal improvement, it is the duty of such commissioners to hear all the legal and relevant testimony offered by either party bearing upon the question of such compensation.
2. **Same—Same—Same—Refusal to Hear Such Testimony.**—The refusal of the commissioners to hear such testimony, when offered in due time, is of itself sufficient to vacate their report.
3. **Same—Same—Report—Objections to Same.**—When such report is returned to the court either party may show cause against its confirmation, upon the ground of excessive or inadequate compensation, improper conduct of the commissioners in refusing or failing to hear legal and proper evidence, or by proof of any other fact tending to show that said report ought not to be confirmed.
4. **Same—Same—Open to Investigation—Notice.**—Under the statute all matters affecting the validity of the report and the action of the commissioners are open for investigation without notice.
5. **Same—Same—Motion to Set Aside.**—On the motion of the company, a rule is made on the tenant of the freehold to show cause why the report and assessment of the commissioners, made in such a case, should not be set aside, upon the ground that said assessment is excessive; and why other commissioners should not make said assessment. Upon the hearing the company will not be confined to the specific objection therein suggested to the confirmation of the report; but the company may impeach it by showing that the commissioners had improperly refused or failed to hear legal testimony offered by the company upon the question of compensation and damage.
6. **Same—Same—Same.**—If the tenant may be surprised by the offer of testimony on matters not referred to in the rule, it is competent for the court to continue the hearing to a future day or term.

At the August term 1873 of the 662 County court of *Rockingham, on the motion of the Washington, Cincinnati and St. Louis Narrow Gauge Railroad Company, commissioners were appointed to ascertain the damages which would be sustained by D. M. Switzer and others by the passage of the road of the company through their lands. In October 1873, the commissioners made their report, by which they fixed the amount to be received by Switzer at \$1,250. And thereupon, at the November term of the court, upon the motion of the company a rule was made upon said Switzer to show cause why said report and assessment should not be set

aside, upon the ground that the said assessment is excessive, and why other commissioners should not be appointed to make said assessment.

The case came on to be heard upon the rule in March 1874; and in the progress of the trial the plaintiff proposed to prove that the commissioners had acted improperly in favor of the defendant, Switzer, in the assessment of damages in this—that they had refused to hear any evidence on the part of the plaintiff to show what was the damage to the land of defendant, and what injury he would sustain by the making of said road through his land as proposed, though the said plaintiff, while the said commissioners were engaged in their assessment of said damages, offered and desired to do so, having the witnesses present for that purpose. To the introduction of this evidence the defendant objected, upon the ground that under the order entered in this cause, at the November term 1873 of the court, the plaintiff could introduce no evidence except to show that the damages assessed by the commissioners to said Switzer were excessive; and that the plaintiff could not move to set aside said report upon any ground but that named in said order, viz: excessive damages allowed 663 to said defendant; *which objection was sustained by the court; and all the evidence excluded except such as related to the question of excessive damages. To which opinion of the court the plaintiff excepted.

After the introduction of the evidence, as to the description of the land, and of a number of witnesses by both parties as to the damages which would be sustained by the making of the road through the land of the defendant, who differed widely in their estimate—those of the plaintiff fixing them at from \$300 to \$800, and those of the defendant estimating them at from \$1,100 to \$1,200—the court confirmed the report of the commissioners, and ordered the said sum of \$1,250 to be paid to Switzer. To which opinion of the court the plaintiff excepted. The company thereupon took the case to the Circuit court of the county, where the judgment was affirmed; and they then applied to this court for a supersedeas; which was allowed.

Compton, for the appellant.

G. G. Grattan and Robt. Johnston, for the appellee.

Staples, J. delivered the opinion of the court.

The court is of opinion that when the commissioners are appointed by a County or Corporation court, under the provisions of section 6, chapter 56, Code of 1860, for the purpose of ascertaining what will be a just compensation to the tenant of the freehold for land taken for a work of internal improvement, it is the duty of such commissioners to hear all the legal and relevant testimony offered by either party bearing

The principal case is cited in *The B. & O. R. R. Co. v. The P. W. & Ky. R. R. Co.*, 17 W. Va. 847, for the rule that, "All matters affecting the validity of the report and the action of the commissioners are open for investigation without notice, rule or pleading."

upon the question of such compensation; and the refusal or failure of the commissioners to hear such testimony.

664 *when offered in due time, is of itself sufficient to vacate their report.

The court is further of opinion, that when such report is returned to the County or Corporation court, either party may show cause against its confirmation, upon the ground of excessive or inadequate compensation and damages, improper conduct of the commissioners in refusing or failing to hear legal and proper evidence, or by proof of any other fact tending to show that said report ought not to be adopted.

The court is further of opinion, that the rule awarded by the County court of Rockingham at the September term 1873, at the instance of the appellant, did not have the effect of confining the appellant to the specific objection therein suggested to the confirmation of the commissioner's report: but it was competent for the appellant, notwithstanding the rule aforesaid, to impeach said report, by showing the commissioners had improperly refused or failed to hear legal testimony offered by the appellant upon the question of compensation and damage aforesaid.

The court is of opinion that, according to a proper interpretation of the statute, all matters affecting the validity of the report and the action of the commissioners are open for investigation without notice, rule or pleading. The rule awarded as aforesaid in this case was therefore unnecessary, and cannot be held to deprive the appellant of a plain right conferred by the statute. If the County court had just reason to apprehend that the appellee might be surprised by the admission of evidence of matters not mentioned in the rule, it was competent and proper to postpone the investigation to such future day or term, at the costs of the appellant, as might afford the appellee sufficient time to meet the additional grounds of objection.

665 *The court is therefore of opinion that the County court of Rockingham erred in refusing to hear the evidence set out in the first bill of exceptions; and the Circuit court erred in refusing to set aside the judgment of the County court for the error aforesaid.

And this court proceeding to render such judgment as the said Circuit court ought to have rendered, it is considered by the court that the judgment of the County court of Rockingham be reversed and annulled; that a new trial be awarded the appellant, upon which trial the evidence aforesaid, if again offered, is to be received. And the case is remanded to the said Circuit court, for further proceedings to be had in conformity with the views herein expressed.

The judgment was as follows:

This day came again the parties by their attorneys, and the court having maturely considered the transcript of the record of the judgment aforesaid, and the arguments of counsel, is of opinion, for reasons stated in writing, and filed with the record, that

the evidence offered by the appellant, and set out in its first bill of exceptions, was relevant and proper evidence, and the County court of Rockingham erred in refusing to hear the same; and for said error the said Circuit court ought to have reversed the judgment of said County court, instead of affirming the same. It is therefore considered by the court that the judgment of the Circuit court be reversed and annulled, and that the defendant in error pay to the plaintiff in error its costs incurred in the prosecution of the appeal and supersedeas aforesaid here. And this court proceeding to render such judgment as the said Circuit court ought to have rendered, it is

666 considered that the judgment *of the County court be reversed and annulled, and that the defendant in error pay to the plaintiff in error its costs by it expended in the prosecution of the appeal and supersedeas before said Circuit court. And it is further considered that a new trial be awarded the plaintiff in error, upon which new trial, if the evidence aforesaid is again offered, it is to be received by the court. And the case is remanded to the said Circuit court, to be proceeded with in conformity with the views herein expressed; which is ordered to be certified to the said Circuit court of Rockingham county.

Judgment reversed.

667 *Moore & als. v. Harnsberger's Ex'ors.

September Term, 1875, Staunton.

1. **Sale of Land by Executors—Confederate Currency.**—A sale of land by executors in October 1862, held, upon the time of sale, the surrounding circumstances and the evidence, to have been made with reference to Confederate States treasury notes as the standard of value, and therefore that the purchase money was to be scaled as of the date of the sale.
2. **Same—Same—Time of Scaling.***—A case in which the value of the land at the time of the sale was to be the proper measure of recovery.
3. **Same—Tender.**†—An offer by a purchaser to one of the executors, a short time after it fell due, to pay the first bond due for the purchase money, he not showing any money, was not a good tender.

This was a suit in equity in the Circuit court of Rockingham county, brought in

***Confederate Currency—Time of Scaling.**—See Ashby v. Porter, 26 Gratt. 455, and *note*.

†**Tender in Confederate Money—Failure to Show Money.**—For instances of an offer to pay in Confederate money being held not a good tender, see Myers v. Whitfield, 22 Gratt. 780; Moses v. Trice, 21 Gratt. 556; Merewether v. Dowdy, 25 Gratt. 232; Stearns v. Mason, 24 Va. 484. But distinguish Compton v. Major, 30 Gratt. 180, where such tender was held to be good. The principal case is cited in Shank v. Groff, 45 W. Va. 543, 32 S. E. Rep. 248, for the proposition that to constitute a good tender the money must be shown. See also, 25 Am. & Eng. Enc. Law 916.

December 1872, by George Harnsberger and N. K. Trout, executors of Jacob Harnsberger, deceased, against Samuel Simmons, John H. Moore and others, to subject a tract of land sold by the executors to Samuel Simmons, and by Simmons afterwards sold to the other parties. The defendants insisted that the land was sold with reference to Confederate money as the standard value, and that the purchase money should be scaled.

It appears that Jacob Harnsberger died in 1861, and that the tract of land in question, which contained one hundred and forty acres, was appraised by appraisers appointed for the purpose, at thirty-five dollars per acre as its cash value in good money. It was sold by the executors at public auction on the 17th of October, 1862, upon the

668 terms of one-fourth cash, and *the balance on a credit of one, two and three years, without interest, a lien for the deferred payments to be reserved in the deed, and it was purchased by Samuel Simmons. The terms seem to have been in writing and read at the sale, but the writing was lost. Nothing seems to have been said in them as to the kind of money which would be received in payment of the purchase money. On this question and as to the value of the land a great many witnesses were examined by both plaintiffs and defendants. It appears that the land was cried for some time and thirty-five dollars had been bid, when the bidding ceased for ten or fifteen minutes, when the enquiry was made by a bidder in the crowd as to the kind of money which was paid, and an answer was given by one of the executors, the other being present and hearing it. Of the precise form of the question and the answer the witnesses differ. The executors were examined as witnesses, and their testimony is stated by Judge Moncure in the opinion of the court. They and the crier say that they said they would take Confederate money for the cash payment, but they did not say they would take it for the deferred payments. A number of witnesses understood them as consenting to take Confederate money for the whole. After this enquiry was made and answered, the bidding was renewed, and the land was knocked off to Samuel Simmons, at fifty-five dollars per acre. And he thereupon paid the cash payment in Confederate money, and executed his three bonds, each for \$1,931.87½, payable in one, two and three years; and the land was conveyed to him, reserving a lien for the purchase money.

As to the value of the land in good money the witnesses, and they were numerous, differed greatly. A number of them fixed it at \$35 per acre cash; others 669 *thought it was worth, on the terms of credit given at the sale, from fifty-five to sixty dollars, and this especially if the cash payment was to be made in Confederate money.

There was evidence that after the first bond fell due Moore, one of the purchasers from Simmons, proposed to N. K. Trout,

one of the executors, to pay it, but Trout declined to receive it. He however, showed no money to Trout.

The cause came on to be heard on the 4th day of February 1874, when the court held that the bonds sued on in the case were not, according to the true understanding and agreement of the parties, to be fulfilled and performed in Confederate States treasury notes, and were not entered into with reference to such notes as a standard of value. And it being agreed that the defendants or some of them were entitled to credits on the notes, the cause was referred to a commissioner to take an account of any payments or set-offs to which they or any of them might be entitled. And the commissioner was also directed to ascertain the order of priority in which the lands purchased by Simmons were subsequently sold to the other defendants.

The commissioner made his report, showing that after allowing the parties their credits, there was due on the 15th of April 1874, on said bonds \$4,245.65½, all principal, and also showing the order in which the other defendants had purchased from Simmons. And the cause came on to be heard on the 25th of April 1874, when the court confirmed the report, and made a decree against Samuel Simmons for the said sum of four thousand two hundred and forty-five dollars and sixty-five and a half cents, with interest and costs. And if the said sum was not paid within ninety days,

670 *the lands were directed to be sold, selling the lands last sold first, and so on. And thereupon John H. Moore and the other purchasers from Simmons, applied to this court for an appeal, which was allowed.

John E. Roller, for the appellants.

Compton, for the appellees.

Moncure, P. delivered the opinion of the court.

The court is of opinion, that the contract made on the 17th day of October 1862, between N. K. Trout and George Harnsberger, executors of Jacob Harnsberger deceased, and Samuel Simmons, for the sale by the former to the latter of a tract of land situated in Rockingham county, containing about one hundred and forty and one-half acres, at \$55 per acre, on the terms of one-fourth in hand and the balance in three equal annual payments, with a vendor's lien to secure them, was made and entered into with reference to Confederate States treasury notes as a standard of value. That the hand payment of one-fourth of the purchase money was agreed to be paid, and was actually paid, in Confederate States treasury notes, is admitted by all parties. And the only question is, as to the deferred instalments of the purchase money, whether they are payable according to their par amount, in good money, or according to the amount due, on the supposition that the contract was made in reference to the said standard

of value, as well in regard to the deferred instalments, as in regard to the hand payment of the purchase money. Our opinion, as has already, in effect, been stated, is, that in regard to both, the contract was made with reference to said standard of value.

671 *Beyond all question, if the sale had been entirely for cash, the whole amount of the purchase money would have been received in Confederate States treasury notes, and the contract in that case would have been made in reference to them as a standard of value. But the difficulty arose from the fact, that the payment of three-fourths of the purchase money was by the contract deferred, and there was danger of the depreciation of the currency before the money became payable, and there was doubt as to what the amount of the depreciation would be. In this state of things, it was difficult, if not impossible, to fix upon a certain medium of payment of the deferred instalments which would do justice to both parties. The purchaser was of course unwilling to agree to pay specie or its equivalent, having contracted in reference to a lower standard of value; and the vendors were no doubt unwilling to agree to receive Confederate States treasury notes at par in payment, without reference to the extent of depreciation at the time of the maturity of the deferred instalments respectively. Had the bonds been, in terms, for the payment of Confederate States treasury notes, they might, and no doubt would, have been construed as contracts for the delivery of a commodity, and would have been soluble by the payment of the amount in such notes, however greatly depreciated they might have been at the time of the maturity of the bonds. All that could be done therefore, in justice to all parties, was to make their contract in reference to Confederate States treasury notes as a standard of value. If they remained of the same value at the maturity of the bonds there would be no difficulty. But if they materially depreciated in value by the time of the maturity of the bonds, then justice could be done by the payment of the value of the same

672 amount of *Confederate States treasury notes at the date of the contract, to be ascertained by the best rule that could be adopted for the purpose.

That the contract was made with reference to Confederate States treasury notes as a standard of value, is, we think, very obvious; whether we look at the time at which it was made and the surrounding circumstances, or to the evidence in the case. The sale was made on the 17th day of October, 1862, when the only, or almost only, currency which existed was Confederate States treasury notes, and that had been almost the only currency for a long time before. The 1st day of January 1862, nearly ten months before the date of the sale, was the day prescribed by law as the day between which and the 10th day of April 1865 it was made lawful for either party to a contract to show, by parol or other

relevant testimony, what was the true understanding and agreement of the parties thereto, either express or to be implied, in respect to the kind of currency in which the same was to be fulfilled or performed, or with reference to which as a standard of value it was made and entered into. Such was the rarity of making a sale of real estate for anything else than Confederate States treasury notes, or, at all events, for specie or its equivalent; and such was the difficulty, if not impossibility of making such a sale for specie or its equivalent, at or about the time of the sale in this case, to-wit, the 17th of October 1862, that strong and clear evidence of an intention to make such a sale at or about that time ought to be required to prove the fact. A sale at such a time, under such circumstances, and in the absence of any such evidence, ought to be construed to be a sale in reference to Confederate States treasury notes as a standard of value. So far

673 from there being in this *case strong and clear evidence of such an intention, the great mass and weight of the evidence sustains the contrary. A great number of witnesses were examined in the case, some fifteen or twenty on each side. And most of them examined on the side of the purchaser testify to the fact that the sale was made in reference to Confederate States treasury notes as a standard of value, as well in reference to the deferred instalments of the purchase money as the hand payment. Indeed, as we have seen, in regard to the hand payment, it is admitted on all sides that such was the case, and that the money was paid and received accordingly. While many witnesses testify that the sale was according to the same standard of value in reference to the deferred instalments also, only one or two of them testify to the contrary. The most important of these is certainly one of the executors themselves, N. K. Trout, who, no doubt, and as we happen to know, was in all respects worthy of confidence. He admits, however, that his co-executor, a son of the testator, was the chief actor in making the sale; and he testifies as to what was said and done at a sale which transpired many years before he gave his testimony. This witness testifies that "after the land had been up some time, the impression seemed to prevail that we would not take the then currency (Confederate money); there was a suspension of probably ten to fifteen minutes, and we had a conference with the legatees, and announced that we would take the payment of that day, the down payment, in Confederate money, but would not agree to bind ourselves to take the deferred payments in Confederate money. I recollect with great distinctness, while standing by the auctioneer, being asked by some person in the crowd: 'Will you take the payment which is to be made to-day in Confederate

674 *money?' I responded: 'Yes, we will.' The interrogator then said: 'Will you require the deferred payments in gold or

472, 8 Am. Dec. 751; Selby v. Morgan, 3 Leigh 577; Brockenbrough v. Spindle, 17 Gratt. 21; Town of Danville v. Sutherland, 20 Gratt. 571.

A contract for the sale of \$6,000 U. S. 8 per cent. stock, to be delivered and regularly transferred on a future day, for \$6,000 current money in hand paid is not usurious. Bull v. Douglas, 4 Munf. 308, 6 Am. Dec. 518.

Sale of Negotiable Note.—Where the maker of a negotiable note, payable to his own order, endorses it and sells it through a third person at a rate of interest greater than that allowed by law, the transaction is not usurious, provided the purchaser *does not know* the character of the note, or that it is sold for the benefit of the maker. Hansbrough v. Baylor, 2 Munf. 36; Taylor v. Bruce, Gilm. 42; Whitworth v. Adams, 5 Rand. 333; Brummel v. Enders, 18 Gratt. 873; Gimmi v. Cullen, 20 Gratt. 499; Town of Danville v. Sutherland, 20 Gratt. 555; Moseley v. Brown, 76 Va. 421; Bailey v. Hill, 77 Va. 492.

Brokerage.—Where one contracts to pay another certain sums as brokerage to negotiate a loan for him, and also to pay attorney's fees for making abstracts of title to the property whereon the loan is to be secured, such sums, not being for the loan or forbearance of money, do not constitute usury, though they exceed lawful interest. Keagy v. Trout, 85 Va. 300, 7 S. E. Rep. 329.

Credit.—On a contract to secure the price or value of work and labor done or to be done, or of property sold, the contracting parties may agree on one price if cash be paid, or on a higher price if time be given, and this higher price may be either a lump sum, or a per cent. on the cash price. In neither case is the transaction usurious. It is not a loan of money, nor the forbearance of a debt, but simply the contract price of work and labor, or property sold. Evans v. Rice, 96 Va. 50, 30 S. E. Rep. 463; Graeme v. Adams, 23 Gratt. 225, 14 Am. Rep. 180.

But where a person, in response to an application to lend money, furnishes, at exorbitant prices, stocks or other property, instead of the money, or as a condition upon which it is advanced, the transaction is a loan and usurious. Gibson v. Fristoe, 1 Call 62, 1 Am. Dec. 562; Douglass v. McChesney, 2 Rand. 109; Stribbling v. Bank of the Valley, 5 Rand. 132; Clarkson v. Garland, 1 Leigh 147; Raynolds v. Carter, 12 Leigh 166, 37 Am. Dec. 642; Brockenbrough v. Spindle, 17 Gratt. 21.

Where a bank had recovered judgments against two of its debtors, and, upon their application, had given them a long indulgence upon their agreement to give real security for the debts, and to pay the attorney of the bank all the costs of the suits and the commission which the bank had agreed to pay him for collecting and securing the debt, the agreement between the bank and the debtors, and, therefore, the note for the commission to the attorney, were held to be usurious. Toole v. Stephen, 4 Leigh 581.

In Graeme v. Adams, 23 Gratt. 222, 14 Am. Rep. 180, the words of the statute were interpreted as follows: "The legislature uses two words, 'loan,' 'forbearance.' It did not use those two words in the same sense. When the word loan was used, it meant 'a delivery of something to another for his temporary use, which he is to return to its owner at the expiration of his term.' A forbearance is the giving of a day for the return of the loan; or, more properly, signifies the giving a further day when the time originally agreed on is past." In this case, where there was a contract to build certain houses which

stipulated that the deferred payments should bear 7½ per cent. interest, it was held that if this provision was intended as a part of the consideration for building the houses and not as a device to obtain more than legal interest for the loan or forbearance of money, it was not usurious.

An extension of time, given to a surety in a deed of trust to secure a debt, in consideration of his executing a new deed of trust, is a "loan of money" within the meaning of the statute. Hopkins v. Koonce, 6 Gratt. 387.

Where there is no loan, or forbearance to collect an existing debt, there can be no usury. Myers v. Williams, 85 Va. 621, 8 S. E. Rep. 483.

Profits.—An agreement to set the profits of the mortgaged subject against the interest of the money lent is usurious, if they exceed the legal rate of interest. Robertson v. Campbell, 2 Call 431.

2. A Contract or Assurance for a Greater Rate Than Is Allowed by Law.—It is settled in Virginia that taking the discount *in advance*, upon discounting a note at bank, is not usurious; and that including the day of payment of the first note in the second, whereby the bank receives under each note interest for the same date, is not usury. Stribbling v. Bank of the Valley, 5 Rand. 132; Crump v. Nicholas, 5 Leigh 251; State Bank of N. C. v. Cowan, 8 Leigh 290; Parker v. Cousins, 2 Gratt. 572, 44 Am. Dec. 338; Bank v. Mandeville, Fed. Cas. No. 850, 1 Cranch, C. C. 522. See statutory provisions allowing interest to be taken in advance by banks, etc., Va. Code, 1887, §§ 2819, 2820. See also, 2 Min. Inst. (4th Ed.) § 47; Bank v. Evans, 9 W. Va. 373.

Interest paid on a bond in advance for three years, this being stated in the bond, but paid in land at a price fixed in reference to the annual interest for three years, is not usurious, and the plaintiff may prove the facts at the trial. Porterfield v. Colner, 1 Gratt. 55.

Nor is it usurious, upon a settlement of accounts, to take a bond or note for the balance due, including interest, and to receive interest on such bond or note. Brown v. Brent, 1 H. & M. 4.

After Maturity.—A bond is not void for usury where it provides for usurious interest only after maturity. Ward v. Cornett, 91 Va. 676, 22 S. E. Rep. 494.

Interest upon Interest.—An agreement to pay interest upon interest is valid, if made after the interest, which is to bear interest, has become due. Stansbury v. Stansbury, 24 W. Va. 634; Craig v. McCulloch, 20 W. Va. 154; Genin v. Ingersoll, 11 W. Va. 549; Pindall v. Bank of Marietta, 10 Leigh 481; Childers v. Deane, 4 Rand. 406; Fultz v. Davis, 26 Gratt. 903.

Where Principal is at Risk.—"If the principal, or any considerable part, be put in risk, it is not usury; because the excess in the premium is the consideration for that risk." PENDELTON, P., in Gibson v. Fristoe, 1 Call 54, 1 Am. Dec. 502. Cited with approval in Steptoe v. Harvey, 7 Leigh 522; Smith v. Nicholas, 8 Leigh 350; State Bank of N. C. v. Cowan, 8 Leigh 248; Brockenbrough v. Spindle, 17 Gratt. 43; Boulware v. Newton, 18 Gratt. 719; Lynchburg v. Norvell, 20 Gratt. 610; Hilb v. Peyton, 21 Gratt. 386.

It was held in Steptoe v. Harvey, 7 Leigh 522, that a contract to lend 142 shares of stock, to be afterwards repaid with 172 shares of the same stock, was not usurious, since, by a fall in the market price, the lender might have received less than the value of his original shares.

But where the principal debt is not in hazard, or the contingency of its loss is slight, so that there is little or no risk, and the contract is, in substance, a

loan or forbearance of money at a greater rate of interest than the law prescribes, it is usury. There are, however, many contracts of hazard, which are recognized by the law as salutary and convenient, such as marine risks, insurances, etc., where the borrowing and lending of money is not the real object of the parties, and which therefore do not come within the statute. *Watkins v. Taylor*, 2 Munf. 424; *Smith v. Nicholas*, 8 Leigh 330; *Boulware v. Newton*, 18 Gratt. 708.

Excess Constituting Part of Purchase Money.—

Where the excess *bona fide* constitutes part of the contract price or purchase money, it is not usury. *Kraker v. Shields*, 20 Gratt. 377; *Graeme v. Adams*, 23 Gratt. 225, 14 Am. Rep. 130; *Evans v. Rice*, 96 Va. 50, 30 S. E. Rep. 463; *Swayne v. Riddle*, 37 W. Va. 291, 16 S. E. Rep. 512; *Reger v. O'Neal*, 33 W. Va. 159, 10 S. E. Rep. 375; *Craig v. McCulloch*, 20 W. Va. 148.

Excess in Nature of a Penalty.—Nor is it usury where the excess over the legal rate is in the nature of a penalty from which the debtor may relieve himself by punctual payment of the debt. *Groves v. Graves*, 1 Wash. 1; *Winslow v. Dawson*, 1 Wash. 118; *Call v. Scott*, 4 Call 402; *Pollard v. Baylor*, 6 Munf. 433; *Campbell v. Shields*, 6 Leigh 517; *Ward v. Cornett*, 91 Va. 676, 22 S. E. Rep. 494.

Miscalculation.—Nor where the excess is *bona fide* the result of a miscalculation resulting from the use of tables such as Rowlett's Tables. *Parker v. Cousins*, 2 Gratt. 372, 44 Am. Dec. 388; *Stuart v. Livesay*, 4 W. Va. 45.

Expenses and Charges.—Nor where the excess is contracted for in good faith to cover reasonable expenses and charges. *Jones v. Hubbard*, 6 Call 211; *Campbell v. Shields*, 6 Leigh 517; *Long v. Israel*, 9 Leigh 556; *Myers v. Williams*, 35 Va. 621, 8 S. E. Rep. 453.

c. Statutory Provisions as to Rate.—The rate of interest in Virginia, prior to May 1, 1797, was regulated by the statute of 12 Anne, c. 16. This statute fixed the rate at 5 per cent. per annum and provided that any contract or assurance for a greater rate should be void as to both principal and interest. The rate was increased to six per cent. by act of November 23, 1796 (2 Stats. at Large, N. S., 27), with the same provision as to forfeiture of principal and interest where this rate was exceeded. There was no change in the rate of interest from this time until the act of March 16th, 1870 (Acts 1869-70, p. 19, ch. 19). By this act, six per cent. was retained as the legal rate, in the absence of contract; but it was made lawful to receive any rate not exceeding twelve per cent. per annum, upon which the parties might agree. This statute, also, contained the provision rendering contracts for a greater rate void as to both principal and interest. By act of 1872-73, the maximum rate for which it was lawful to contract was reduced to eight per cent. But the legal rate, in the absence of contract was still six per cent. It was provided also, that all contracts and assurances for a greater rate should be void as to the interest in excess of six per cent. (Acts 1872-73, ch. 336, p. 329; Va. Code 1873, ch. 137, §§ 4, 5.) By act of 1873-74, the present provision as to interest was enacted, providing that the rate should, in no case, exceed six per cent. per annum, and that "all contracts and assurances made, directly or indirectly, for the loan or forbearance of money or other thing, at a greater rate of interest than is allowed by the preceding section (six per cent.), shall be deemed to be for an illegal consideration as to the excess beyond the principal amount so loaned or forborne." Va. Code 1887, sec. 2318.

d. Change in Statute.—Where Higher Rate Lawfully Contracted for.—Where a person entered into a contract, which was legal at the time, to pay a certain rate of interest on a bond, he must pay such interest not only up to the maturity of the bond but after maturity till paid, notwithstanding a subsequent law providing for a lower rate. *Cecil v. Hicks*, 29 Gratt. 1, 26 Am. Rep. 391. The court will compel the payment of interest at such agreed rate, though the debtor's lands are placed in a receiver's hands at the creditor's instance. *Strayer v. Long*, 33 Va. 715, 3 S. E. Rep. 372. The same rule holds where the contract for a higher rate is lawful because not within the terms of the statute which declares what transactions shall be deemed usurious. *Evans v. Rice*, 96 Va. 50, 30 S. E. Rep. 463. A debt to be usurious must be so in the beginning. It cannot be made so, by subsequent events. *Ward v. Cornett*, 91 Va. 673, 22 S. E. Rep. 494.

Such higher or conventional rate continues, therefore, after maturity till payment, where the excess over the legal rate is in the nature of a penalty from which the debtor may relieve himself by punctual payment of the debt. *Pollard v. Baylor*, 6 Munf. 433; *Campbell v. Shields*, 6 Leigh 517; *Ward v. Cornett*, 91 Va. 676, 22 S. E. Rep. 494, so where the excess constitutes part of the contract price or purchase money, or for any other reason does not fall within the statute of usury. See *Kraker v. Shields*, 20 Gratt. 377; *Graeme v. Adams*, 23 Gratt. 225, 14 Am. Rep. 130; *Evans v. Rice*, 96 Va. 50, 30 S. E. Rep. 463.

Where an annuity was bequeathed in 1791, while the legal rate of interest was only five per cent., though the annuity fell in arrear after interest was raised to six per cent. yet only five per cent. should be allowed on such arrears. *Thorntons v. Fitzhugh*, 4 Leigh 209.

Though the statute of usury, at the date of the contract, declares it to be null, yet if, at the date of the decree, the statute has been amended and only avoids the contract as to the interest, the decree should be for the principal loaned, with interest from the date of the decree. *White v. Freeman*, 79 Va. 597; *Bain v. Savage*, 76 Va. 904; *Mosby v. Ins. Co.*, 31 Gratt. 629; *Bloss v. Hull*, 27 W. Va. 509.

e. Usury Purged by Change of Parties.—The usury is purged by a change of parties in a case where a bond executed by three persons for a loan of money at usurious interest is subsequently superseded by another bond, for the same amount, principal and interest, which new bond is signed by two persons as principals, who were strangers to the first bond, and by one of the former obligors, as surety. *Drake v. Chandler*, 18 Gratt. 909, 98 Am. Dec. 762; *Keckley v. Union Bank*, 79 Va. 458.

Although every subsequent security, however remote or however often removed, given for a note originally usurious, is void, a new note, made by different parties, is purged of the usury, unless the transaction was merely an attempt to avoid the statute. *Vaught v. Rider*, 33 Va. 659, 3 S. E. Rep. 293; *Keckley v. Union Bank*, 79 Va. 464; *Coffman v. Miller*, 26 Gratt. 701; *Martin v. Hall*, 9 Gratt. 8; *Law v. Sutherland*, 5 Gratt. 357. Nor will the taint of usury be relieved where there is in fact the same principal through all the transactions. *Mathews v. Trader's Bank (Va.)*, 27 S. E. Rep. 609.

Code 1873, ch. 137, § 11 does not apply in favor of a mortgagee where a successful charge of usury has been made against a prior mortgagee in a suit brought against them both and such usury has been purged by the court. *Christian v. Worsham*, 78 Va. 100.

Where a stranger assumes to pay a usurious debt of another, the intervention of this stranger purges the usury, and he cannot set it up against his obligation to pay. *Smith v. McMillan*, 46 W. Va. 577, 88 S. E. Rep. 288.

f. Usury in Building and Loan Association Contracts.—In ascertaining the amount to be decreed against the borrowing member of a building fund association whose contract of borrowing has been declared usurious, but who has made no payment within twelve months before suit, a balance should be struck at the date of his last payment, and no charge thereafter made for interest, dues, or fines. He should be credited by his interest payments and the withdrawal value of his stock, and a decree should be pronounced for the balance due, with interest from the date of the decree. *Crabtree v. Old Dominion Building & Loan Ass'n*, 95 Va. 671, 64 Am. St. Rep. 818, 4 Va. Law Reg. 12, 29 S. E. Rep. 741.

A corporation created by a circuit or corporation court, under the provisions of sec. 1145 of the Code, cannot charge more than the legal rate of interest for the loan or forbearance of money. The legislature alone can grant this power. *Crabtree v. Old Dominion Building & Loan Ass'n*, 95 Va. 670, 64 Am. St. Rep. 818, 4 Va. Law Reg. 12, 29 S. E. Rep. 741.

Under the Tennessee law, which controls this case, building associations are authorized to lend money at the legal rate, and to take such additional premium as may be bid by the borrower, hence such premium does not render the contract usurious and illegal where the premium paid is the result of open and competitive bidding. Nor is the contract rendered usurious by the fact that the payment of interest and premium for a part of the time is taken in advance. *Counselman v. Holston Nat. Building & Loan Association*, 97 Va. 261, 88 S. E. Rep. 608.

A New York corporation doing business in Virginia and elsewhere, and entering into contracts within its chartered powers which are valid according to the laws of New York, though usurious according to the laws of Virginia, cannot be held to be seeking to evade the usury laws of Virginia simply because it requires its contracts to be performed in the state of New York. This cannot be said to be a mere device to evade the usury laws of Virginia. *Ware v. Building Ass'n*, 95 Va. 680, 64 Am. St. Rep. 826, 29 S. E. Rep. 744.

g. Usury in Negotiable Paper.—Since the passage of the act now embodied in section 2818 of the Code, which declares that usurious contracts shall be deemed to be for an illegal consideration, as to the excess beyond the principal sum loaned or forborne, the plea of usury cannot be sustained in an action on negotiable paper brought by a *bona fide* holder for value, who acquired the same before maturity in due course of trade. The only effect of such plea is to cast the burden of proof on the plaintiff to show that he is such holder; when he has shown this he is entitled to recover. *Lynchburg Nat'l Bank v. Scott*, 91 Va. 652, 22 S. E. Rep. 487. See extensive *note* to this case by Prof. Lile, 1 Va. Law Reg. 363.

An indorser who has knowledge of the usury and voluntarily pays it cannot afterwards recover it of his principal, if the latter relies on the plea of usury. *Wallace v. Lipps* (W. Va.), 34 S. E. Rep. 731.

In an action of debt by the holder of a negotiable note, against the maker and four endorsers, upon the plea of usury by the endorsers, the jury found that the note was endorsed by the first three endorsers, for the accommodation of the maker, and was sold by him to the fourth endorser, at a usurious rate

of interest; who afterwards and before it became due, endorsed it to the holder for value. Upon this verdict the court should render a judgment in favor of the maker and the first three endorsers, and against the fourth endorser, under Code, ch. 177, § 19, p. 733; *Moffett v. Bickle*, 21 Gratt. 280.

h. Measure of Relief.

1. In General.—In the case of *Munford v. McVeigh*, 92 Va. 446, 28 S. E. Rep. 867, *KERR, P.*, in his review of the statute law and Virginia decisions upon the subject of usury says, "In England up to a comparatively recent period the statutes against usury were very radical in their character, and were rigidly enforced. Under their operation the whole of the debt, principal and interest, was avoided at law, but where a borrower came into a court of equity, seeking relief from an usurious transaction, that court, proceeding upon the principle that he who asks equity must do equity, required him, as a condition to the enjoyment of the relief which he prayed, to pay his creditor principal and legal interest, and he was only permitted to recover back the usurious gain or excess. See *Browning v. Morris*, 2 Cowper 792; *Smith v. Bromley*, 2 Doug. 697; and *note* to *Jones v. Barkley*, in same report.

"This doctrine of the English chancery was adopted in this state, but at an early period it was so far modified that the borrower who appealed to a court of equity for relief from an outstanding usurious transaction was required only to pay the principal debt, without interest. This principle appears in the Code of 1819, p. 374, sec. 2, which declares that 'Any borrower of money, &c., may exhibit a bill in chancery against the lender, and compel him to discover, upon oath, the money or thing really lent, and all bargains, contracts or shifts, which shall have passed between them, relative to such loan, or to the repayment thereof, and the interest or consideration for the same; and if thereupon it shall appear that more than the lawful interest was reserved, the lender shall be obliged to accept his principal money, without any interest or other consideration, and pay costs, but shall be discharged from all other penalties of this act.'

"It has constituted a part of our statute law, in substantially the same form, since 1796, and it may be from an earlier period, and is continued in our present Code, without material variation as section 2822."

Under this section it was held, in *Young v. Scott*, 4 Rand. 415, that in all cases where a party applies to a court of equity for relief against a usurious contract, whether he alleges in his bill that he is able to prove the usury without the defendant's confession, or not, he can only be relieved upon payment of the principal without interest.

From our earliest history down to 1872, nothing could be recovered at law, upon proof of usury, but the whole contract, principal and interest was declared void. During all this period, there was a constant struggle on the part of the courts to harmonize the administration of the law with their idea of justice. The law against usury was virtually repealed whenever the debtor came into a court of equity for assistance. As a result of this struggle, the legislature has changed the penalty of the law, which imposed a forfeiture of the principal and interest, and now provides that usurious contracts "shall be deemed to be for an illegal consideration as to the excess beyond the principal amount so loaned or forborne." For the first time in the his-

story of our usury laws, it is now possible to bring into harmony the relief afforded in courts of law and equity. Under the present statute, whether the suit be prosecuted at law or in equity, if usury be established, the lender can only recover the principal sum loaned or forborne. *Munford v. McVeigh*, 92 Va. 446, 23 S. E. Rep. 857; *Greer v. Hale*, 95 Va. 553, 23 S. E. Rep. 873.

2. *Where Debt Secured by Usurious Deed of Trust*—*Marks v. Morris*.—In *Marks v. Morris*, 2 Munf. 407, 5 Am. Dec. 481, it was held that a borrower of money at usurious interest, secured by deed of trust containing power of sale, might come into a court of equity and have such sale enjoined until the creditor should, by some proper proceeding, establish the validity of his contract; in which case the injunction was to be dissolved, otherwise, perpetuated. The reason for this decision was that such borrower had no opportunity to make defense in any tribunal; and, though he had tied his own hands, he was considered as not a free agent, but rather as the slave of the lender and, therefore, entitled to the same relief as if the deed had not been made. This decision has given rise to much controversy. It was followed in *McPherrin v. King*, 1 Rand. 172; *Martin v. Lindsay*, 1 Leigh 406; *Fitzhugh v. Gordon*, 2 Leigh 626; approved in *Turpin v. Povall*, 8 Leigh 98; distinguished in *Thornton v. Gordon*, 2 Rob. 719; *Young v. Scott*, 4 Rand. 415; and finally overruled in *Bank of Washington v. Arthur*, 3 Gratt. 173; *Bell v. Calhoun*, 8 Gratt. 22.

In the Code of 1860, ch. 141, sec. 10, the following provision appears: "Upon a bill, requiring no discovery of the defendant, but praying an injunction to prevent the sale of property conveyed to secure the repayment of a sum of money or other thing borrowed at usurious interest, the court shall cause an issue to be made and tried at its bar by a jury, whether or no the transaction be usurious; on the trial of such issue, neither the bill nor the answer shall be given in evidence. If the jury find the transaction usurious, then the same relief shall be given, as if the party claiming under the conveyance had resorted to the court to make his claim available. But the court may grant new trials as in other cases."

In *Brockenbrough v. Spindle*, 71 Gratt. 21, this section was construed as embodying the principle of *Marks v. Morris* (*supra*), and that the measure of relief, as in that case, extended to the whole debt and interest tainted by the usury. See also, *Turner v. Turner*, 80 Va. 379.

In *Davis v. Demming*, 12 W. Va. 243, it was held that this section applied only to bills to prevent the sale of property conveyed by a deed of trust to secure a usurious debt.

This provision was continued as a part of our statute law until the Code of 1887, from which it was omitted, as the same remedy could now be given under the statute both at law and in equity, and there was no longer any occasion for its continuance. See opinion of LACY, J., in *Edmunds v. Bruce*, 88 Va. 187, 14 S. E. Rep. 840. "The controversy, therefore, which was waged over *Marks v. Morris* has ceased to be of any practical value." See opinion of KIRKPATRICK, P., in *Munford v. McVeigh*, 92 Va. 455, 23 S. E. Rep. 857.

In *Bank of Washington v. Arthur*, 3 Gratt. 173, it was held that although the bond and deed of trust be usurious and void, yet if part of the consideration was a pre-existing valid debt, which continues to be a valid debt, the decree should be for the principal

of such pre-existing debt, with interest thereon from the time it was entitled to bear interest. See also, *White v. Freeman*, 79 Va. 597; *Rankin v. Rankin*, 1 Gratt. 158.

3. *Where Whole Debt with Interest Has Been Paid*—*Spengler v. Snapp*.—The provision of Va. Code of 1819, p. 374, sec. 2, re-enacted as sec. 7, ch. 142 of the Code of 1840, and appearing as section 2822 of the Code of 1887, that a borrower who appeals to a court of equity for relief from an outstanding usurious transaction is required to pay only the principal debt, without interest, does not apply where the usurious loan has already been paid. So it was held in *Spengler v. Snapp*, 5 Leigh 478, where the whole debt had been paid, that a borrower who comes into a court of equity for relief is entitled to recover only the excess above the principal and legal interest, with interest on such excess; for, in order to be relieved from a usurious contract, the borrower must come with clean hands, and he who asks equity must do equity by paying the principal debt with legal interest thereon. "It would seem to follow as an inevitable consequence," says the court in *Munford v. McVeigh*, 92 Va. 446, "that, having discharged his obligation, he could, when coming into a court of equity for relief, recover back only the excess over and above the principal and legal interest. He could certainly not successfully invoke the aid of a court to recover more than the court would have permitted him to retain." In support of this principle, that only the excess above the principal and legal interest with interest on such excess can be recovered back, see *Clarkson v. Garland*, 1 Leigh 102; *Spengler v. Snapp*, 5 Leigh 478; *Moseley v. Brown*, 76 Va. 419; *Munford v. McVeigh*, 92 Va. 446, 23 S. E. Rep. 857. It has been adopted as a part of our statute law and appears as sec. 2823 of the Va. Code of 1887, but the relief is there limited to one year. See *Exchange, etc., Bank v. Fugate*, 93 Va. 821, 23 S. E. Rep. 884. Excess of interest over the legal rate may be recovered back in an action of *assumpsit*. *Norvell v. Hedrick*, 21 W. Va. 523.

4. *Payments Expressly Applied to Interest*—*Munford v. McVeigh*.—The case of *Munford v. McVeigh*, 92 Va. 446, 23 S. E. Rep. 857, 1 Va. Law Reg. 734, overruling *Meem v. Dulaney*, 88 Va. 674, 14 S. E. Rep. 863, and *Edmunds v. Bruce*, 88 Va. 1007, 14 S. E. Rep. 840, established the rule that payments upon a usurious contract, expressly applied to the interest, fall within the rule of *Spengler v. Snapp*, 5 Leigh 478, as limited by sec. 2823 of Va. Code of 1887, which provides that "if an excess beyond the lawful interest be paid in any case, the person paying the same may, in a suit brought within one year thereafter, recover it from the person with whom the contract was made, or to whom the assurance was given." Where payments, therefore, have been made upon a debt upon which a greater rate of interest than that allowed by law is reserved in the contract, or received in order to secure the forbearance of the lender, and the borrower himself applies the payment to the interest, or the lender so applies it with the assent of the borrower, the appropriation so made will not be disturbed, unless within one year thereafter a suit be instituted by the borrower for its recovery, or a suit be brought by the lender within that period, in which case the borrower may set it off against the demand for which he is sued.

In this case, *Munford v. McVeigh* (*supra*), the borrower had made payments which were expressly applied to the usurious interest, but which in all did not amount to more than legal interest. It was

held that these payments should not be credited upon the principal, but that the judgment should be for the principal sum due with interest from the date of the decree. The decision in *Munford v. McVeigh* (*supra*) was approved in *Crabtree v. Building Ass'n*, 96 Va. 670, 29 S. E. Rep. 741. See also, *Moore v. Johnson*, 34 W. Va. 672, 12 S. E. Rep. 918.

5. *Where No Application of Payments Made.*—Where payments have been made upon a usurious contract, which are merely credited on the bond, and not applied specially, the borrower is entitled to have such payments deducted from the principal sum loaned or forborne. *Turner v. Turner*, 80 Va. 379; *Reger v. O'Neal*, 83 W. Va. 159, 10 S. E. Rep. 375; *Norvell v. Hedrick*, 21 W. Va. 523.

Under U. S. Rev. Stat. §§ 5197, 5198, usurious interest which has been actually paid to a national bank on discounting and renewing a series of notes, cannot in an action by the bank on the last of them be applied in satisfaction of the principal sum due. *Bank v. Boylen*, 26 W. Va. 556.

6. *Where Usury in Contract Itself.*—Where there is usury in the contract as distinguished from the reservation of a greater rate of interest than is allowed by law, as where the contract is expressed to be for a greater sum than actually loaned or forborne, in a suit either by the lender or borrower, at law or in equity, it is the duty of the court, usury being established, to eliminate the usurious principal and apply all unappropriated payments in satisfaction of the principal sum justly due, leaving undisturbed such payments as the parties have themselves applied. Upon the principal so ascertained, interest should be allowed at the rate of six per cent. per annum from the date of the judgment or decree. See *Munford v. McVeigh*, 92 Va. 446, 23 S. E. Rep. 857; *King v. Buck*, 30 Gratt. 823.

7. *Relief against Judgments for.*—Relief against a judgment at law on the ground of usury will not be granted unless the matter is put directly in issue. Nor will relief be granted against a judgment by default unless good cause be shown for not defending at law. *Brown v. Toell*, 5 Rand. 543, 16 Am. Dec. 759. See also, *Rankin v. Rankin*, 1 Gratt. 151; *Martin v. Hall*, 9 Gratt. 10; *Terry v. Dickinson*, 75 Va. 478.

Although the statute now provides that usurious contracts shall be deemed to be for an illegal consideration, instead of void, as formerly, a judgment by default will be set aside for usury. *Greer v. Hale*, 95 Va. 533, 28 S. E. Rep. 873.

1. *Construction.*—The question whether or not a contract is usurious is to be decided with reference to the time when it was entered into. *Southall v. Farish*, 85 Va. 403, 7 S. E. Rep. 534; *Pollard v. Baylor*, 6 Munf. 433.

The statute, *Sess. Acts 1844*, p. 54, while in terms applicable to a plea, is also applicable to a replication to a plea. *Hope v. Smith*, 10 Gratt. 221.

Retroactive.—The act of March 22, 1873, Code of 1873, ch. 57, § 36, p. 544, in reference to the defence of usury by corporations, is retroactive in its operation, and applies to contracts made by a corporation before the passage of the act; and this is true though suit has been brought upon such contract before its passage. And the act is not in violation of the constitution of the United States, or of that of Virginia. *Town of Danville v. Pace*, 25 Gratt. 1, 18 Am. Rep. 663.

Right of Judgment Creditor.—Under Va. Code, sec. 2894, which provides that any judgment creditor who apprehends that he is in danger by reason of usurious dealings on the part of his debtor may file a bill against the party with whom the dealings were had,

and compel him to discover all such dealings, and that if more than legal interest has been received such excess shall be applied on the plaintiff's demand, it was held that the judgment creditor first filing his bill has the superior lien on the amount recovered. *Ryan v. Krise*, 89 Va. 723, 17 S. E. Rep. 123; *Clark v. Krise*, 89 Va. 739, 17 S. E. Rep. 132.

Where Two or More Bills Are Filed—Priority.—When two or more bills are filed under Va. Code, sec. 2894, the claim of the party first filing his bill takes priority and must be paid first. *Clark v. Krise*, 89 Va. 739, 17 S. E. Rep. 132. This section was repealed Jan. 3, 1894. Acts 1893-'94, p. 76.

J. Evidence.

1. *In General.*—The court will never presume a contract to be usurious, unless the usury be proved. *McGuire v. Parker*, 1 Wash. 303. The party who pleads usury must prove it. *Harnsbarger v. Kinney*, 6 Gratt. 287.

Usury is a quasi penal offence and must be strictly proved. *Ward v. Cornett*, 91 Va. 676, 22 S. E. Rep. 494. It must be established by a clear and satisfactory preponderance of evidence. *Evans v. Bior*, 91 Va. 50, 30 S. E. Rep. 463; *Ware v. Building Ass'n*, 96 Va. 680, 29 S. E. Rep. 744. To convict a person of usury, the usury must be proved beyond a rational doubt to the contrary. *Brockenbrough v. Spindle*, 17 Gratt. 21; *Kelley v. Lewis*, 4 W. Va. 456. Usury may be given in evidence under the plea of non-assumpsit. *Bank v. Evans*, 9 W. Va. 373.

2. *Answer as Evidence.*—It was formerly provided, Va. Code 1873, ch. 137, sec. 12, that upon a bill requiring no discovery but praying an injunction to prevent the sale of property conveyed to secure repayment of money or other thing loaned at a usurious rate, the court should cause an issue to be made and tried at its bar by a jury as to whether the transaction was usurious, and on the trial of such issue neither the bill nor the answer could be given in evidence. "This provision of the statute," says Mr. Barton in his work on Chancery Practice, "was, however, omitted from the Code of 1887. It was doubtless passed to meet the case of *Thornton v. Gordon*, 2 Rob. 719, wherein it had been held that an answer in such a case would have the like weight as evidence with an answer in any other case in chancery; and it was also designed to adopt the principles of the case of *Marks v. Morris*, 2 Munf. 407, which had been overruled by the case of the *Bank of Washington v. Arthur*, 3 Gratt. 173, and *Bell v. Calhoun*, 8 Gratt. 22, and it therefore permits such a bill to be filed against the representative of the lender after his death." 1 Bart. Ch. Pr. (2d Ed.) 433. See also, *Gilliam v. Clay*, 3 Leigh 590; *Powell v. Manson*, 22 Gratt. 190.

Where the debtor calls on the creditor to answer under oath and discover usury, the answer of the creditor under oath, when responsive to the bill, must be accepted as true, in the absence of other evidence sufficient to overcome such answer. *Ward v. Cornett*, 91 Va. 676, 22 S. E. Rep. 494.

k. *Power of Legislature over Usury Laws.*—It is within the power of the legislature to designate what transactions shall be subject to, and what shall be exempt from the laws of usury. It may take away the defense of usury and declare valid contracts which were usurious at the time they were entered into, or it may remove a disability to contract which it had previously imposed. *Bosang v. Building Ass'n*, 96 Va. 119, 30 S. E. Rep. 440; *Smoot v. Building Ass'n*, 96 Va. 686, 29 S. E. Rep. 746; *Moody v. Ins. Co.*, 31 Gratt. 629. See also, *Town of Danville*

v. Pace, 25 Gratt. 2, 18 Am. Rep. 663; White v. Building Ass'n, 22 Gratt. 233.

1. **What Law Governs.**—A contract made in one state, but to be performed in another, is, as a general rule, governed by the law of the place of performance; and, if the rate of interest allowed by the latter is higher than that of the place of contract, the parties may stipulate for the higher rate without incurring the penalties of usury. Building Ass'n v. Tinsley, 96 Va. 322, 31 S. E. Rep. 508; Ware v. Building Ass'n, 96 Va. 680, 29 S. E. Rep. 744; Nickels v. Building Ass'n, 93 Va. 380, 25 S. E. Rep. 8; Nat., etc., Ass'n v. Ashworth, 91 Va. 706, 22 S. E. Rep. 621; Backhouse v. Selden, 29 Gratt. 581; Fant v. Miller, 17 Gratt. 47.

B, a resident of Virginia, took to Maryland a negotiable note, blank as to date and place of payment, but signed by himself and endorsed by other residents of Virginia. He inserted a proper date and place of payment in Maryland and negotiated the note at a rate usurious in both states. This note was renewed with the same parties and usuriously discounted in Maryland. A renewal note, made, endorsed and payable in Virginia, was given, by the same parties, for the second note. Under the Virginia law at the time, usury avoided the whole contract, while in Maryland it avoided only the excess over the legal interest. It was held, (1) that the taking of the last note was not a novation of the previously existing debt; but that the contract was still a Maryland one, to be governed by the law of Maryland; (2) that the last note was a continuation of the old debt made with reference to the laws of Maryland, and as it was not void there, it could not be avoided in Virginia. Bowman v. Miller, 25 Gratt. 381, 18 Am. Rep. 666.

The laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of the contract and the legislature has no power to make any law which will impair the obligation of such contract. Roberts v. Cocke, 28 Gratt. 207.

The law in force when the verdict was rendered determines the interest to be allowed on the sum found by the verdict, and not the law in force at the rendition of the judgment, unless it clearly appears that the later law is intended to operate retrospectively. Murdock v. Franklin Ins. Co., 33 W. Va. 407, 10 S. E. Rep. 777.

II. PLEADING AND PRACTICE.

a. **Who May Plead Usury.**—Any defendant may plead in general terms that the contract or assurance on which the action is brought was for a greater rate of interest than is allowed by law. Va. Code 1887, § 2821; Code W. Va., ch. 96, § 6. Under this plea the defendant may give in evidence any fact which shows or tends to show that such contract or assurance was for a usurious consideration; and when no plea is made, if the contract or assurance is in writing and provides for usurious interest, judgment shall be rendered for the principal sum only. Turner v. Turner, 80 Va. 379; King v. Buck, 30 Gratt. 323. Usury may be given in evidence under the plea of non-assumpsit. Bank v. Evans, 9 W. Va. 373.

The defence of usury is a privilege which is personal to the debtor. If he declines to avail himself of it, no stranger will be allowed to do so. Spengler v. Snapp, 5 Leigh 478; Crenshaw v. Clark, 5 Leigh 65; Hope v. Smith, 10 Gratt. 221; Christian v. Worsham, 78 Va. 100; Dickerson v. Bankers, etc., Co., 63 Va. 496; 25 S. E. Rep. 548; Lee v. Feamster, 21 W. Va. 108; Bar-

bour v. Tompkins, 31 W. Va. 410, 7 S. E. Rep. 1; Moore v. Johnson, 34 W. Va. 672, 12 S. E. Rep. 918; Smith v. McMillan, 46 W. Va. 577, 33 S. E. Rep. 233.

It is provided by statute in Virginia, Code 1887, sec. 2825, that corporations shall not be allowed to plead usury. This statute is retroactive in its effect and applies to contracts made by corporations before the passage of the act. Town of Danville v. Pace, 25 Gratt. 1, 18 Am. Rep. 663.

b. **Form of Plea.**—For form of plea of usury to debt on bond, see Bart. Law Pr. (2d Ed.) 539; 4 Min. Inst. (3d Ed.) pt. 2, p. 1749.

c. **What Plea Must Set Out.**—Where usury is relied upon by a defendant in equity to defeat the plaintiff's whole claim, the facts constituting the usury must be distinctly alleged, and clearly proved according to the allegation; but it is not necessary to allege them with the formal strictness of a plea of usury at law. Smith v. Nicholas, etc., 8 Leigh 330.

A plea of usury of a foreign state must set out the law of usury of that state. Fant v. Miller, 17 Gratt. 47; Klinck v. Price, 4 W. Va. 4.

If to a bill brought to foreclose a mortgage, the defendant pleads usury, and the bill itself on its face, and the documents filed with it, present a case of usury, such as is pleaded, it is not necessary for the defendant to take depositions to support his plea. His adversary's bill supports his plea. Lane v. Ellzey, 6 Rand. 661.

d. **When Plea May Be Received.**—The plea of the "statute against usury" ought to be received in a court of equity, at any time before the decree is final; if there be strong reasons, from the statement in the bill, for believing that the matter of such plea may be true. Ellzey v. Lane, 4 Munf. 66.

e. **Answer.**—The defense of usury may be set up by answer, and although the averments in such answer be very informal, yet, if taken in connection with the charge in the bill, they make the defense of usury in substance, the answer is good. Smith v. Nicholas, 8 Leigh 330; Kelley v. Lewis, 4 W. Va. 456.

Prior to the present statute, Va. Code 1887, sec. 2822, Code W. Va., ch. 96, sec. 7, providing that the borrower may compel a discovery, but the lender shall only recover the principal due, without interest, the rule was that when the borrower alleged usury in his bill and called for a discovery the lender might demur to the bill and refuse to answer unless the plaintiff waived the penalty and offered to pay the principal with legal interest. The principle of this rule was that a party cannot be compelled to subject himself to penalties and forfeitures by his answer. Belton v. Apperson, 26 Gratt. 214.

Where the answer explicitly denies the allegations of the bill as to usury, and there is no competent evidence to prove it, an injunction obtained to the judgment at law should be dissolved, and, if the cause is ready for a hearing, the bill should be dismissed. Wise v. Lamb, 9 Gratt. 294. See also, Sneed v. Smith, 1 Patt. & H. 46.

As to the effect of an answer as evidence, see ante, "Answer as Evidence."

f. **Demurrer.**—Where the contract is not usurious on its face, the question of usury cannot be raised by a demurrer to the bill setting out the contract. Brakeley v. Tuttle, 3 W. Va. 86.

It is error to dismiss a bill filed under Va. Code, § 2822, on the ground that the plaintiff has an ample remedy at law. Ruffin v. Commercial Bank, 90 Va. 708, 19 S. E. Rep. 790.

g. **Continuance.**—A continuance ought not to be granted at law, on the ground that the party, a few

days before that appointed for the trial, filed a bill in equity for a discovery of usury, as auxiliary to his defense at law; unless he make affidavit, that the usury therein charged, had recently come to his knowledge. *Ross v. Norvell*, 3 Munf. 170.

b. New Trial.—Where a bill to set aside a judgment on the ground of usury simply states that the debt was usurious, without stating the usurious interest taken, and the defendant denies the usury, and the charge of usury is not sustained by competent evidence, the court will not, after long delay, set aside the judgment and grant a new trial. *Terry v. Dickinson*, 75 Va. 475.

705 *Russell v. Randolph & als.

September Term, 1875, Staunton.

Deeds—Unrecorded.—In April 1868 R conveyed land with general warranty to C, and C conveyed it in trust to secure four bonds for the purchase money. The trust deed was recorded, but the deed to C was not, until March 1869. One of the bonds was paid by C. R assigned the other three to W, and B and J, J being the last assignee. In July 1868 D recovered a judgment against R, and afterwards filed his bill to subject a small tract of land of R to satisfy it. In May 1873 C was declared a bankrupt, and upon petition by J the bankrupt court had C's land sold, and fixed the priorities of the creditors, making D the first and J the last, the proceeds of the land not being sufficient to pay all; but directing the fund should be retained until it was ascertained how much D would get from the proceeds of the other tract.

Homestead Exemptions.—In March 1871 R executed a declaration of homestead, which embraced all his personal property; and on the 10th of August 1871 he conveyed this property to P in trust for his wife and children. In January 1874 J having purchased D's judgment, he filed a bill against R and his wife and children and P, in a state court, to subject this personal property to satisfy this judgment; and in April 1874 there was a decree in the bankrupt court, by which the proceeds of C's land was distributed among the assignees of his bonds, it not being enough to satisfy J. And it being suggested to the court, that beside the small tract of land aforesaid, there was personal property of R, which might be subjected to pay the said judgment, which was sufficient for that purpose, it was decreed that no part of the proceeds of C's land should be applied to pay the judgment of D. **HELD:**

1. **Same—Effect as against a Prior Judgment Creditor.**—The declaration of homestead by R, having been after D had recovered his judgment, was null and void as to D's debt.
2. **Deeds—Consideration Not Valuable—Effect as to Judgment Creditors.**—The deed of R to P being not upon consideration deemed valuable in law, having been made after the judgment, was also null and void as to D's debt.

706 *3. **Same—Impeachment by Creditor.**—Under § 2, ch. 179, of the Code of 1860, D, without having sued out execution at law, might impeach by a suit in equity the deed of homestead and the deed of trust.

***Homestead Exemptions—As against Prior Judgment Creditors.**—See V. C., § 3642; *Rose v. Sharpless*, 28 Gratt. 153; *Holt v. Williams*, 13 W. Va. 704; 2 Minor's Inst. (4th Ed.) 912.

4. **Decree of Bankrupt Court.**—The decree of the bankrupt court directing, that D should not receive any of the proceeds of the sales of C's land until he had exhausted the other land of R, did not satisfy D's judgment.

5. **Same—Finality.**—The decree of the bankrupt court of April 1874 was a final decree, and obligatory on all other courts; and it was a proper decree, as the judgment of D was a debt of R and not of C, and R's property should be first applied to its payment.

6. **Substitution—Warranty.**—C's land being only liable to satisfy D's judgment because of his failure to have his deed recorded, if he had paid that judgment, or if it had been paid out of the proceeds of his land, he would have been substituted to all the rights and remedies of D against R; and he would also have had a remedy against R upon the warranty in R's deed.

7. **Assignee—Equities—Rights against Assignor.**—J being the assignee of R of one of the bonds given for the purchase money of the land, and thus a creditor of C, and having a lien on the land to secure the bond, he has all the equities of C against R, and also an equity against R as assignor of the bond.

8. **Marshaling.***—As holder of the bond J had but one fund upon which he can rely for payment, whilst D has two funds for the satisfaction of his judgment, the land and the personal property embraced in the deed of homestead and deed of trust. And a court of equity will marshal the assets, and compel D to exhaust the fund upon which J had no claim, that J may appropriate the only fund within his reach.

9. **Substitution.**—D is the only person who can complain of being required to resort to R's personal estate to the relief of the land fund, and that only upon showing that such a course would operate to his prejudice. And if D did show this, J might satisfy his judgment and stand in his place. In this case he has done better by taking an assignment of the judgment.

10. **Same.**—Clothed with the rights and remedies of D, J may properly proceed against the property of R to satisfy R's debt, and against the land of C, to satisfy the debt chargeable upon it.

707 *By deed bearing date the 18th day of April, 1868, Beverly Randolph and his wife, in consideration of the sum of \$7,542.50, conveyed, with general warranty, to J. M. Cobb, a tract of land in the county of Clarke. And by deed of the same date Cobb and wife conveyed the same land to D. H. McGuire, to secure the payment of several sums of money, each for the sum of \$1,385.62½, with interest payable annually from the 1st of March, 1868, and due respectively on the 1st of September in the years 1869, 1870, 1871 and 1872. Both of these deeds were acknowledged before the same justices of the peace on the 6th day of July 1868, and the deed of trust was admitted to record on the 8th of the same month; but the deed to Cobb, though de-

***Marshaling.**—Upon the doctrine of marshaling, see *Watkins v. Dupuy*, 87 Va. 92; *Blakemore v. Wise*, 35 Va. 272; *Strange v. Strange*, 76 Va. 244, all citing, but the last distinguishing from the principal case. See also, 3 Minor's Inst. (2d Ed.) 416, 584.

livered to him at the time of its acknowledgment, was not put on record until the 10th of March 1869.

At the July term 1868 of the County court of Clarke, Duval, Keigler & Co. recovered a judgment against Beverly Randolph for \$631.77, with six per cent. interest thereon, from April 12th 1865 until paid, and \$8.46 costs. This judgment was docketed on the 1st of September following; and though an execution of fieri facias was sued out on it, it was not taken from the office.

The bond of Cobb due in 1869 was assigned to James B. Russell, and was paid by Cobb. The second due in 1870, was assigned some time prior to March 1st 1869 to R. B. Wolfe, and considerable payments were made on it by Cobb, to the administratrix of Wolfe. The third bond payable in 1871, was assigned on the 1st of March 1869 to Baker & Co., and Cobb made some payments on it. And about the 21st of September 1869, the fourth bond due in 1872, was assigned by Randolph to James B. Russell; and on that there were only some payments of interest.

708 *This last bond not having been paid when it fell due, the trustee in the deed of trust advertised the land for sale; and thereupon Cobb obtained from the judge of the Circuit court of Clarke county an injunction. And he afterwards, in May 1873, upon his own application, was declared a bankrupt, in the District court of the Western District of Virginia, held at Harrisonburg.

In August 1873, James B. Russell filed his petition in Cobb's proceeding in bankruptcy, in which he set out the foregoing facts, and also that Cobb, after he had been declared a bankrupt, had filed an amended bill, in which he stated that Duval, Keigler & Co. had instituted proceedings and had obtained a decree for the sale of twenty acres of land of Beverly Randolph; that their judgment constituted the first lien on his land which he would have a right to pay off out of his purchase money to Beverly Randolph remaining unpaid, and that no sale of his land could be properly made until the twenty acres of land was sold and the proceeds applied to the claim of Duval, Keigler & Co.

The prayer of the petition was that Cobb might be restrained from any further proceedings in the State court; that the court would settle the amounts and respective priorities of the lien and other debts of Cobb, whether said liens have been proved in bankruptcy or not; that the land of Cobb might be speedily sold, &c. Cobb and his assignee in bankruptcy, Wolfe's administratrix, Baker & Co., and Duval, Keigler & Co. were made defendants to the petition.

Upon the filing of this petition the judge made an order restraining the proceedings in the State courts, and directing the assignee to take the necessary steps to sell the bankrupt's lands.

In October 1873, the cause came on **709** to be heard, *when the court ascertained the liens on the lands of Cobb to be as follows: First, the judgment in

favor of Duval, Keigler & Co. for \$631.77, with interest, &c.; but there being an unsold tract of land of Beverly Randolph, which had been decreed by the Circuit court to be subject to the payment thereof, said claim was to be credited by whatever might be derived from the sale of said tract of land; second, the claim of Wolfe's administratrix; third, the claim of Baker & Co.; and fourth, the claim of Russell. The amount of each of these claims was set out in the decree, and commissioners were appointed to sell the land of Cobb embraced in the deed of trust, upon terms stated in the decree.

In December 1873 the commissioners returned their report; in which they stated that the land had been sold, and purchased by James B. Russell, at the price of \$3,100. And on the 12th of February the court made a decree confirming the report, and directed the commissioners, out of the cash payment for the land, to pay the expenses of sale, and to hold the remainder thereof until it shall be more definitely ascertained, the exact amount of this fund to which Duval, Keigler & Co. will be entitled, as indicated in the former decree; it being suggested to the court, that there has been a sale of the land which they were required to exhaust before they could share in this fund, but said sale has not been acted on by the Circuit court of Clarke county.

The commissioners made their final report, showing the collection of all the purchase money of the land, and the payment to Russell as assignee of Wolfe's administratrix of \$551.58, and as assignee of Baker & Co. of \$1,241.69—these sums being the amount of their claims—and to Russell \$1,094.75, in part of his claim.

710 *And the cause came on to be finally heard on the 2nd of April 1874; and the court referring to its former decrees directing the purchase money to be retained until the court could determine whether Duval, Keigler & Co. or their assignees, by virtue of their judgment should be entitled to any portion of the proceeds of the sale of lands of James M. Cobb, sold under decree in this cause; and it now appearing to the court, that in addition to the land of Beverly Randolph, referred to in the former decrees in this cause, there is personal property of the said Beverly Randolph which may be subjected to the payment of said debt, one or both sources being sufficient for the payment of the same; and the said judgment being a debt of Beverly Randolph, and only binding upon the land of J. M. Cobb, in case it cannot be made out of the personal property of said Randolph, or of land sold by him since the sale to Cobb, it was decreed that no part of the fund derived from the sale of the land of J. M. Cobb, for distribution in this cause, should be applied to the satisfaction of the judgment of Duval, Keigler & Co. or their assignee; but the same should be applied, after paying the costs, to the satisfaction of the debts of Wolfe's administratrix, Baker & Co. and James B. Russell, as ascertained

by the decree of the 15th of October 1873; and the report of the commissioner was confirmed.

In January 1874 James B. Russell instituted his suit in equity in the Circuit court of Clarke county, against Beverly Randolph and Mary C. his wife, and R. P. Page, trustee, and their five children, four of whom were infants, and Duval, Keigler & Co. In his bill he stated the judgment of Duval, Keigler & Co., and that on the 10th of December 1873 they assigned the said judgment to him. That on the 17th

711 of March *1871 Beverly Randolph executed a declaration of homestead, and the same was admitted to record in the clerk's office of the County court of Clarke on the 29th of August 1871. This declaration embraced certain personal property therein described as "being all the personal property of which I, the said Beverly Randolph, am possessed." That on the 10th of August 1871 said Randolph, by deed recorded in the said clerk's office on the 29th of the same month, conveyed to R. Powell Page, trustee, for the benefit of Mrs. Randolph and her children, certain personal property, described as being in part the same that was embraced in the deed of homestead exemption. That the consideration of this conveyance is, by its terms, "because of the fact recited, that Beverly Randolph had, by a declaration of homestead, set apart and consecrated as free from levy, &c., for or on account of any debt he might owe, and for the further consideration of one dollar." Copies of these deeds were filed with the bill. He stated, that he was induced to purchase the judgment of Duval, Keigler & Co. by reason of its being complicated with other debts due to him, which rendered it very important that he should be able to control it.

The prayer of the bill was for an injunction to preserve the property, and that the said deeds might be set aside, and that the said personal property, being all the personal property of which Beverly Randolph was possessed, might be sold and applied to the payment of plaintiff's debt, and for general relief.

In February 1874 Beverly Randolph answered the bill. He referred to the proceedings in the cases in the Circuit and the Bankrupt courts. And he referred to another case in the Circuit court of Clarke county, in which the tract of twenty

712 acres of land, referred to *in the decree of the Bankrupt court, had been sold and purchased by Russell, and the proceeds of the sale had been decreed to be applied to the satisfaction of the judgment of Duval, Keigler & Co. And he submits whether the said judgment is not now, and was not at the date of the assignment thereof to the plaintiff, fully paid off and discharged; whether the actual sale of the several tracts of land upon which the said judgment was a lien, the confirmation of said sales, the judicial ascertainment of the liens of said judgment, and the decree applying the funds in the hands of the court

to the payment of said judgment, is not an actual legal satisfaction thereof; and whether, these lands having been sold for the purpose, this complainant can now, or at any time, by execution upon said judgment, or otherwise, subject any other property to the satisfaction of said judgment.

It was agreed between Russell and Randolph, by their counsel, that the case should be submitted upon the bill and answer; that the allegation of matters of record should be taken as true, except when the same was contradicted by the records themselves. The allegation of the bill, as to the assignment of the judgment to Russell, the conveyance of the personal property to Page, trustee, the consideration therefor, and the identity of the property conveyed, was admitted to be true.

The cause came on to be finally heard on the 3d of March 1874; when the court dissolved the injunction and dismissed the bill as to Beverly Randolph with costs. But upon the application of Russell, and with the consent of Randolph, the cause was retained for a reconsideration and review of this decree by a decree to be made in vacation. And on the 30th of May 1874 the court dissolved the injunction and dis-

713 missed *the bill as to all the defendants, with costs. Russell thereupon applied to a judge of this court for an appeal: which was allowed.

Barton & Boyd, for the appellant.

Holmes Conrad, for the appellees.

Staples, J. delivered the opinion of the court.

The court is of opinion, that the declaration and claim of "homestead" made by Beverly Randolph on the 17th of March 1871, is void as against the judgment recovered by Duval, Keigler & Co. at the July term of the County court of Clarke, 1868. That such declaration and claim are invalid as to antecedent debts is fully established by the decisions of this court, and of the Supreme Court of the United States. Homestead Cases, 22 Gratt. 266.

The deed of trust executed by Beverly Randolph on the 10th of August 1871, for the benefit of his wife and children, and embracing a part of the property claimed as a homestead, is also void as against said judgment. That deed not being upon consideration deemed valuable in law, must be regarded as merely voluntary, and therefore invalid as against the claims of creditors whose debts were contracted prior to its execution.

Under the provisions of the second section, chapter 179, Code of 1860, it was competent for Duval, Keigler & Co., without having sued out an execution at law, to impeach by bill in equity, the deed of homestead and deed of trust upon the ground of fraud, actual or constructive. The appellant Russell being the bona fide assignee of said judgment recovered by Duval,

714 *Keigler & Co., stands in their shoes; is substituted to all their rights and

remedies, and entitled to enforce any security they may justly claim.

The court is further of opinion that although the tract of land conveyed by Randolph to Cobb was ordered to be sold under a decree of the circuit court of the United States, rendered on the 15th of October 1873, to satisfy the judgment aforesaid, as well as the claims of Cobb's creditors, it was nevertheless provided in that decree, that Duval, Keigler & Co. should not be entitled to recover any of the proceeds of sale until they shall have exhausted the lands of Beverly Randolph, decreed also to be sold; and should by further proof show to the court that said land has proved insufficient to pay the claim, and the amount of said deficiency."

There is no pretence for saying that this decree operated as a satisfaction of the judgment; for although its priority was recognized, yet the United States court was clearly of opinion, and very properly so, that Randolph's estate ought first to be applied to the judgment before any part of the land purchased by Cobb from Randolph was subjected: And this upon the obvious ground that the judgment was a debt of Randolph for which neither Cobb nor his estate was justly liable.

The same rule was adopted by the United States court in its decree of the 12th September 1874. By that decree the court refuses to order any distribution of the fund whatever, until it could be definitely ascertained what was the exact amount to which Duval, Keigler & Co. would be entitled from the lands of Randolph directed to be sold under previous decrees of the court. And none can fail to believe that if the attention of the United States court had then been called to the fact that

Randolph was the owner of other
715 *property justly liable to the judgment, that court would have required the holders of that judgment to proceed against that property before subjecting the tract sold and conveyed by Randolph to Cobb. If the United States court was of opinion that a part of Randolph's estate should be applied to the payment of his individual liabilities, it would as a necessary consequence, have held that the whole, if needed, should be so applied.

The correctness of this view is conclusively shown by the decree of the same court rendered on the 2d of April 1874. That decree recites, "that it now appearing to the court that in addition to the land of Beverly Randolph referred to in former decrees in this cause, there is personal property of the said Beverly Randolph which may be subjected to the payment of the judgment, and said judgment being a debt of Beverly Randolph, and only binding upon the land of J. N. Cobb in case it cannot be made out of the personalty of Beverly Randolph, or of land sold by him since the sale to J. N. Cobb; it was therefore directed that no part of the fund from the sale of the Cobb land should be applied to the satis-

faction of the judgment in favor of Duval, Keigler & Co., or their assignee.

This was a final decree. It disposes of the whole matter in controversy. It deprives Duval, Keigler & Co., or their assignee, of the benefit of the judgment lien upon the Cobb land; it excludes them unconditionally from any participation in that fund, and requires them to resort to such estate as Randolph was entitled to for the satisfaction of the judgment.

It has been suggested, that this decree was obtained by the contrivance of Russell himself, who had then become the assignee of the debt. There is nothing in the record

to show at whose instance it was
716 rendered. *It is the decree of a

court having jurisdiction of the parties and the subject matter. It must be held as absolutely conclusive in every other court, unless it is impeached for fraud; of which there is no pretence in this case. If in fact it was entered at the instance of Russell, the matter was easy to be proved by a discovery, or by extrinsic evidence. The record of the decree was filed as an exhibit in this case, and was read without objection in the court below. This court cannot disregard it upon any mere suspicion, or even a suggestion, that the United States court, in rendering this decree, was imposed upon by one of the parties.

But the court is further of opinion, that if the decree is attributable to the action of the appellant Russell, it was nevertheless a just and proper decree under all the circumstances, such as the appellant might well ask and the appellee cannot justly complain of.

As already stated, the judgment recovered by Duval, Keigler & Co. was against Randolph only; Cobb was in no way bound for that debt. The lien of the judgment upon the land of Cobb, purchased from Randolph, was owing to Cobb's failure to record his deed in due time. If the deed had been properly recorded, this controversy would never have arisen, and there would have been no pretence for charging the judgment upon the land purchased by Cobb. But notwithstanding Cobb's neglect in this particular, it was competent for him to insist that Randolph's creditors should exhaust all his real and personal estate before subjecting his (Cobb's) land. And if Cobb had satisfied the judgment, or it had been paid out of the proceeds of his land, he would have

been substituted to all the rights and
717 remedies of Duval, Keigler & *Co.

against Randolph. Besides this right of substitution, Cobb had his remedy upon the warranty contained in Randolph's deed to him of the 18th April 1868—a contract entered into long anterior to the claim of homestead and the deed of trust.

Now it must be borne in mind that the appellant, Russell, is the holder of one of the bonds executed by Cobb to Randolph for the purchase money of the land. He is therefore assignee of Randolph, and a creditor of Cobb, having also a vendor's lien upon the land for unpaid purchase money. The

appellant has therefore all the equities of Cobb, and a strong equity against Randolph, growing out of the assignment.

As the holder of the bond, he has, however, but one fund upon which he can rely for payment, and that is the land. On the other hand, Duval, Keigler & Co. have two funds for the satisfaction of their judgment, the land and the property embraced in the deed of homestead and the deed of trust.

A court of equity will so marshal these securities as to compel Duval, Keigler & Co. to exhaust that fund upon which the appellant has no claim, in order that the latter may appropriate the only fund within his reach.

This is a familiar doctrine of the equity courts: the rule being that if one party has a lien or interest in two funds for his debt, and another party has a lien on or interest in one only of the funds for another debt, the latter has a right in equity to compel the former to resort to the other fund, in the first instance, for satisfaction, if that course is necessary for the satisfaction of the claims of both parties: provided always this course does not trench upon the rights or operate to the prejudice of the creditor entitled to the double fund.

In such cases, the equity of the creditor having *but one fund, is not against the double creditor, but only against the common debtor; that the accidental resort of the paramount creditor to the double fund shall not enable the debtor to get back the second fund discharged of both debts. When, therefore, the paramount creditor is satisfied out of the doubly charged fund, the other creditor has a right of substitution to all his rights against the remaining fund. 1 Story's Eq. Jur., § 633; Adams' Eq., mar. 272; Vance v. Monroe, 4 Gratt. 93; Jones et als. v. Phelan & Collander, 20 Gratt. 229.

According to these authorities, Duval, Keigler & Co. are the only persons who can complain of being required to resort to Randolph's personal estate to the relief of the land fund; and they can only object upon showing that such a course would operate to their prejudice. If they made that appear, the appellant would still have the right to satisfy their judgment, and to stand in their place. He has done what is better, he has taken an assignment of the judgment. Clothed with all their rights and remedies, he may very properly proceed against the property of Randolph to satisfy his debt, and against the land of Cobb to satisfy the debt chargeable upon that land. This satisfies all the equities, and attains substantial justice.

The court is therefore of opinion, that if the United States court had rendered no such decree as the one now under consideration, a court of equity having all the parties before it, and with a view to the adjustment of their rights, would now adjudicate these questions precisely as that court has done. The appellee Randolph, and those claiming under him, cannot

justly complain that his property is applied to the payment of debts contracted by him long before his right to a homestead accrued, and that his bona fide assignee is *thus permitted to collect his debt out of property liable for its payment.

For these reasons, the court is of opinion, that the decree of the Circuit court must be reversed, and the cause remanded for further proceedings in conformity with the view herein expressed.

The decree was as follows:

This day came again the parties by counsel, and the court having maturely considered the transcript of the record of the decree aforesaid, and the arguments of counsel, is of opinion, for reasons stated in writing, and filed with the record, that the Circuit court erred in dissolving the injunction and in dismissing the bill of the appellant, James B. Russell: wherefore, for the error aforesaid, it is ordered and decreed that the said decree of the Circuit court be reversed and annulled, and that the appellee, Beverly Randolph, pay to the appellant his costs by him expended in the prosecution of his appeal aforesaid here. And this court proceeding to render such decree as the said Circuit court ought to have rendered, it is adjudged, ordered and decreed, that the homestead of the defendant, Beverly Randolph, and the deed of trust executed by him on the 10th day of August 1871 be vacated and annulled, so far as they are in conflict with the debt due to the said James B. Russell, as assignee of the judgment in favor of Duval, Keigler & Co.; that it be referred to one of the commissioners of said court to ascertain and report the exact amount due said Russell as assignee as aforesaid, if the same cannot be agreed by the parties, and a decree to be rendered for the sale of so much of the property embraced in the deed of homestead and deed aforesaid as may be necessary to satisfy the balance due the complainant; and in the meantime said Circuit court, or the judge thereof in vacation, may make such order touching the custody and disposition of the property aforesaid as may seem just and proper; which is ordered to be certified to the said Circuit court of Clarke county.

Decree reversed.

721 *Triplett v. Allen & als.

September Term, 1875, Staunton.

1. Sales of Land by the Acre—Mistake—Compensation.—A case in which a sale of land was held, upon the written contract and the evidence, to have been a sale by the acre, and not a sale in gross; and the vendor was bound to make good the deficiency in the quantity at the average value of the whole tract per acre.

*Mistake—Compensation.—On this subject, see Back v. Kilgore, 26 Gratt. 442, and note; Watson v. Hoy, 28 Gratt. 718, and note; also, Boschen v. Jurek, 92 Va. 756.

1. **Same—Same—Words "More or Less"—Not a Contract of Hazard.***—The conveyance of the land, after giving the number of acres, adds the words "more or less." These words will not relieve the vendor or vendee, as the case may be, from the obligation to make compensation for an excess or deficiency, beyond what may be reasonably attributed to small errors from variation of instruments or otherwise, unless there be evidence to show that a contract of hazard was intended.

2. **Same—Same—Same.**—Ten acres, in a tract of 166 acres, where the land is worth fifty dollars an acre, is not one of these small deficiencies to be covered by the phrase "more or less."

This was a bill in the Circuit court of Shenandoah county, by Leonidas Triplett, to enjoin a judgment for \$1,635.45 with interest, recovered against him by Lemuel Allen, upon a bond given by Triplett to Allen for part of the price of two tracts of land sold by Allen to Triplett. The grounds relied on in the bill for an injunction, were that the land was sold by the acre, and there was a deficiency in the quantity sold; and that Allen had conveyed to Triplett a right of way from one tract to the other over the land of Tiphon W. Allen; which right of way he did not possess. The injunction was awarded as to \$1,000 of the judgment.

Allen answered the bill. He denied 722 that the sale of *the lands was by the acre, and insisted that it was a sale in gross. He denied that he conveyed to Triplett any right of way except that mentioned and reserved to him in his father's will. If Tiphon W. Allen has refused to permit complainant to enjoy said right of way as alleged, as to which he, Allen, is not advised, he is not responsible for the fact.

A number of witnesses were examined as to the circumstances attending the contract between Allen and Triplett, for the sale and purchase of the land; and the cause coming on to be heard on the 25th of August 1874, the court dissolved the injunction and dismissed the bill with costs. And thereupon Triplett obtained an appeal to his court. The facts are stated by Judge Christian in his opinion.

M. Bird and H. C. Allen, for the appellant.

***Sales by the Acre—Contracts of Hazard.**—In the case of *Boschen v. Jurgens*, 92 Va. 459, JUDGE KEITH delivered the opinion of the court, and citing the principal case, also, *Blessing v. Beatty*, 1 Rob. 287; *Crawford v. McDaniel*, 1 Rob. 448; *Watson v. Hoy*, 28 Gratt. 608; *Benson v. Humphreys*, 75 Va. 196, said: "These cases not only show that equity will take jurisdiction of this class of cases, upon the ground of mistake, but that 'every sale of real estate, where the quantity is referred to in contract, and where the language of the contract does not plainly indicate that the sale was intended to be a sale in gross, must be presumed to be a sale per acre; that while contracts of hazard are not invalid, courts of equity do not regard them with favor.'" See also, *Norfolk Trust Co. v. Foster*, 78 Va. 419.

M. Walton, for the appellees.

Christian J. delivered the opinion of the court.

The court is of opinion, that the decree of the Circuit court of Shenandoah was erroneous in dissolving the injunction awarded in vacation, and dismissing the plaintiff's bill. The evidence conclusively shows that the sale by Allen to Triplett was a sale per acre, and not a sale in gross. The contract of sale filed with the answer provides "that the said Lemuel Allen doth covenant and agree to sell to the said L. Triplett the home tract of land (with appurtenances thereto belonging), containing one hundred and sixty-six acres, three roods and twenty-eight poles," with certain boundaries described—"together with one hundred and fifty acres of mountain land," for the consideration of ten thousand

723 *dollars. This contract was dated the 3d of November, 1869. It seems on the day before this contract was entered into this land was offered at public auction, and the home tract was offered and bid for by the acre. On that day the bidding went up to some \$35 or \$40 per acre, and the land was taken down. On the next day (November 3d) the land was again offered at public auction, and the bidding went up to \$52 per acre. The bidding was then stopped, and there were certain negotiations between the parties; calculations were made, putting the mountain land at \$8 per acre; and propositions to give for the home tract enough per acre (estimating the tract at one hundred and sixty-six acres, three roods and twenty-eight square poles) to make the purchase money for the whole amount to the sum of \$10,000. The result of these negotiations was the contract above referred to, by which Allen agreed to sell to Triplett one hundred and sixty-six acres, three roods and twenty-eight poles of what was known as the home tract. A deed was executed on the 2d of December, by Allen and wife, with general warranty, conveying to Triplett this land as described in the contract of sale, except that after the words describing the quantity, are inserted the words "more or less." It turns out upon a survey of the home tract that there is a deficiency of about ten acres.

The court is of opinion that under the contract of the parties and the evidence taken in the cause, the sale was a sale per acre, and not a sale in gross, and that the appellee is bound to make good this deficiency at the average value of the home tract per acre.

But if the contract can be considered a sale in gross and not per acre, the insertion of the words "more or less" in the deed does not affect the case. For it is well settled by repeated decisions of this 724 court, that *the employment of such words will not relieve the vendor or vendee, as the case may be, from the obligation to make compensation for an excess or deficiency, beyond what may be reason-

ably attributed to small errors from variation of instruments or otherwise; unless, indeed, there be evidence to show that a contract of hazard was intended. In the absence of such evidence, it is to be presumed that the parties contract with reference to quantity. It is an important element in every agreement, and prima facie must be intended to influence the price.

Ten acres in a tract of one hundred and sixty-six acres, especially when worth at least \$50 per acre, is not one of these "small deficiencies" to be covered by the phrase "more or less;" and the vendor must be held liable, and the vendee compensated for such deficiency. Nor is the vendor at all relieved from obligation to make good this deficiency by the fact that a part of this land, to the extent of about four acres, was at the time of the sale vested, by proceedings of condemnation, in the Manassas Gap Railroad Company; and that vendee knew, when he bought the land, that said railroad passed through one side of this land. Knowledge of the fact that a railroad passed through the home tract does not alter the question, or change the obligations of the parties. The vendee, under his contract, had purchased one hundred and sixty-six acres, three roods and twenty-eight poles of the home tract. How much of the home tract had become vested in the railroad company was no concern of his. He had a right to presume that the quantity called for by his contract was still left after deducting that in the possession of the railroad company. The company had acquired a fee simple right to the land held by them, for which no doubt Allen had received full compensation.

725 So far as *this four acres is concerned, Allen stands in the same position as if he had sold and conveyed the four acres to another party before the sale to Triplett; and the fact that Triplett saw and knew that the Manassas Gap railroad passed through this land, could have no more effect on this contract of the parties than if he saw and knew that four acres of the home tract had been sold and possession delivered to a purchaser having a deed in fee simple for four acres of said land. The contract of Allen was to convey to Triplett one hundred and sixty-six acres, three roods and twenty-eight poles, and if he had conveyed a part of it, or had received compensation for a part of it, vested by proper legal proceedings in a railroad company, it was no concern of Triplett, and Allen must make up the deficiency. The court is therefore of opinion that the decree of the said Circuit court was erroneous in dissolving the injunction and dismissing the plaintiff's bill.

The court ought to have perpetuated the injunction certainly, to an amount sufficient to cover the deficiency in the land sold, and have proceeded to declare, upon the evidence in the cause of the value of the land and the deficiency in the value of acres proved, what amount is due to Triplett.

The court is further of opinion, that no

deduction in the purchase money can be made on account of the right of way which is claimed by the appellant to have been guaranteed to him by the appellee. The deed conveys Samuel Allen's "right of way across Rhesa Allen's farm now owned by Tiphen W. Allen to the aforesaid mountain land." To ascertain what Samuel Allen's right of way is, reference must be had to the will of Rhesa Allen. The third clause of said will provides as follows: "I further desire that my son Lemuel shall have

one hundred and fifty acres of timbered

726 *land, adjoining the lands of Charles Moore, of the mountain tract; and the residue of all lands on the southeast side of the river, or, in other words, the mountain side of the river, shall be Joseph Tiphen W. Allen's land, with the express understanding that Lemuel Allen is to have a right of way to the timbered land." Now this right of way under the will, whatever it may be, has been conveyed by Allen to Triplett. But there is nothing in the record to show that the right of way conveyed, that is, what was conferred by the will of Rhesa Allen, has been denied to Triplett. He (Triplett) is certainly entitled under his contract to the same right of way which was secured to Lemuel Allen under the will of Rhesa Allen. But there is nothing to show in the record, that this right of way has been denied to him.

Triplett, as to his legal rights, can only stand upon such as are secured by the will to Lemuel Allen. It does not appear that these rights have been denied to him. It will be time enough to act upon this question when Triplett has failed to recover his right to the same right of way which the will secures to Lemuel Allen. All that this court now means to decide upon this branch of the case is, that Triplett is only entitled to such right of way as Allen had under the will of Rhesa Allen, his father. What that may be, is a subject of litigation between the parties, and remains to be determined; but the value of the said right of way is still undetermined, and is not to be taken into the estimate of the deficiency for which the appellee is responsible.

The court is therefore of opinion, that the said decree of the said Circuit court, dissolving the injunction and dismissing the plaintiff's bill, is erroneous; and that said

decree be reversed, and this cause re-

727 manded *to said Circuit court, with instructions to inquire and determine what was the deficiency of the number of acres and the value thereof, and to perpetuate the injunction as to said amount, and dissolve the same as to the balance. The decree must, therefore, be reversed, and the cause be remanded to said Circuit court to be further proceeded in accordance with the principles herein announced.

The judgment was as follows:

This day came again the parties by counsel; and the court having maturely considered the transcript of the record of the

decree aforesaid and the arguments of counsel, is of opinion, that the decree of the said Circuit court is erroneous, in dissolving the injunction and dismissing the appellant's bill; the court being of opinion, that the sale from Allen to Triplett was a sale per acre, and not a sale in gross, and that the appellee Allen is bound to make good the deficiency which is shown to exist.

The court is further of opinion, that in taking account of this deficiency, and of what amount the appellant is entitled to recover from the appellee, the value of the right of way is not to be estimated; the court being of opinion, that the appellee conveyed by his deed the same right of way which under the will of his father was secured to said appellee Allen, and there is nothing in the record to show that this right of way has been denied to him.

It is therefore ordered and decreed, that the said decree be reversed and annulled, and that the appellant recover against the appellee his costs expended in the prosecution of his appeal here. And the cause is remanded to said Circuit court, with 728 instructions to *ascertain and determine what is the deficiency in the quantity of the land sold by the appellee to the appellant, and the value of said land appearing to be so deficient; and as to that amount the injunction must be perpetuated, but dissolved in all other respects: which is ordered to be certified to the said Circuit court of Shenandoah county.

Judgment reversed.

729 *Myers v. Nelson & als.

September Term, 1875, Staunton.

Judicial Sales—Payments in Confederate Money.—M buys land at a judicial sale in 1859, and gives his bonds payable annually down to 1863. He pays all, but the last bond, and pays on that \$2,000 in Confederate money; and a few days afterwards offers to pay the balance to the commissioner in Confederate money, who refuses to receive it. M then files his petition in the cause, stating that he owes this balance, and that the commissioner refused to receive it; that he is ready to pay it, and asking that he may be authorized to pay it, and that a commissioner may be directed to convey the land to him. The court decrees that M be authorized to pay to the general receiver the balance due, stating the amount, and upon its payment a commissioner named should convey the land to M. **HOLD:**

1. **Appellate Practice.**—The decree being a proper decree upon its face, it could not have been altered on appeal.

2. **Payments in Confederate Money.**—The decree did not authorize M to pay in Confederate money, and a payment to the receiver in that money was not a discharge of M's debt.

In 1858 a suit in equity was instituted in

***Judicial Sales—Payments in Confederate Money.**—The principal case is cited in *Fultz v. Brightwell*, 77 Va. 750; also in *Purdie v. Jones*, 32 Gratt. 840, and note.

the Circuit court of Augusta, by Nelson's widow and others against Nelson's infant heirs, for the sale of a tract of land in which they were the joint owners; and a decree was made in the cause appointing a commissioner to make the sale. In February 1859 a private sale of the land was made to Jacob Myers by one of the adult parties, and this sale was reported to the court by the commissioner, and was confirmed. And the commissioner declining to act further, two of the adult parties *were appointed commissioners, and directed to carry out the contract.

The contract provided that one-fourth of the purchase money should be paid on the 1st of April 1859, and the balance was to be divided into four equal annual instalments, to fall due on the 1st of April 1860, 1861, 1862 and 1863; the title to be retained until all the purchase money was paid.

Myers, in execution of the agreement, paid the amount which was to be paid on the 1st of April 1859, and executed his bonds to the commissioners for the deferred payments, each bearing date the 29th of February 1860, and being for the sum of \$3,486.79½. He seems to have paid the three first bonds; and on the 10th of April, a few days after it was due, he paid \$2,000 on the fourth bond; and a few days after that, he offered to pay the balance of this bond; but the commissioners refused to receive it; Myers offering to pay that balance, as he had paid the \$2,000, in Confederate treasury notes. Myers thereupon, in June 1863, applied by petition in the cause to the judge of the court, to be permitted to pay the balance he owed for the land, and to have a deed for it. This petition, and the proceedings upon it, are stated in the opinion of the court delivered by Judge Anderson.

In June 1874, the suit of Nelson & als. v. Nelson's infant heirs, was revived in the names of the then living parties, and on the motion of the plaintiffs and defendants, a rule was made upon Myers to show cause why he should not be required to pay \$3,486.79½, with interest, subject to a credit of \$2,000 paid April 10th, 1863; the balance due, after allowing said credit, being the amount of purchase money due from said Myers, &c.

Myers appeared and filed his answer 731 to the rule, setting *out what had been done in the cause, saying that he had strictly complied with the decree made upon his petition, and that he had received a deed for the land, which had been duly recorded. And he insisted that the decree of June 1863 was a valid decree by a court of competent jurisdiction; and no attempt having been made to reverse it, it was, after the time which had elapsed, conclusive on all the parties in the cause.

The cause came on to be heard on the 14th of October 1874, when the court held that the order of June 1863, made at the instance of Myers, did not, either under the circumstances, or in its terms, justify or entitle him to discharge his indebtedness for the land purchased by him, by depositing the money in the Central Bank as gen-

eral receiver of the court in Confederate currency, depreciated at the time to nine for one in gold; nor was the general receiver justified in receiving such currency, nor was Trout, the commissioner, authorized to make a deed to Myers upon his filing the certificate of the receiver: And therefore that said deposit of Confederate currency with the receiver should be wholly disallowed as a discharge of said indebtedness of said Myers, and that the deed made by the commissioner was void, and made without authority; and further, that the order of June 1863 was correct, and could not have been appealed from. It was therefore decreed that the deed from Trout, the commissioner, was null and void; that Myers should pay to the general receiver of the court the said sum of \$3,486.79½, with interest thereon from the 1st of April 1863, subject, however, to a credit thereon for \$2,000, paid on the 10th of April 1863, with the costs of the rule, which, when paid, will be a full discharge of the purchase money aforesaid due from said Myers.

And said Myers, if he for any cause
732 shall fail to make *such payment, do appear here on the 1st day of the next term of the court, to show cause, if any he can, why the said land shall not be re-sold for the payment of said purchase money and costs. And a commissioner was directed to ascertain and report to whom the money thus decreed belongs, and in what proportions. And thereupon Myers applied to a judge of this court for an appeal; which was allowed.

A. H. H. Stuart, for the appellant.

G. M. Cochran, for the appellees.

Anderson, J. delivered the opinion of the court.

Appellant's bond for \$3,486.79½, executed to A. L. Nelson and William J. Nelson, commissioners, bearing date February 29, 1860, fell due the 1st of April 1863. It was executed for the last instalment on a tract of land which was sold to appellant on the 29th of February 1859, under a decree of the Circuit court of Augusta county, in the cause of Nelson's guardian, against Nelson's infants, and which was confirmed at the June term 1859. The appellant paid \$2,000 on this bond on the 10th of April 1863. And, in the month of June following, presented a petition to the Hon. Lucas P. Thompson, judge of the said Circuit court, in which he alleges that he is prepared to comply with the contract on his part by paying up the whole purchase money due on said land, there being about \$1,500 due yet, but the commissioners positively refused to receive the money, but require him to keep it unproductive in his hands, and to account for the interest which he alleges is in contravention of the contract and the decree, and grievously unjust to him;

733 *and he prays that said commissioners shall be required to receive the money, or some other receiver be appointed to re-

ceive it, and that when paid, a deed shall be made to him as provided in the contract.

Certainly the debtor had a right to pay his debt after it was due, and it being a debt contracted with commissioners of the court, and payable to them, they were under the control of the court, and if they refused to receive payment, in compliance with the contract, the court had power to compel them to receive payment, or to order the money to be deposited with the general receiver to the credit of the cause; and upon a certificate of the deposit being filed with the papers in the cause, to order that the commissioner, who was appointed for the purpose, should make a deed of conveyance to the purchaser; and such was the order made by the court.

In execution of said order, the appellant tendered the balance due in Confederate treasury notes, which the commissioners refused to receive. He then deposited them with the bank, as the general receiver of the court, which gave him a certificate to the effect that he had deposited \$1,520 in the treasury notes of the Confederate States to the credit of said cause, which would be invested by the bank in 7 per cent. bonds of the Confederate States; and stating that the bank had given the certificate in that form, "because of a notice served upon the bank by John B. Baldwin, Esq., counsel for R. R. Nelson, &c., (filed with the papers is the cause,) forbidding the receipt of Confederate treasury notes, and is intended to charge the bank only with the payment of Confederate States treasury notes, or the Confederate bonds, in which they may be invested." The said treasury notes were then depreciated to nine for one in gold.

734 *There is no error apparent on the face of the decree, and no exception is taken to it by the appellees, and it could not be done in this collateral proceeding. The only question is as to the execution of it. It is contended by counsel for appellant, that the decree viewed in the light of surrounding circumstances, and of the fact which may be judicially known, that at the date of the decree, Confederate currency being the only currency used as the medium of exchange in the ordinary transactions of the country, the decree must be construed as intended to authorize payment to be made in that currency.

Confederate treasury notes were never made a legal tender in payment of debts; and it was not in the power of the courts, as that eminent judge was well aware, to authorize a debtor to pay off a specie debt, or to compel a creditor to receive payment, against his will, of a specie debt, contracted before the war, in a depreciated Confederate currency, worth only when first tendered five and a half, and when deposited with the receiver only nine, for one in gold. The petition of the debtor does not ask that he may be allowed to make payment in that depreciated currency. He makes no offer in his petition to pay in Confederate treasury notes, or any allusion to that currency;

but says he is prepared to comply with his contract by paying up the whole of the purchase money due upon said land. It was a contract in effect to pay in specie, and a preparation to pay in that depreciated currency was surely not a preparation to comply with his contract. What he asks for in his petition he was entitled to. And the decree awards it to him. But it does not authorize him to make the payment or tender payment in the depreciated currency then prevailing, which the obligees had positively refused to receive, and

735 which *it was not in the power of the court to require them to do, and which we have seen his petition does not in terms propose. But it only authorizes him to pay his debt, which he had a clear right to do, and upon the payment in full, to receive a conveyance of title to the land. But the decree does not decide the question, if that was before the court, in what medium it shall be paid. It could not be intended by the decree, to authorize the debtor to pay in a medium, or to compel the creditor to receive payment in a medium, which the contract did not authorize or require, or which it was not in the power of the court to do. It will not be presumed that the court intended to do what was forbidden by law, and what it had no power to do, and of which the eminent judge was as well aware as is this court, when it is not so expressed or imported by the terms of the decree. It was doubtless known to him, that Confederate currency was at the time the only circulating medium of exchange; and he may have been aware that the petitioner contemplated making payment in that currency. But as he had not proposed it in his petition, but only to be allowed to make payment in compliance with his contract, which he was clearly entitled to do; and as no question had been raised by the petition as to the medium of payment, or by any pleading or proceeding in the record, he may have deemed it most proper to award to the petitioner what he asked for in his petition, and what he was entitled to, and not to pass upon a question which was not raised by the petition, but which would more properly be raised upon the proceedings in execution of the order. The question appears not to have been raised in the execution of the order, or brought to the attention of the court until

it was raised by the rule upon which 736 the decree *was pronounced, which is now appealed from; and it does not appear that Judge Thompson ever passed upon it. It might have been raised by the bank as general receiver, and ought to have been raised and submitted by it to the court when it was notified by the creditor not to receive Confederate currency in payment; and the bank was not justified in receiving the Confederate treasury notes as the general receiver of the court until the question as to its receivability had been submitted to and passed upon by the court. And so it may be said the question might have been and ought to have been submitted by

commissioner Trout to the court before he executed the conveyance, as the certificate showed upon its face that payment had been received in Confederate treasury notes by the general receiver against the protest of the parties to whom the payment was due. The court is therefore of opinion that the question not having been passed on by Judge Thompson in his decree, was still an open question, and that there is no error in the decree of the Circuit court of Augusta county of the 14th day of October 1874, and that it be affirmed.

Decree affirmed.

737 *Coffman v. Niswander & als.

September Term, 1875, Staunton.

Sales of Land—Verbal—Conditions.—In 1857 C, by a verbal contract, sold to N a lot in D, and N took possession of the lot, built a house upon it and improved it, but did not pay the purchase money at the time agreed. C having become the security of N as the guardian of W and in a debt to K, in April 1861 they entered into a written agreement, whereby, reciting these facts, it was agreed that C should retain the legal and equitable title to the property until the purchase money for the lot and the debts for which C was bound as the surety of N were fully paid. This agreement was not recorded. After the war N became a bankrupt; and in 1868 C filed his bill against N and his assignee, to have the property sold and applied to the payment of the purchase money for the lot and the debts for which C was surety for N; and it was sold, not bringing enough to pay C for his purchase money and what he paid for N to W. Other judgment creditors of N intervene and claim the proceeds of the sale after payment of the purchase money. **HOLD:**

1. **Same.**—N had neither the legal nor equitable title to the property until the debts were paid.
2. **Judgment Creditors—Rights.**—The judgment creditors of N have only the equities of N against C; and as against them, the agreement between C and N is valid, though not recorded.

In September 1868 Hiram Coffman filed his bill in the Circuit court of Rockingham county, in which he stated, that in the year 1857 he sold to John Niswander a lot of ground in the town of Dayton, in said county, for the sum of two hundred and seventy-six dollars, to be paid on the 1st of April 1858. That it was a verbal contract never reduced to writing until the 1st of April 1861; but Niswander took possession *of the lot, and built a house upon it, enclosed and made other improvements thereon.

He further states that Niswander qualified as the guardian of his niece Miss Lucy Jane Williams, and gave bond with plaintiff and two others as his sureties, and that as such guardian he received \$1,700, for which his sureties are still liable, as plaintiff is advised that no part of said money has been paid to said Lucy. That plaintiff is also Niswander's security on a bond to Harvey

Kyle for \$298.83, with interest from the 21st of June 1859, which also remains unpaid.

He further states that in view of these facts and of the unsettled condition of the country in the spring of 1861, plaintiff required Niswander to pay these debts, and he being unable to pay up, they on the 1st of April 1861, entered into a written contract, in which plaintiff's vendor's lien and his aforesaid liabilities are fully set out, and their payment stipulated for; and in which it is provided that the legal and equitable title to said house and lot should remain with the plaintiff until the lien and debts aforesaid were fully paid, and the plaintiff relieved from all liability as such surety.

He states that Niswander is insolvent and has gone into bankruptcy. And he makes him and his assignee parties defendants, and prays for a sale of the house and lot; that the purchase money due to himself be first paid out of the proceeds of sale, and that the balance be applied to the satisfaction of the debts for which plaintiff is surety.

The agreement of April 1st 1861, which is under seal, was filed with the bill. It recites the verbal agreement of 1857, as stated in the bill, and that if the money was not paid on the 1st of April, 1858, the agreement was to be null and void; and that said Niswander had wholly failed

739 to pay the purchase money, *but took possession of the lot and built a house thereon, and desires to be secured in the possession of said lot and buildings. It further recites the liabilities of Coffman as security of Niswander; and then it is agreed that Coffman will make good the title to said house and lot upon the following terms and conditions, which are accepted by the said Niswander, viz: Niswander to pay the purchase money and interest, and to pay off his debts to Lucy Williams and Kyle, so as to relieve and wholly discharge the said Coffman from all liability on said bonds; and then Coffman binds himself to make a good and perfect title to said Niswander for said house and lot. But until Coffman is fully paid off and released from his liabilities as surety as aforesaid, he is to retain the legal and equitable title to said lot.

In October 1868 the court made a decree, directing a commissioner named, after giving notice as directed in the decree, to sell the house and lot mentioned in the bill at public auction, upon a credit of six, twelve, eighteen and twenty-four months, the purchaser to give bonds with security, bearing interest from the date of sale, and the title to be retained. And in pursuance of this decree the commissioner reported that he had sold the house and lot at public auction, when the plaintiff Coffman became the purchaser at the price of eleven hundred dollars, and had executed his bonds with security.

At the April term 1869 of the court, David Blosser, administrator of Anna Blosser deceased, Jacob Dinkel, administrator of Harriet S. Dinkel deceased, and two others,

filed their petition in the cause, in which they set out that they were judgment creditors of John Niswander, and that their judgments had been docketed. They charge

that their judgments are liens 740 *upon the land of Niswander; and at the time their judgments were obtained Niswander was the owner of a house and lot in the town of Dayton, which lot he had purchased of Hiram Coffman in 1857, and had built on it a brick dwelling at a cost of several thousand dollars. That he had gone into bankruptcy, and had no personal estate. They refer to the bill of Coffman, and his pretensions under the agreement of April 1st, 1861. They insist that if that agreement was made on the 1st of April 1861, as it purports to have been, it is not valid against them as creditors of Niswander, it never having been recorded, and they having no knowledge of it, and Niswander having been put in possession of the lot long before said pretended contract. They do not believe that said contract was made at the time it bears date; and they insist that their judgments are liens upon the said land, at least after the payment of the \$276 and interest for purchase money, to which they ask that Coffman may be required to prove he is entitled. They make Coffman, Niswander and his assignee defendants to their petition, ask that the two first may be required to answer, and that their judgment liens may be enforced and their debts paid out of the proceeds of the sale of the house and lot.

Coffman answered the petition, and averred the agreement referred to was executed on the day it bears date, and was designed to secure him in the payment of the debts therein referred to, as well as the payment of the purchase money of the lot. He did not consider it necessary to record the contract, in as much as Niswander had not even a shadow of title to said house and lot until he had complied with the terms and conditions of said contract, and held no writing of any kind to show

741 that he had even a right *to the property under any circumstances. And he says that the debts and purchase money mentioned in said contract are not yet paid.

In October 1869 the court confirmed the report of the sale, and directed the commissioner to collect enough of the purchase money to pay the expenses of sale and his own fee and commission, and to permit Coffman to retain in his hands the balance of the purchase money until the further order of the court. Subsequently a commissioner, to whom the cause was referred, made a statement of the liens upon the land. From this statement it appeared, the purchase money, principal and interest, to January 1st, 1875, was \$554.07; that the judgment in favor of Anna Blosser's adm'or was rendered in August 1866, and, with interest up to January 1st, 1875, amounted to \$1,055.56; that in favor of Harriet Dinkel's adm'or was rendered in February 1867, and after allowing a credit upon it paid in 1874,

there remained due \$175.74; and that Miller's judgment was rendered in May 1867, and there was due on that \$255.86. It was admitted that in August 1870 Coffman paid, as surety for Niswander on his guardianship \$1,100.

The cause came on to be finally heard on the 8th of February 1875, when the court held that the aforesaid judgment liens were superior to the unrecorded contract; and confirming the report of these liens, it was decreed that the commissioner who made the sale of the house and lot should proceed to collect the purchase money, and after paying the costs of the suit, that he should pay first to the plaintiff Coffman \$554.07, with interest on \$276 from the 1st of January 1875 till paid; and second, that he should pay the residue of said purchase money to Anna Blosser's administrator, in satisfaction of his judgment for 742 *\$1,055.66, with like interest on \$527.19 part thereof; and if any balance remained in his hand, that he should apply the same to the satisfaction of the other judgments mentioned in the commissioner's report in the order of their priority; and make report to the court. And thereupon Coffman obtained an appeal to this court.

Berlin, for the appellant.

Compton, for the appellee.

Staples J. delivered the opinion of the court.

It is very clear that the contract of 1st April 1861 was not a sale by Niswander to the appellant Coffman; it was not even a surrender by the former to the latter of any interest in the land, for he had none, legal or equitable. It was the mere substitution of a new contract for the old one, which by its own terms was ended, and which the parties did not choose to renew. It was a new sale to the same purchaser upon terms acceptable to each. The arrangement interfered with no liens or incumbrances created by the act of Niswander the purchaser, because none such were in existence. It did not divert the debtor's property from the just claims of creditors, because the vendor only retained the title as a security for what was justly due him, and for other debts of the purchaser for which he was bound as surety. These debts were as valid and meritorious as those due the appellees, and it was eminently just and proper to provide for their payment to the relief of the appellant as surety.

The main reliance of the appellees, however, is upon the failure to record the contract of April 1861. This view is based upon an entire misconception of the 743 *respective position of the parties:

There would be great force in it if Niswander the purchaser was asserting title against Coffman's creditors under a contract never recorded. But in this case it is the creditors of the purchaser who are attempting to enforce their liens against the property. They may stand in the pur-

chaser's shoes, and subject his interest, whatever it may be, to their debts; but they have no further claim.

The common law courts, indeed, do not regard the owner of an equitable title as having any estate whatever. They treat a contract to convey merely as a personal covenant, the breach of which is only to be compensated in damages. Courts of equity, on the other hand, consider the purchaser, though without the legal title, as the owner of the land; but this is only where he has fully complied with all the terms of the sale, and is entitled to call for the conveyance without any conditions imposed. This right is in subordination to the legal title. A court of equity will never compel the vendor to part with that title until the conditions are fully performed upon which he agreed to make the conveyance. If the purchaser himself cannot compel a conveyance, neither can his creditors. The failure to record the contract can therefore neither enlarge their remedies, nor diminish the rights of the vendor.

It is improper to say that parties may be misled by the apparent ownership of the purchaser. Persons who deal with one in possession of real estate are required to look to the records. If upon examination they find no evidence of title, they trust the occupant at their peril. Had the appellees searched the registry they would have learned that he had neither a legal nor an equitable title, and that Coffman appeared as the sole owner. Had they applied 744 to Coffman himself *they would have

ascertained the nature of Niswander's interest, and the terms upon which he was entitled to a conveyance. If indeed they have been misled, it is the result of their own negligence in failing to make such enquiry as would have placed them in possession of the necessary information.

Occupying no higher ground than their debtor, these creditors can only require the appellant to convey the property when his purchase money is paid and he is indemnified as surety for the debts specified in the article of agreement.

It is recited in the decree, that upon the admission of the parties, the appellant has already paid, since the institution of the suit, the sum of eleven hundred dollars, as the surety of Niswander. And as the property brought only that sum at the sale under the decree, the proceeds of sale in the appellant's hands, as purchaser at that sale, will be more than absorbed by the amount of his claims. It would seem, therefore, that a decree might at once be entered in his favor. Under the circumstances, however, it is deemed most advisable to reverse the decree of the Circuit court, and to remand the case for further proceedings in accordance with the views herein expressed.

The decree was as follows:

This day came again the parties by counsel; and the court having maturely considered the transcript of the record of the de-

cree aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the Circuit court erred in holding that the appellees are entitled to priority over the appellant in the distribution of the proceeds of the sale of the house and lot sold by the appellant to

John Niswander. It is therefore adjudged, ordered and decreed, that so much of the decree of 8th day of February 1875 as directs the payment of the balance of said proceeds to Abraham Blosser, Jr., administrator de bonis non of Anna Blosser deceased, after paying and satisfying the lien of the appellant, be reversed and annulled, and that the appellees do pay to the appellant his costs by him expended in the prosecution of his appeal aforesaid here. And this court, proceeding to render such decree as the said Circuit court ought to have rendered, is of opinion, that the appellant Coffman, out of the proceeds of sale of the house and lot aforesaid, is entitled in preference to the appellees, to be satisfied, first the amount of the purchase money due him, to-wit, the sum of \$554.10 cents, with interest on \$276, part thereof, from the 15th day of January 1875; second, he is entitled to be repaid whatever sum or sums he may have heretofore paid, or may hereafter pay, or may be justly liable for, as the surety of John Niswander upon the debts of the latter to Lucy Jane Williams and to Harvey Kyle, as set forth in the article of agreement of the 1st day of April 1861; and the residue of said proceeds, if any, to be paid to the administrator of Anna Blosser deceased. And the cause is remanded to the said Circuit court for further proceedings to be had therein in conformity with this decree: which is ordered to be certified to the said Circuit court of Rockingham county.

Decree reversed.

746 *Hess & al. v. Rader & Wife & als.

September Term, 1875, Staunton.

1. Commissioners—Sale under Decree of Court.—Will appointed a commissioner to sell land at public auction, but he is not to act under the decree until he gives bond, &c., faithfully to perform this and any future decrees made in the cause. He does not execute the bond, but he sells the land at private sale to H, which he reports to the court. The court confirms the sale, and directs him to collect the money and invest it; and H pays him the whole purchase money; only a part of which he invests, and dies insolvent. **Held:**

1. Judicial Sales—Confirmation.—The sale having been made by a commissioner under a decree of the court, and that sale having been confirmed by the court, it is a judicial sale.

2. Same—Same.—Whether made at public or private sale, it only becomes a sale at all, when confirmed by the court: that constitutes such sale a judicial sale.

3. Failure of Commissioner to Give Bond—Liability of Purchaser.—"Caveat Emptor."*—W not having given the bond as required, had no authority to receive the purchase money; and H is responsible to the party who is entitled to the proceeds, for so much as has not been properly invested by W, and cannot be made out of W's estate.

4. Statutory Regulations.—The statute, Code of W. ch. 174, § 1, is imperative, that a bond shall be given, and it is the duty of a purchaser at a judicial sale to see that the bond has been given before he pays his money to the commissioner, or he does it at his own risk.

In a cause pending in the Circuit court of Augusta county, in which the committee of Sarah Kratzer, a person of unsound mind, and Elizabeth Kratzer, were plaintiffs, and the said Sarah Kratzer, by her guardian *ad litem was defendant, a decree was made on the 18th of June 1859, by which E. T. H. Warren was appointed a special commissioner to sell a tract of land, in one-half of which Sarah Kratzer had a life estate, and Elizabeth Kratzer was entitled to one-half at once, and to the whole on the death of the said Sarah. And the decree provided, that the said special commissioner was not to act under said decree until he executes and files with the clerk of the court, bond, with security to be approved by said clerk, payable to the Commonwealth of Virginia, in the penalty of \$7,000, and conditioned faithfully to perform the requirements of this and any future order of this court in this cause. Warren does not appear to have executed the bond required by this decree; but after two failures to sell the land at public auction, he made a private sale of it to Andrew Hess and Martin Miller for \$3,000, payable at different periods up to March 1861. This contract was reported to the court; and on the 14th of June 1860 the court approved and confirmed the contract; and decreed that Warren should take from the purchasers their bonds, and collect the same as they fell due, and pay the costs of suit and sale, and the remainder loan out on good personal security, subject to the future order of the court; and report to the court at the next term.

All the purchase money of the land was paid by Hess and Miller to Warren, as soon as it was due, and he seems to have invested a part of it on personal security. He, however, having gone into the army early in the late war, and having been killed, made no report to the court; and no further steps were taken in the case until November 1864; when Hess and Miller filed their petition in the cause, stating the

*Failure of Commissioner to Give Bond—Liability of Purchaser.—See *Lloyd v. Erwin's Adm'r*, 29 Gratt. 598, and note; also, *Donahue v. Fackler*, 21 W. Va. 136; *Palmer v. Garland*, 81 Va. 450; *Marrow v. Brinkley*, 8 Va. 61; *McAllister v. Bodkin*, 76 Va. 815; *Boisseau v. Boisseau*, 79 Va. 79; *Lamar v. Hale*, 79 Va. 163; *Fletcher v. Hassler*, 29 W. Va. 406, 1 S. E. Rep. 581; *Thomson v. Brooke*, 76 Va. 100, all citing the principal case, but the last distinguishing from it.

payment of the purchase money, and asking that a conveyance of *the land might be made to them; and accordingly the court made a decree appointing a special commissioner to convey the land to them; which was done.

In June 1866 Elizabeth Kratzer filed her petition in the cause, in which she states the fact that Warren did not execute the bond required of him by the court, and that he did not leave sufficient estate to discharge his liability for the purchase money received by him; and she asks that the purchasers of the land, Hess and Miller, or the estate of Warren, may be compelled to make up any deficiency, after applying the sums to be received from the borrowers from Warren of a part of the purchase money.

This petitioner afterwards married Adam Rader, and they filed an amended and supplemental bill in the cause, in which they set up the same claim upon the estate of Warren and the purchasers of the land. This bill was answered by Hess and Miller; and accounts were directed and taken, from which it appeared that after applying the moneys lent out by Warren, and so much of his estate as was applicable to this claim, there remained due to the plaintiffs for the land the sum of \$2,331.07, with interest on \$1,762.14, from the 1st of October 1873, subject to a credit on the interest of \$34.50.

The cause came on to be heard on the 11th of April 1874, when the court annulled the deed that had been made to Hess and Miller, and decreed that they should pay to Rader, as receiver of the court, the said sum of \$2,331.07, with interest on \$1,762.14. And unless said payment was made in sixty days, commissioners named should proceed to sell the land on terms stated in the decree. From this decree Hess and Miller applied to a judge of this court for an appeal; which was allowed.

749 *Fultz, for the appellants.

Sheffey & Bumgardner, for the appellees.

Christian, J. delivered the opinion of the court.

The court is of opinion, that the sale made to Hess and Miller was a judicial sale, being made under a decree of the Circuit court of Augusta, entered in June 1859. It is true it was not made at public auction, but it was made by a party who had been appointed commissioner of the court; was reported to said court and confirmed as a sale made by the court. It was none the less a judicial sale because made privately, and not at public auction. In either event it only becomes a sale at all, when confirmed by the court. It is the confirmation by the court, and not the biddings or propositions to buy that constitutes such sale a judicial sale.

The court is further of opinion, that the payment of the purchase money to Warren, by Hess and Miller, was without authority, and that such payment does not discharge

them from obligation to pay to the appellees such part of the purchase money as has been lost in consequence of the insolvency of Warren.

Hess and Miller, being purchasers at a judicial sale, were bound to take notice of the decrees and other material proceedings, under authority of which the land was sold, and must be presumed to know the law which governs such sales. Now the decree directing a sale, and appointing a commissioner for that purpose, upon its face expressly provides, that "the said commissioner shall not act under this decree until he executes and files with the clerk of the court bond with security, to be

approved by said clerk, payable to the 750 *commonwealth of Virginia in the penalty of \$7,000, and conditioned faithfully to perform the requirements of this and every future order of the court in this cause." The very decree under which the appellants purchased, informed them that the party with whom they were dealing was not authorized to act until he had given the bond required. It was easy for them to have made the enquiry if the bond had been given; and it was their own culpable neglect in not making such enquiry: and if loss has occurred to them, it was in consequence of their own want of diligence and negligence in not seeing to it, that the party with whom they were dealing was clothed with proper authority.

But beside the express directions of the decree, the statute law, which every party acting under it must be presumed to know, informed these appellants that "no special commissioner appointed by a court shall receive money under a decree or order until he gives bond before the said court or its clerk." Before they paid any part of the purchase money they should have enquired if the bond required by law had been given. Otherwise they might be paying to one who had no authority to receive it. They might as well have paid it to a stranger. Both the decree under which they purchased, and the law governing such decrees, declared that the giving a bond was a condition precedent to any authority of the commissioner in the premises.

Much was said in the argument, about the hardship of requiring parties to pay their money twice in the same transaction, when it had been once paid to a commissioner of the court. It may be answered to this—1st, the hardship arises out of the negligence of the parties; and 2d, they have not paid it to a commissioner of the court authorized to receive it, because 751 the very *authority to receive the money is the execution of the bond required by law.

The provision of the statute referred to, Code 1873, ch. 174, § 1, is one most useful and salutary. It was intended as a shield of protection to all parties, whose property had to be disposed of, and proceeds administered by the court of chancery. These parties are most frequently persons under disability, such as infants, insane, and

others not *sui juris*. The legislature in its wisdom has determined not to leave the matter to the chance of a court's requiring a bond for the faithful performance of the duties of its commissioner, or to the chance of the appointment of an insolvent commissioner; but has declared as the law of every case, that "no special commissioner appointed by any court shall receive money under a decree or order until he gives bond before said court or its clerk."

No case of individual hardship should influence the courts in weakening in any degree the force of this wise and salutary law; but it ought to be constantly maintained and enforced, as one which affords wholesome and safe protection to all parties, whose property is sold under proceedings of a court of chancery. The court is therefore of opinion that there is no error in the decree of the said Circuit court, and that the same should be affirmed.

Decree affirmed.

752 *Green v. Phillips & als.

[21 Am. Rep. 323.]

September Term, 1875, Staunton.

Fixtures—Machinery.*—The true rule in determining what are fixtures in a manufacturing establishment, where the land and buildings are owned by the manufacturer is—That where the machinery is permanent in its character, and essential to the purposes for which the building is occupied, it must be regarded as realty, and passes with the building; and that whatever is essential to the purposes for which the building is used will be considered as a fixture, although the connection between them be such that it may be severed without physical or lasting injury to either.

This was an appeal from the decree of the Circuit court of Rockingham county, dissolving an injunction which had been granted to enjoin the sale under executions of *feri facias*, of certain machinery in the manufactory of the Harrisonburg Lumber Manufacturing and Merchandise Company of Rockingham. This bill was filed by John T. Green, who claimed as the beneficiary in a mortgage given by the company to secure a debt for \$1,045, for money loaned, and it was against a number of the creditors of the company, who had recovered judgments and sued out executions of *feri facias*, which were levied on some of the machinery in the company's factory. The case is fully stated by Judge Christian in his opinion.

Berlin and Harnsbarger, for the appellant.

There was no counsel for the appellees.

***Fixtures—Machinery.**—See on this subject, Shelton v. Picklin, 32 Gratt. 727, and *note*, collecting cases; also, Patton v. Moore, 16 W. Va. 437, and McFadden v. Crawford, 36 W. Va. 377, 15 S. E. Rep. 410, both citing the principal case with approval.

753 *Christian, J. delivered the opinion of the court.

The controversy in this case arises between a mortgagee and execution creditors as to certain machinery in the possession of the "Harrisonburg Lumber Manufacturing and Merchandise Company."

Certain persons having entered into a partnership to build and put into operation a sash, blind and door factory, in the town of Harrisonburg, obtained from the Circuit court of Rockingham a charter of incorporation.

This company purchased and paid for four-and-a-half acres of land in the town of Harrisonburg, and erected a building thereon, putting into said building a steam boiler and engine, and also planing, mortising and moulding machine, and entire machinery necessary to carry out the purposes of the company in the manufacture of sash, blinds, doors, flooring, and other building material.

The company seems not to have been prosperous in their operations, becoming indebted to numerous creditors, who obtained judgments against it at different times for various amounts.

On the 11th November 1869, the company, through its president and secretary, executed a mortgage upon its property, including land, buildings, machinery, fixtures, &c., to W. E. Green, to secure the payment of the sum of one thousand and forty-five dollars. The deed creating this mortgage, (which it appears was for the benefit of John T. Green, the appellant in this case,) was not recorded until December 8, 1870.

In the meantime numerous other creditors had obtained judgments against the company. Upon some of these judgments executions were issued and levied upon certain machinery—one being levied upon

754 what *is known as a shaper—another being levied upon the steam engine, which runs or drives the machinery—another upon a moulding machine and two planing machines.

Upon the levy of these executions the appellant, who is the beneficial mortgagee, filed his bill of injunction addressed to the judge of the Circuit court of Rockingham, in which, after setting forth the incorporation of the company, the objects and purposes for which it was incorporated, the fact that he was a large stockholder in the company, its indebtedness to him evidenced by the mortgage above noticed, and for other debts due him; the levy of the executions upon the machinery attached to the company's building—he alleges that said machinery is all attached to the building, and constitutes fixtures firmly fastened to the sale, and absolutely necessary to the purposes for which the factory was established; and if sold under said executions and removed, the factory would be stopped and rendered valueless. He claimed that the machinery thus levied on, was part and parcel of the realty, and not liable to levy and sale, separate and apart from the building and the land. He asserts that his

mortgage is prior and superior to the other judgments, and insists that if there is to be a sale, the whole property levied on, buildings and machinery shall be sold, and the different creditors paid according to the priorities of their respective claims. He also prays for an injunction to prevent the sale of the machinery levied upon, and to enjoin all proceedings under the said judgments until the various debts outstanding against the company, and the different liens and their priorities could be ascertained; and that the whole property might be sold and the creditors satisfied

755 according to *their respective rights. To this bill the judgment creditors were made parties.

An injunction was awarded according to the prayer of the bill, by the Hon. Robert H. Turner, judge of the 14th judicial circuit. Two of the defendants answered the bill—J. D. Price and R. Ball & Co. Price admitted the large indebtedness of the company, and insisted upon a settlement of its affairs; does not object to a sale of the property to pay its debts, but suggests a private sale, instead of a sale at public auction. He denies the validity of the mortgage set up by the plaintiff in his bill; alleging that the deed exhibited therewith was executed without authority from the company, and was informal, null and void; and that if the debt is due from the company, it must stand upon the same footing as other debts. This allegation, affirmative, in the answer, as to the execution of the deed without authority, is not sustained by any proof, and indeed seems to be abandoned; for when the commissioner reports the debt due to William E. Green as secured by a mortgage, the report is confirmed by the court, without exception.

The only other defendants who answer the bill, are R. Ball & Co. They allege, that they recovered a judgment against the Harrisonburg Lumber and Merchandise Company at the May term of said Circuit court, 1870, for the sum of \$460.09, with interest from 31st July 1863, and that on the 10th of June, 1870 they caused an execution of fieri facias to be issued from the clerk's office of said Circuit court, and caused the same to be levied upon sash moulding machines and two planers (Daniel's and Surface's), belonging to said company. They further allege that "they are advised and so answer, that the said property so levied on is, according to the laws of Virginia, not fixtures

756 *attached—a realty exempted from levy and sale under an execution of fieri facias—but goods and chattels subject to such levy and sale; and they therefore deny that it is part and parcel of the freehold, or real estate; and deny that the factory would be rendered valueless by the removal of the machinery levied on." They deny that there would be any necessary injury to the complainant, or any one else, by a separate sale of the property levied on by the sheriff to satisfy the execution on their judgment, and ask that the

injunction be dissolved. The other judgment creditors whose executions had been levied upon the steam engine, and the machine known as the shaper, did not answer the bill. A number of depositions were taken, and it was conclusively shown, both, that the different machines and the engines levied upon were firmly fastened to the building in which they were put up, and that they were absolutely essential to the purpose for which the building was erected as a factory of sash, blinds and doors, and other building material.

Two witnesses were examined by the defendants. One of them, Thomas W. Basford, in answer to the question, "How, if at all, are these machines (planers) attached to the realty?" says, "Only, so far as I know, by leather bands running on the band wheel. They ought not otherwise to be attached, any more than a table. Their weight holds them on the floor." On cross examination, in answer to the question, "Do you know whether the machines of which you speak are actually attached otherwise than by the bands of which you speak?" says, "I cannot tell; I don't think they ever were intended to be attached; they may have been nailed to the floor."

This witness also states, that these planing machines "are essentially necessary 757 to the company for the purpose *of manufacturing, planing lumber, &c., for which they organized."

The remaining witness for the defendants says, "there is a Daniel's planer, another planer, and a moulding machine in that factory. The planers are on a dirt floor, and are only attached to the realty by the bands which run on a wheel attached to a shaft, which shaft is attached to the building. The moulding machine is up-stairs, on a plank floor, and, I think, screwed to the floor. I think the machine stands upon a board, which extends beyond the feet, and it is my impression this machine is fastened to this board. This board is fastened to the floor. It is also attached by bands like the planers. I worked the last machine for some nine months, and I think it ought to be fastened to keep it steady."

William C. Price, a witness introduced by the plaintiffs, says, "From the organization of the company, I was foreman in the wood department of the concern. I assisted, in connection with Mr. Scott, a regular machinist, in placing in position all the machinery except the Daniel planer. * * * There are sills 10x12 inches imbedded in the ground floor of the building, and the planer is fastened down by screw bolts to those sills. It is also connected by belts to the line shaft of the mill. * * * The line shaft is attached to the driving wheel of the engine by a belt which drives the whole machinery."

In reply to a question as to how the steam engine (which was also levied on) is fastened, he says, "There are walls built, on which sills are laid, on which the engine is placed, and fastened by bolts passing through these sills, and secured thereto. A

sill then passes from the sills on this foundation to the sills in the main building, and thereto attached, lapped out, keyed 758 and *spiked." As to the Daniel planer he says: "It is placed on ties embedded in the ground floor, to which it is fastened by screws, and also by braces, which pass from the posts of the planer to the joists of the floor above, to which they are fastened by screws and nails."

With regard to the moulding machine or shaper, this witness says: "It is screwed fast to the second floor of the building, and also attached to the main line shaft or belt." He further says: "These machines could not be operated unless they were immovably fixed."

This witness expressed the opinion that these machines can be detached without serious injury to the building or to the machines.

The evidence of this witnesses is fully corroborated by three others, except that one of them says the surface planer could not be removed without tearing up the floor of the building. All the witnesses on both sides agree that all these machines, with the engine levied upon, are absolutely essential for carrying out the purposes for which the company was organized, and for which the land was purchased and the buildings were erected.

Upon this evidence, and upon the answers of the appellees, the case was heard upon a motion to dissolve the injunction; and the Circuit court, by its decree entered on the 4th day of May 1872, dissolved the injunction it had awarded restraining the sale of the machinery upon which the executions of fieri facias had been levied. It was from this decree that an appeal was allowed by one of the judges of this court.

The main question raised upon the pleadings and evidence in this cause, and which we now have to determine, is whether the machinery levied upon is of the nature of personalty, which can be taken under an execution of fieri facias, or whether they

are of such a character as the law de- 759 nominates fixtures attached to *and a part of the realty, which pass to the mortgagee. It is true in this case, the deed relied upon as creating the mortgage conveys the machinery as well as the land and buildings; but as that deed was not recorded until after the levy of the executions, it becomes important and necessary to determine whether these machines, engine, &c., are fixtures, which an execution of fieri facias cannot reach.

It is not necessary in this case to go into a consideration of the general doctrine of fixtures by which the nature and legal incidents of this property must be determined, or to notice the distinctions which arise with respect to this kind of property, as between landlord and tenant, vendor and vendee, and heir and executor; which distinctions are sometimes nice and difficult: but in this case it seems sufficient to lay down the following general rules as to this species of property: 1st. A fixture is an article which

was a chattel, but which, by being affixed to the realty, became accessory to it and parcel of it. 2d. The true criterion of a fixture is the united application of the following requisites: annexation to the realty or something appurtenant thereto; application to the use or purpose to which that part of the realty with which it is connected is appropriated; the intention of the party making the annexation to make a permanent accession to the freehold. It is true that many cases may be found which hold, that to give chattels the character of fixtures, and deprive them of that of personalty, they must be so firmly attached to the real estate that the connection cannot be severed without breaking or otherwise injuring the freehold. But the general course of modern decision, both in England and in the American courts, is against adopting, as the criterion for deter-

760 mining the character of chattels *as fixtures, whether the annexation to the realty be slight and temporary, or immovable and permanent, and in favor of declaring everything a fixture which has been attached to the realty with a view to the purposes for which it is held or employed, however slight or temporary the connection between them. See 3 Smith's Lead. Cases, seventh American edition, 202, and cases there cited.

In the present age, the marvelous increase of manufactures have called into existence numerous establishments, in which the building is the mere incident or accessory to the machinery or apparatus which it contains. As was said by Lord Mansfield, in *Lawton, ex'or, v. Salmon*, 1 H. Bl. 259: In cases of this description, to require substantial or even nominal annexation, would exclude things absolutely essential to the enjoyment or use of the freehold, and include others which are comparatively trivial and unimportant. Whatever is essential to the purposes for which the building is used will be considered as a fixture, although the connection between them is such that it may be severed without physical or lasting injury to either.

In accordance with this doctrine, it has been repeatedly held that a steam engine, erected for the purpose of furnishing the motive power of a manufactory, is to be regarded as a fixture, or, in other words, as a part of the manufactory itself; and there are numerous cases which hold that the machinery of a manufactory is to be regarded as part of the realty, whether it is attached to the body of the building, or merely connected with the other machinery by running bands or gearing, which may be thrown off at pleasure without injury to the freehold. See cases cited in note 2, Smith's Lead. Cases, supra.

761 *In cases where a building is erected for manufacturing purposes, the machinery gives character and value to the building, and not the building to the machinery. Each must lose its vitality and value by a separation from the other. The public good and individual interest

are therefore both subserved by regarding them as substantially the same, and keeping them together.

It would seem absurd and inconsistent to make the presence of a ligature, a belt, or screw, or nail, essential to the operation of a rule, which is founded upon considerations of a different nature.

In *Winslow v. Merchants Ins. Co.*, 4 Metc. R. 306, Chief Justice Shaw in an able and well considered opinion says: "The rule that objects must be actually and firmly affixed to the freehold to become realty, or otherwise to become personalty, is far from constituting a criterion. Doors, windows, blinds and shutters, capable of being removed, without the slightest damage to a house, and even though at the time of a conveyance or mortgage, actually detached, would be deemed a part of the house, and pass with it. And so we presume mirrors, wardrobes, and other heavy articles of furniture, though fastened to the walls by screws with considerable firmness must be regarded as chattels. The difficulty is somewhat increased when the question arises in respect to a mill or manufactory, where the parts are often so arranged and adapted, so ingeniously combined as to be occasionally connected or disengaged as the objects to be accomplished may require. In general terms, I think it may be said that when a building is erected as a mill or manufactory, and the water works or steam works relied upon to move it are erected at 762 the same time, and the machinery *to be driven by them are essential parts of it, adapted to be used with it and in it, they are parts of it, and pass with it by a conveyance, attachment or mortgage." See also 1 Ohio 511, and cases there cited.

With regard to factories and the machinery necessary to carry out the purposes for which they are erected, the cases on which the subject differ only in this—some hold that there must be an actual attachment, however slight and temporary, in order to change the character of the chattels from personalty into realty; while others hold that there need be no actual annexation, if the machinery is essential to the objects and purposes for which the building in which the machinery is placed was erected.

In this case these distinctions, often nice and difficult, need not be considered; for in the case before us both of these considerations concur. The machinery was all affixed more or less firmly to the building; and it is admitted on all hands, that the purpose and object of the incorporation of the company, and the purchase of the land and erection of the buildings was to constitute a factory for the manufacture of sash, blinds, and doors and other building material, and that the building was a mere incident or accessory to the machinery and engine necessary and essential to carry out the primary and leading purpose of the manufactory.

The true rule deduced from all the authorities seems to be this: That where the machinery is permanent in its character,

and essential to the purposes for which the building is occupied, it must be regarded as realty, and passes with the building; and that whatever is essential to the purpose for which the building is used will be considered as a fixture, although the 763 connection *between them is such that it may be severed without physical or lasting injury to either.

It follows, therefore, that the engine and other machinery in the factory of this company were not personalty, and could not be taken under the executions of *fieri facias* caused to be issued by the appellees, and that the decree of the Circuit court dissolving the injunction was clearly erroneous.

I am therefore of opinion, that the decree of the Circuit court dissolving the injunction be reversed, and the cause remanded for further proceedings to be had therein according to the principles herein declared.

The decree was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid, and the arguments of counsel, is of opinion, for reasons stated in writing, and filed with the record, that said decree was erroneous in dissolving the injunction awarded by the judge in vacation on the 21st day of January 1871; this court being of opinion that the motion to dissolve the injunction should have been overruled, and no sale allowed of the machinery levied on under the *fieri facias* sued out by the judgment creditors; but that said machinery could only be sold with the land and buildings to which they were annexed, and in which they were used; and that whenever it may be proper to decree a sale or lease of the land and buildings for the payment of the debts of the company, the machinery must be sold or leased with them. It is therefore decreed and ordered, that 764 the said decree of said *Circuit court, dissolving said injunction, be reversed and annulled, and that the appellant recover against the appellees his costs by him expended in the prosecution of his appeal here; and that the cause be remanded to said Circuit court for further proceedings to be had therein. All of which is ordered to be certified to the said Circuit court of Rockingham county.

Decree reversed.

765 *Fisher & Bro. v. March.

November Term, 1875, Richmond.

Absent, BOULDIN, J.

1. Practice — Executions. — F recovers judgment against M, on which execution is issued, but is stayed by order of plaintiffs' attorney. It appears, however, that some shares of stock were sold by the officer to satisfy the judgment; but there is no return of such sale by the officer. It appearing further, that the stocks did not sell for enough to discharge the judgment, F may have another

execution, or bring another action for the balance still due.

2. **Same—Appearance by Counsel—Judgment.**—In an attachment suit by F against M, there is no service of process on M, or order of publication; but there is a declaration in assumpsit with a special and general count, and counsel appears for him and pleads, and the cause is tried by a jury and judgment for F. The record affords at least *prima facie* evidence, that the counsel was authorized to appear for M, and defend the action.

3. **Same—Same—Same—Effect.**—In a suit by attachment, if the plaintiff recovers judgment against the defendant, without his appearance, such judgment will have no effect in another State, as a personal judgment against the debtor. But if the defendant appears and defends himself in person or by attorney, then the judgment will have the same force and effect everywhere, as a judgment recovered in an ordinary suit.

4. **Same—Judgments—Validity—Presumption.**—In such a case the record may show upon its face that the debtor did or did not appear; and if it does, the judgment will have effect accordingly. If the record does not show whether he did or did not appear, the presumption is in favor of the validity of the judgment.

5. **Same—Same—Effect in Foreign State.**—But in such case, if the record does not state that the debtor did or did not appear, or even if it states that he did appear, in a suit upon this judgment in another state, the defendant may by his pleading and evidence aver and prove the contrary.

766 *6. **Same—Foreign Attachments in Equity—Affidavit.**—In a foreign attachment in chancery, the affidavit required by the statute may be made by the agent of the plaintiff, and it may be made after the suit is brought.

7. **Same—Same—Same.**—If in such affidavit the affiant swears that the matters and things set forth in the bill are true, he adopts the bill as part of the affidavit.

8. **Same—Bill and Scire Facias—Variance.**—Where the bill sets out a judgment correctly, as stated in the record of the judgment, there is no variance because a *scire facias* issued against garnishees, recites it as of a different amount, or that the endorsement on the papers by the clerk, of the proceedings in the cause, of the date of the judgment, is different from that stated in the bill.

***Foreign Attachments in Equity—Affidavit.**—The affidavit, required by the statutes to authorize a creditor to sue out an attachment against the effects of an absent debtor, may be made either before or after the bill is filed. *O'Brien v. Stephens*, 11 Gratt. 612; *Moore v. Holt*, 10 Gratt. 284; *Cirode v. Buchanan*, 22 Gratt. 216; *Chapman v. R. R. Co.*, 26 W. Va. 320; *Barton's Ch. Pr.* (2d Ed.) 625.

"And although the attachment many have been improperly sued out, yet if there is an appearance and defence made to the claim, the court having properly taken jurisdiction may proceed to give relief according to the principles of equity." *Barton's Ch. Pr.* (2d Ed.) 625; *O'Brien v. Stephens*, 11 Gratt. 610; *Perry v. Ruby*, 81 Va. 328.

See also, on this subject, *Anderson v. Johnson*, 32 Gratt. 558, and *note*; 4 *Minor's Inst.* (2d Ed.) 566 *et seq.*; *Batchelder v. White*, 80 Va. 108; *Va. Code*, § 2964; *Wingo v. Purdy*, 87 Va. 472; *McAllister v. Guggenheimer*, 91 Va. 317; *Ruhl v. Rogers*, 29 W. Va. 779, 2 S. E. Rep. 798; 3 *Enc. Pl. & Pr.* 9.

9. **Same—Suit on Judgment—Conclusiveness.**—In a suit upon a judgment, the questions whether it was an illegal contract on which the judgment was recovered, or whether the agent who made the contract was authorized to make it, are concluded by the judgment.

This case was argued in Staunton, but was decided in Richmond.

In January 1871, Fisher & Brother, of Philadelphia, instituted a suit in equity, in the nature of a foreign attachment, in the Circuit court of Frederick, against Clement March, as their foreign debtor, and Richard Parker, the home defendant. In their bill they charge: That in the District court of Philadelphia they recovered a judgment against Clement March for \$3,558.61, with costs, the whole amounting to \$3,589.11, with interest on \$3,558.61 from the 15th of May 1866, on which judgment execution issued, but was not satisfied; and that the said debt remained unpaid. And they file a copy of the record of the case. They say, that March is not a resident of the state of Virginia, but has effects in the county of Frederick. That he has an equitable interest in some land lying near Winchester. They pray that this interest may be sold to satisfy their debt, and for general relief.

The affidavit made by the agent of the plaintiffs when the attachment was 767 sued out being insufficient, *another affidavit was made by the same agent on the 7th of April 1871. In this affidavit he swears that the matters and things set forth in said bill are true; that he verily believes the debt set forth in the bill of \$3,589.11, with interest on \$3,558.61 from the 15th of May 1866 till paid, against Clement March, is justly due from him to the complainants; and at the time of the institution of this suit they were entitled to recover the said sum of money and interest, and have now a present cause of action therefor; and that the said Clement March is not a resident of the state of Virginia.

Parker answered the bill, stating that March had purchased a tract of land in July 1870 of about sixty-three acres, near Winchester; that he paid the cash payment, and received a deed for the land; and to secure the deferred payments which would fall due on the 4th of July 1871 and 1872, March conveyed the land to the defendant, as trustee, &c.

The record filed with the bill is the record of an attachment in the District court of the county and city of Philadelphia, brought in April 1866 by Fisher & Brother, to attach Clement March, late of said county, by all and singular his goods and chattels, lands and tenements, &c. The writ was endorsed to summon Charles Chamblos & Co., and several other persons as garnishees. The declaration was in assumpsit, and claimed, in a special count, the amount of two checks drawn by the defendant upon the Girard Bank, one, bearing date the 10th day of March, for \$581.91, and the other, bearing date the 6th of April 1865,

for \$3,009.94. There were also the general counts in assumpsit.

There was no process served upon 768 March; but the ^{record} states, that the defendant Clement March pleads non assumpsit. J. C. Bullett, for the defendant.

At the May term 1866 a special jury was empanelled, and found a verdict for the plaintiffs for \$3,558.61; and the court rendered a judgment for that sum, with costs. Upon this judgment an execution was issued against the goods and chattels, lands and tenements of March, for \$3,589.11, which included the costs; but proceedings upon it were stayed by order of the plaintiff's attorney.

After the judgment had been rendered, Fisher & Brother sued out a scire facias against Charles Chamblos & Co. as garnishees, in which, after reciting the attachment against the goods, &c., of March, and that the officer had summoned said Charles Chamblos & Co. as garnishees, and the suit had been so proceeded in that the said Fisher & Brother ought to recover from the said Clement March the sum of thirteen hundred and eighty-two dollars and seventy-three cents, which had been adjudged to them in that court, for their damages and costs about their suit in that behalf expended, the officer was directed to summon said Charles Chamblos & Co. to show cause, if any they can, why the said Fisher & Brother should not have execution of the goods, &c., of March in their hands.

Chamblos & Co. appeared in answer to this summons; and, in answer to interrogations, stated that they had in their hands certificates representing 9,275 shares of stock of Pennsylvania Mining Company, of Michigan, which had been left with them by Clement March for safe keeping. A judgment was rendered against them for this stock; and the execution which was issued upon this judgment recited the judgment recovered by Fisher & Brother 769 against March as for \$3,589.11. This execution was also stayed by the plaintiffs' counsel.

There was also a scire facias against the Pennsylvania Mining Company, as garnishees, in which the judgment of Fisher & Brother was recited to be for \$1,382.72. It does not appear that anything was done upon this proceeding; but it appears in the record, that the sheriff sold the Pennsylvania Mining Company's stock which was in the hands of Charles Chamblos & Co., and that it was purchased by Fisher & Brother at the sum of \$742.

March did not answer the bill, but he put in four pleas; to which the plaintiffs demurred; and the court sustained the demurrer as to the first, second and fourth, and overruled it as to the third; and gave the defendant leave to amend the second plea. This second plea the defendant afterwards amended, and filed five additional pleas; to which the plaintiffs also demurred.

The cause came on to be heard on the 8th day of July 1872, when the court sustained

the demurrer to the pleas Nos. 1, 5, 6, 7 and 8; held that No. 4 was not sustained by the proofs; but that the amended plea No. 2 and Nos. 3 and 9 were good in law and sustained by the proofs. And it was therefore decreed, that the plaintiffs' bill be dismissed with costs; and that the attachment sued out against the land of March be dissolved. And Fisher & Brother thereupon applied to this court for an appeal; which was allowed.

The pleas, and the evidence in relation to the questions made by them, are sufficiently set out in the opinion of the court delivered by Judge Moncure.

770 *George Tucker Bispham and L. T. Moore, for the appellants.

Dandridge and Pendleton, for the appellee.

Moncure P. delivered the opinion of the court.

This is a foreign attachment suit in equity brought in the Circuit court of Frederick county, by Fisher & Brother of Philadelphia, against Clement March of New Hampshire, for the purpose of subjecting an interest which the said March has in a tract of land in the said county of Frederick, to the payment of a judgment obtained by the said Fisher & Brother against the said March in a foreign attachment suit in the District court for the city and county of Philadelphia, for the sum of \$3,558.61, with costs, amounting in the whole to \$3,589.11, with interest on the first named sum from the 15th day of May 1866. The said March filed no answer to the bill filed in the suit in Frederick Circuit court, but made his defence entirely by pleas, which he filed at different times during the pendency of the suit, to the number of nine in all. By the final decree, made in the suit on the 8th day of July 1872, six of these nine pleas were not sustained; the demurrers to five of them, to wit: Nos. 1, 5, 6, 7 and 8 having been sustained, and the other of the six, to wit: No. 4, not having been proved; but three of them, to wit, Nos. 2, 3 and 9, were held to be good in law, and sustained by the proofs; and therefore the bill was dismissed with costs, and the attachment sued out in the cause was dissolved.

The errors assigned by the appellants, in the decrees complained of by them, are founded on the action of the Circuit court upon the said three pleas, Nos. 2, 3 and 9, which we will now consider in their order.

771 *Plea No. 2 as Amended.

"And the defendant by way of amendment, by leave of the court, to the pleas formerly filed in this cause, says that the execution upon the judgment on which this suit is based, which appears by the record to have been issued, and under which certain property of said defendant was taken, was never returned to the office from which it was issued, and that until said execution shall have been returned to said office, the plaintiffs have no right to

sue upon said judgment; and further, that as, under the execution which was upon the judgment now sued on, it appears by the record that 9,275 shares of Pennsylvania Mining Company stock, belonging to the defendant, was sold by the sheriff, and the same delivered by him to the plaintiffs, the said seizure of said stock, and its delivery to the plaintiffs, must be taken as payment in full of said judgment and execution; and that therefore the plaintiffs have no right to sue; and further, that it appears by the record, that by virtue of the execution issued on the judgment now sued on, from the office in which the same was obtained, 9,275 shares of Pennsylvania Mining Company stock, belonging to defendant, was delivered to plaintiffs; and the acceptance of the said stock must be taken as satisfaction in full of said judgment and execution."

It appears by the record, that only two executions were issued upon the judgment aforesaid, one of them against the defendant in the attachment, Clement March, and the other against the garnishees, Charles Chamblos & Co.; and both of them were returned by the sheriff, with a stay of proceedings endorsed thereon by the plaintiffs' attorney. It does not appear from any return

772 turn of endorsement on either of *them, that either of them was levied on anything. But it otherwise appears from the record that they were in fact levied upon the shares of stock aforesaid, which were sold by the sheriff and purchased by the plaintiff at 8 cents per share, making the whole purchase money \$742, which operated as a credit to that extent, on account and in part of the executions; leaving the entire balance of the debt, interest and costs, for which the said executions were issued, still remaining unpaid. There can be no doubt but that for the recovery of the said balance the plaintiffs had a right to sue out other executions upon the said judgment, or to bring another action or suit thereon, notwithstanding the said levy and other proceedings had under the executions aforesaid.

It follows, as a necessary consequence from what has been said, that we are of opinion the Circuit court erred in holding the said plea No. 2, to be good in law and sustained by the proofs.

Plea No. 3 is in these words:

"And for further plea the defendant says, that it does not appear from the record in this cause, that any process for appearance was ever served upon defendant, in person or by order of publication; and although an appearance by attorney is entered of record, such appearance was unauthorized by the defendant."

It is true that it does not appear from the record in the said cause, that any process for appearance was ever served upon the defendant, in person or by order of publication. But is it true that the appearance by attorney which was entered of record, was unauthorized by the defendant?

We think not. The record shows that a

declaration in assumpsit, embracing several counts, both special and the common, was filed in the case; there was a

773 *rule to plead; in answer to which, the defendant appeared by J. C. Bullett his attorney, and filed a plea of non-assumpsit; the issue upon which was tried by a special jury, which rendered a verdict for the plaintiffs' claim; on which verdict a judgment was accordingly entered. The record thus shows that the defendant did appear by attorney in the case: and if the record be not conclusive upon that question in this case, it certainly affords very strong prima facie evidence of the fact, and ought to prevail, in the absence of stronger evidence to the contrary de hors the record. So far from there being such stronger evidence to the contrary, we think the evidence de hors the record tends strongly to support, rather than to contradict, the record in this respect. Mr. Bullett, in his deposition taken in the case, says: "I am a member of the bar, and have been for twenty years. I represented Clement March in a judgment obtained by Fisher & Brother against him. I cannot state from my present recollection, at what time I received authority from Mr. March to appear in that case. I had been the counsel of Mr. March prior to that time, and I may have appeared in the case without previous authority; though I suppose I had authority from him. I have no recollection on the subject. (His testimony was given more than six years after the transaction occurred.) It is not very likely that I would have appeared for him without authority." Witness wrote to Mr. March on the day on which the judgment was obtained, and said in the letter: "Judgment was obtained this morning against you for \$3,558.61; the debt being proved by your clerk Mr. Hunter. I understand there is more than sufficient in the hands of the garnishees to pay the judgment. I think that you had better send an order to have any amount that is in

774 their hands paid *over to me, after the judgment is satisfied." Witness further says: "I have no recollection whether I ever received any letter from Mr. March in regard to it or not. Mr. March never made any objection to my appearing for him, to my recollection. I have never seen him since."

Mr. Bullett's deposition was afterwards taken again; on which occasion a paper in the case of Fisher v. March and Chamblos, &c. garnishees, taken from the records of the District court aforesaid, and which had been mislaid at the previous taking of his deposition, was shown to the witness, when he testified as follows: "The paper shown me is a copy of an order, signed by Mr. March upon Charles Chamblos, with a receipt of Fisher & Brother attached, and was filed by me, according to my best recollection now, under instructions which I received at the time, I suppose, from Mr. Chamblos. I was at the time representing Mr. March as his attorney in this case. I recollect that I was frequently importuned

by the Messrs. Fisher or their counsel, I think by both, to direct Mr. Chamblor to hand over the stock referred to. This I refused to do without Mr. March's authority. Finally the authority was produced, in the shape of the order dated November 13, 1866, a copy of which is set out in the paper now shown me; and I then drew the receipt, or had it drawn by a clerk in my office, which is set out in the paper before me, and endorsed upon that paper the words, 'Filed by consent of counsel for plaintiff, defendant and garnishees,' and signed it as counsel for the defendant and garnishees. I had no doubt at that time, as to my authority to act as attorney for Mr. March in signing that endorsement and making that arrangement. The original order, obtained, as I believe, by Mr. Fisher from Mr. March, was submitted to me before

775 I drew the receipt or filed the papers.

I certainly had no doubt of my right to act as Mr. March's counsel, or I would not have acted."

This is certainly very strong testimony to show that Mr. Bullett's appearance as counsel in the case was authorized by Mr. March. Now what testimony is there in the case tending in any way to show the contrary? Only the testimony of Mr. March himself, who certainly does not say that Mr. Bullett was not his counsel in the case. The most that he says is, that he had no recollection of having ever authorized Mr. Bullett to appear and defend any suit brought against him by Fisher and Brother in the year 1865 or 1866, in Philadelphia; and that he had no recollection of having ever received any letter from Mr. Bullett, advising him that any such suit had been brought against him. But he had just said, in qualification of his answer in regard to another part of the same transaction, "I am speaking from recollection of six years' standing, and do not know that I am strictly accurate." And in answer to a question, "Who was your counsel in Philadelphia before you left there?" he said, "John C. Bullett." This testimony of the defendant himself is wholly insufficient to disprove a fact which is so strongly sustained by the evidence on the other side.

We therefore think that the Circuit court erred in holding that plea No. 3 is good in law and sustained by the proofs.

Plea No. 9 is in these words:

"That the judgment now sued on was obtained under foreign attachment proceedings, by virtue of the location within the jurisdiction of the court rendering the said judgment of certain effects of said defendant, to protect which said effects,

776 John C. Bullett, "an attorney practicing in said court, appeared; and that the said judgment was obtained by virtue of and against those effects only; and that therefore no action thereupon can be entered in this court against said defendant."

The ground of the defence involved in this plea is, that the proceeding in Philadelphia was purely an attachment proceed-

ing, having for its object the subjection of certain specific effects of the defendant to the payment of the plaintiffs' claim; that the appearance of the defendant's attorney had reference only to the protection of the said effects, and not to the prevention of a judgment against the defendant personally, for the recovery of a debt, except as a means of protecting the said effects; that a person, whose effects are attached in a state in which he does not reside, has a right to appear for the purpose of defending his effects, without subjecting himself to a personal judgment which may be enforced against him in another state; and that therefore the judgment recovered against the defendant personally, in the attachment proceeding in Philadelphia in this case, cannot be enforced against him in this state under the constitution of the United States, article 4, section 1, and the act of May 26th, 1790, passed in pursuance thereof.

We think that no sufficient authority can be found to sustain this ground of defence, and that it is in conflict with the principle of all or nearly all of the cases on the subject. There may possibly be in some of the states attachment proceedings of a peculiar kind, having reference only to the property and not to the person of a debtor. These proceedings, if there be any such, are altogether in rem, and there is in them no personal judgment against the defendant. And though he may appear to defend his property against a judgment, such

777 "appearance will not make the judgment which may be rendered against him in such proceeding a judgment, which may be enforced against him personally, even in the state in which it is rendered, much less in any other state.

But such is not the general nature of attachment proceedings. On the contrary, their general and almost universal nature is two-fold—first, to obtain a judgment by a creditor against a debtor for the amount of the debt claimed; and, secondly, to subject by attachment certain property or credits of the debtor to the payment of such debt. The first enquiry in such cases always is, whether there be in fact any such debt, and what is its amount; and that enquiry is governed by the same principles as if the suit were an ordinary one by a creditor against a debtor. If the debtor will not appear and defend himself, in person or by attorney, the creditor will go on to establish his claim in the mode prescribed by law; and if he does so, will obtain a judgment, which will have such effect in the state in which it is rendered as may be given to it by the law of that state; but it will have no effect in another state as a personal judgment against the debtor. The debtor however may appear and defend himself in person or by attorney; and if he does, then the case is tried, as if the creditor and debtor were the only parties to the suit, and as if the recovery of a personal judgment for the debt were the only object of the suit; and the judgment which may be recovered in such a proceeding will have

the same force and effect everywhere as a judgment recovered in an ordinary suit between creditor and debtor. The record may show upon its face whether the debtor did or did not appear, and if it does, then the judgment will have effect accordingly.

But it may not show upon its face
778 *whether the debtor did or did not appear. In that case the presumption would be in favor of the validity of the judgment. But the defendant would have a right in such case, by his pleading and evidence, to aver and prove the contrary; and he would have such right, even though the record should state upon its face that the defendant did appear. Of course we are now speaking of the effect of the judgment elsewhere than in the state in which it is rendered. Its effect there depends upon the law of that state.

In support of the foregoing positions we need only refer to 6 Rob. Pr. 434-439; 2 Smith's Leading Ca. 827, 841, 6th Am. ed.; 2 Am. Lead. Ca., *Mills v. Duryee*; and the cases cited in those works. See also *Alldrich v. Kinney*, 4 Conn. R. 380; *Thompson v. Whitman*, 18 Wall. U. S. R. 457; *Knowles v. The Gaslight and Coke Co.*, 19 Id. 58; and *Hill v. Mendenhall*, 21 Id. 453; and the authorities referred to in those cases.

In the case under consideration, there can be no doubt but that the attachment proceeding of *Fisher & Brother versus Clement March*, in the District court for the city and county of Philadelphia, was of that general nature which made it proper to ascertain in the first place, whether the debt claimed by *Fisher & Brother* to be due them by *March*, was in fact due. The attachment was to appear and answer. There was a declaration in assumpsit filed, containing all the usual counts. There was a rule upon the defendant to plead. He accordingly appeared by attorney and plead non assumpsit. And there was a verdict and judgment for the plaintiff, all in the form usual in an ordinary action of assumpsit for the recovery of a debt. The proceeding was had in the city of Philadelphia, where the cause of action arose; where the defendant had long resided, and had

779 transacted business to an *immense amount—which place he left less than a month before the proceeding was commenced, with the declared intention of soon returning to his former residence and place of business. It does not appear that he had any estate or effects elsewhere. It was therefore manifestly his interest to appear and defend himself in the said proceeding, if he had any such defence to make, and the presumption is he could better make it in Philadelphia, where the transaction occurred, than anywhere else. That such is the nature and effect of proceedings under the foreign attachment law of Pennsylvania, see 1 *Brightley's Pendor's Digest*, page 716, title "Foreign Attachment," page 721, § 28. It is there expressly declared to be lawful for any defendant in an attachment, at any time before judgment obtained in

the attachment, to cause an appearance to be entered for him, and to make defence to the action; in which case the action shall proceed as if commenced by a summons; but the attachment will continue to bind the estate and effects attached; and if judgment be rendered for the plaintiff, such judgment will have the like force and effect as in case of an action commenced by a summons." See also *Blyler v. Kline*, 64 Penn. St. R. 130.

We are therefore of opinion, that the Circuit court erred in holding that *Plea No. 9* is good in law and sustained by the proofs. And this disposes of all the errors assigned by the appellants.

But the appellee assigns errors in the rulings of the court, which it will be necessary to notice. They need however only to be noticed briefly.

In regard to the credit claimed for \$742, the proceeds of the sale of the Pennsylvania Mining stock, the Circuit court **780** made no decree upon that subject. *Of course the defendant is entitled to that credit, and will receive it.

In regard to the affidavit to the bill, if it be not now too late to object to it, we think it is substantially sufficient, if it be not in strict and literal compliance with the law. We speak especially in reference to the second affidavit, which was made on the 7th day of April 1871. It is no valid ground of objection to that affidavit that it was made after the institution of the suit, nor that it was made by the agent of the plaintiffs instead of the plaintiffs themselves. The affidavit states that "the matters and things set forth in the bill are true," and thus adopts it as part of the affidavit.

In regard to the pleas, the demurrers to which were sustained by the court, or such of them as to the action of the court upon which the appellee complains. The first of these is the fourth in the series of the pleas, to wit: the plea of no such record. Two grounds seem to be relied on in support of this plea—1st, that the amount of the judgment is differently stated in different parts of the record, whereas the bill in this case states but one of these amounts; and 2dly, that the date of the judgment is differently stated in different parts of the record; in one being stated as in May 1866, and the other as October 21st, 1870. In regard to the first of these grounds, the amount of the judgment is \$3,558.61, the amount claimed in the bill; and there is no variance in the statement of the amount anywhere in the record of the judgment; but the special counts in the declaration, and the verdict and judgment, all correspond in that respect. There is an unaccountable variance from that amount in the writs of scire facias against the garnishees; but even that is corrected in the writ of fieri facias against the

781 *garnishees, which is for the true amount of the judgment, as is also the fieri facias on the original judgment. The record sued on is the record of the original judgment, in which there is no

variance. The apparent variance in the scire facias against the garnishees is immaterial in this case. In regard to the second of these grounds, to wit: the different dates of the judgment, the true date, according to the record, is May 15th, 1866, the date of the verdict. The only apparent variance from that in the record, if it can be said to be in the record, is in the index or minutes of the proceedings, from which it would appear that the date of the judgment was October 21, 1870. But this variance is immaterial in this case, and we must regard the true date as that which is mentioned in the body of the record, to wit: May 15th, 1866.

The second of the pleas in regard to the action of the Circuit court on which the appellee complains is the seventh of the series; and, indeed, the eighth involves the same matter of defence, to wit: that the debt is founded on a stock-jobbing and gambling transaction, which is contrary to the law of Pennsylvania, and to public policy here as well as there, and fatal to the claim of the appellants, notwithstanding the judgment recovered by them in the attachment proceeding in Philadelphia. In regard to this ground of defence, the counsel for the appellants in their brief say, "that in the court below the point was made, that the contract upon which the judgment was obtained was a 'time' contract, and that it was prohibited by the laws of Pennsylvania. The point is not perhaps of importance in this court; but it may not be improper to note that the act of assembly prohibiting such contracts was repealed by the act of April 17th, 1862. (Supplement to Pendon's Digest, p. 1,266.) Such contracts are now *constantly enforced by the courts in Pennsylvania. See *Smith v. Bonvier*, 20 P. F. Smith 325, 70 Pa. St. R. 325." On the other hand, the counsel for the appellee in their brief insist that "there is no repeal of those laws which applies to this case." However that may be, we think it is a sufficient answer to this ground of defence, to say that there is no evidence in the record of the law of Pennsylvania on this subject; and, even if there was, and it was as contended for by the counsel for the appellee, the question would be concluded by the judgment rendered in the attachment case in Pennsylvania, to the judgment of the court, in which case it properly belonged, to decide the question, if it had, as it might have been raised therein.

In regard to the question raised by the sixth plea, as to the authority of Hunter to sign the checks, that question is, of course, concluded by the judgment obtained for the amount of these checks.

Having noticed, as far as seems to be necessary, the errors assigned in the decree of the Circuit court, whether on the side of the appellants or appellee, we are of opinion, that the said court erred in holding that pleas No. 2, 3 and 9 are good in law and sustained by the proofs; but did not err in not sustaining any of the other pleas; and

that the said decree ought to be reversed and annulled so far as it is in conflict with the foregoing opinion, and affirmed so far as it is consistent therewith, with costs to the appellants; and the cause remanded to the said Circuit court for further proceedings to be had therein to a final decree in conformity with the foregoing opinion.

The decree was as follows:

This case, which is pending in this court at its place of session in Staunton, having been heard but not determined
 783 *there, this day came the parties here by their counsel, and the court having maturely considered the transcript of the record of the decrees aforesaid, and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the appellants, Fisher & Brother, are entitled in this suit to a decree against the appellee, Clement March, for the amount of their claim in the bill mentioned, to wit: \$3,589.11, with interest on \$3,558.61, from the 15th day of May 1866; being the amount of a judgment recovered by said Fisher & Brother against said March in a foreign attachment suit in the District court of the city and county of Philadelphia, of which suit a copy of the record is filed with said bill; subject however to a credit for \$742, as of the 17th day of July 1866, being the amount made on that day by a sale of certain stock under execution issued on said judgment; and are further entitled in this suit to a decree subjecting to the payment of said claim, or the balance due thereon after the application of said credit, any estate, debts or effects of the said March in the said county of Frederick; and that the said Circuit court erred in holding that pleas No. 2, 3 and 9 are good in law and sustained by the proofs; and in dissolving the attachment sued out in this cause against the land, &c., of the defendant March; in directing that the sum of one hundred and twenty-nine dollars and seventy-one cents (with its accrued interest), in the hands of the special receiver in the case, be by him paid to A. R. Pendleton, of counsel for said March; in dismissing the plaintiff's bill; and in decreeing that the said defendant recover of the plaintiff his costs in that behalf expended.

Therefore it is decreed and ordered, that so much of the decrees appealed from
 784 as is in conflict with the *foregoing opinion be reversed and annulled, and the residue thereof affirmed; and that the said March pay to the said Fisher & Brother their costs by them expended in the prosecution of their appeal aforesaid here. And it is further decreed and ordered that this cause be remanded to the said Circuit court of Frederick county, to be proceeded in to a final decree in conformity with the foregoing opinion.

And it is ordered that this decree be entered on the order book here, and be forthwith certified to the clerk of the Supreme Court of Appeals at Staunton, where the case is pending, who shall enter

the same on his order book, and forthwith certify it to the clerk of the said Circuit court of Frederick county.

Decree reversed.

785 *McVeigh & al. v. The Bank of the Old Dominion.

November Term, 1875, Richmond.

I. Negotiable Notes—Effect of War—Notice.—M owned a large real estate in Alexandria, and was president of the Bank of the Old Dominion located in that city. In 1861 M endorsed seven notes made in March and on to June by J, which were discounted at the bank. Before any of these notes fell due the Union forces took possession of Alexandria, and held it till the end of the war. A few days after they came M left the city, and joined his family, who had left some time before; he leaving at his dwelling a white servant, and having had his place of business at the bank. He remained at Richmond, within the Confederate lines, until the end of the war. Two of the notes had been made and discounted for M's accommodation, and he received the proceeds. All the notes were protested for non-payment as they fell due, and notice of dishonor was left at his house, with the white servant left by M there, except one, which was left at his place of business at the bank; and no other notice was ever given him. **HOLD:**

1. **Same—Same—Notice to Endorsers.**—The notice was not sufficient to bind M as endorser on the notes.
2. **Same—Same—Same—Accommodation.**—On the notes made and discounted for his accommodation, M was liable without notice.
3. **Same—Same—Same—Same.**—Though the declaration is special upon the note, and avers demand and notice to the endorser, the plaintiff may prove on the trial that the note was made and discounted for the accommodation of the endorser, and that he received the proceeds, and recover in the action, though no notice, or an insufficient notice, was given to the endorser.
4. **Statutory Application.**—The statute directing how notices may be given, does not apply to a notice of the dishonor of negotiable paper. Code of 1860, ch. 167, § 1, of 1873, ch. 163, § 1.
5. **Same—Payment in Confederate Money.**—The fact that the makers of these notes paid to the branch of the bank at P, in Confederate money, the full amount of the *notes, under the act of assembly authorizing it, the branch not having the notes at the time, does not constitute a payment; though after the war the bank took possession of all the assets of said branch, including the funds so paid in.

786 **II. Same—Effect of War—Validity.**—A note made in June 1861, by a person resident within the Confed-

erate lines, and discounted by a bank located within the Union lines, is illegal and void; unless it was given in renewal of a note made before the war, and by an agent acting under authority conferred before the war.

III. Same—Same—Liability of Joint-Maker and Endorser.—In an action against J & E, partners, as makers, and M as endorser of a negotiable note, the process is served on J and M, but is again and again returned as to E, "not found," or "no inhabitant," and the action is discontinued by the plaintiff as to E.—E is not thereby released from liability on the note, and therefore M, the endorser, is not released; and the plaintiff may have judgment against J and M.

IV. Same—Place of Payment.—J & E, partners, living in the city of Alexandria, made a note dated at Alexandria, and payable at the Bank of the Old Dominion, which is located in the said city, which is endorsed by M, the president of the bank, and discounted by said bank. **HOLD:** That it is not necessary to state on the face of the note that it is payable in the State of Virginia, to bring the note within the statute; Code of 1860, ch. 144, § 7, of 1873, ch. 141, § 7; but it may be shown by evidence that the place of payment is within the state.

The facts in this case are set out in the opinions of Moncure P. and Anderson J. There was a judgment in the court below in favor of the Bank of the Old Dominion; and the defendants applied to this court for a supersedeas, which was awarded.

Wattles, Jno. Howard and Beach for the appellants.

Claughton for the appellee.

Moncure P. This is an action of debt brought by the Bank of the Old Dominion against James H. McVeigh and Edgar McVeigh, late copartners trading under the firm name of J. H. McVeigh & Son, and William N. McVeigh, as drawers and
787 endorser of *seven protested negotiable notes, amounting together to the principal sum of sixteen thousand five hundred dollars. The action was brought on the 18th day of August 1870, in the Corporation court of the city of Alexandria. Process was executed and rules taken regularly, against the defendants James H. McVeigh and William N. McVeigh; but not against Edgar McVeigh, as to whom the process was several times returned "not found," and "no inhabitant;" and after the cause had been for some time continued at rules for service as to him, it appears that on the first Monday in March 1871, on the motion of the plaintiff, an order was made to abate the suit as to the said Edgar McVeigh; though it appears from the record that on a previous day, to wit: on the 10th day of October 1870, the cause was docketed as to all the defendants, including the said Edgar McVeigh. The defendants pleaded nil debet and payment, on which issues were joined, which came on to be tried in July 1871, when the jury found a verdict for the plaintiff, in the sum of \$12,323.55, with interest from January 1, 1866, on which verdict a judgment was thereupon rendered

***Negotiable Notes—Effect of War—Notice.**—See Bank of Old Dominion v. McVeigh, 29 Gratt. 546, and note; Farmers' Bank of Va. v. Gunnell, 26 Gratt. 181, and note; McVeigh v. Allen, 29 Gratt. 588, and note; also, Alexandria Sav. Ins. v. McVeigh, 84 Va. 41; Corbin v. Bank, 87 Va. 666; Bank v. McVeigh, 82 Gratt. 590; Slaughters v. Farland, 81 Gratt. 184; Levy v. Peabody Ins. Co., 10 W. Va. 566; Smith v. Lawson, 18 W. Va. 240.

by the court; to which judgment, on the petition of the defendants, a writ of error was awarded by this court: and that is the case we now have under consideration.

The errors complained of, if they exist, appear in two bills of exceptions taken by the defendants to certain rulings of the court in the cause. The first presents a single question. The second presents all the other, and the most important, questions arising in the cause, and will be at once considered.

The second bill of exceptions of the defendants states, that on the trial of the cause, the plaintiff, to maintain the issues on its part, gave in evidence to the jury, seven promissory negotiable notes, 788 drawn by *James H. McVeigh & Son, and endorsed by William N. McVeigh, which notes are set out, in *haec verba*, in the bill of exceptions, also the notarial certificate of protest of the said notes, which certificates are also set out in *haec verba*, in said bill. The plaintiff then proved that James H. McVeigh and Wm. N. McVeigh were, on the 30th day of May 1861, residents of the city of Alexandria; that after the Federal forces occupied the city of Alexandria, on the 24th day of May 1861, the said James H. and Wm. N. McVeigh, on the 30th of May 1861, left their residences in the city of Alexandria, and went in the Confederate lines, where their families were on a visit; that said Wm. N. McVeigh left at his residence in Alexandria, a white servant and all his furniture, and left also his books and papers at the banking-house of the Bank of the Old Dominion, of which bank he was president; that Wm. N. McVeigh did not resign his office; did not formally notify the directors of his intended absence; that the officers of said bank, however, knew that said Wm. N. McVeigh had left Alexandria, and whilst within the Confederate lines, he was, in 1862, re-elected president of said bank; that Robert Crupper was the confidential clerk and attorney of James H. McVeigh & Son, and that the power from them to said Crupper, authorizing him to draw and endorse notes and checks in their absence, was deposited in the Bank of the Old Dominion; that Wm. N. McVeigh knew of Crupper's agency; that he had been, prior to the war, in the habit of intrusting his signature in blank with James H. McVeigh & Son, and that he had left said blanks with said McVeigh & Son, and that the same were left by McVeigh & Son in the hands of Robert Crupper when McVeigh & Son left Alexandria; that Wm.

N. McVeigh, just before leaving Alexandria in May 1861, *requested Robert 789 Crupper to take care of his property, meaning thereby his real estate; that in June 1863, the said Robert Crupper, claiming to act as the agent of Wm. N. McVeigh, with the bank book of Wm. N. McVeigh in his possession, went to W. H. Lambert, the cashier of the Bank of the Old Dominion, and demanded of him four notes of Wm. Cogan, each for \$500, which had been, prior to the war, deposited with said bank by W.

N. McVeigh for collection, and entered on his said bank book; that said plaintiff had previously refused to accept payment of said notes from Wm. Cogan, in Virginia currency, because he was not authorized by Mr. McVeigh to do so, and because a rule of the bank prohibited receiving such money in payment of notes deposited for collection, but told said Crupper in the presence of said Cogan, that plaintiff would receive said money, in payment of debts due the plaintiff by Mr. McVeigh; that said Lambert then delivered the notes given by Cogan to said Crupper, taking his receipt therefor signed by him as agent, a copy of which is inserted in the bill of exceptions; that said Crupper collected said notes of Cogan in Virginia currency, and the plaintiff accepted the same of Crupper, and applied the amount, to-wit: \$2,379, by direction of said Crupper, to the note sued on, bearing date the 17th day of June 1861; that the firm of C. A. Baldwin & Co., composed of C. A. Baldwin & W. N. McVeigh, drew a check in the city of Richmond on the 29th day of January 1863, on the plaintiff in favor of Maria L. Baldwin, the wife of C. A. Baldwin, which said check is in the words and figures following to-wit:

January 29th, 1863.

Cashier Bank Old Dominion, pay to the order of Mrs. Maria L. Baldwin any 790 money she may call for, *taking receipt for the same on the back of this check, & charge same to our account.

C. A. Baldwin & Co.

Endorsed—Received June 10th 1863 of the Bank of the Old Dominion, eighteen hundred and fourteen 95-100 dollars on account of the within check.

Maria L. Baldwin;

that said check was sent through the hostile lines, and Mrs. Baldwin handed it to Robert Crupper, who presented it to W. H. Lambert, the cashier; that Mrs. Baldwin was requested to put her name on the check and did so, but whether before or after the receipt was written thereon did not satisfactorily appear; that said Lambert acting under the direction of Crupper, claiming to be the agent of Wm. N. McVeigh, directed the balance due C. A. Baldwin & Co. from the plaintiff, to wit: \$1,814.95, to be applied to the credit of the note sued on, dated the 17th of May 1861; that said Crupper at the time had in his possession the bank book of C. A. Baldwin & Co. and the said check, and that said Lambert thereupon made the entries in the bank book in the following words and figures, to wit: "'63, June 10. By check M. L. Baldwin, \$1,814.95;" that the two notes dated 17th May and 17th June 1861 were discounted for the use and accommodation of Wm. N. McVeigh by the plaintiff, and the proceeds thereof were received to his own use; that Mrs. Baldwin never received one cent on said check; that she did not in person direct Lambert to apply the balance due C. A. Baldwin & Co. to the payment of the note of J. H. McVeigh & Son

endorsed by Wm. N. McVeigh; that upon her return to Richmond she stated that she did not know what was done with the money

—she had put her name on the back
 791 *of the check, but had received no money; that said check was cancelled, and the check and bank book returned to Robert Crupper; that Mrs. Baldwin whilst in Alexandria stopped several months with Robert Crupper as his guest, who on her return to Richmond in July 1863, accompanied her to Annapolis; that the receipt on said check above the signature of Maria L. Baldwin, was made by, and is in the handwriting of Wm. H. Lambert; that said Crupper also collected of E. E. Hough \$200 rent due from him as tenant of Wm. N. McVeigh, and took also from said Hough a note for \$300, which was after the close of the war, sent by James H. McVeigh to Wm. N. McVeigh; that Wm. N. McVeigh was the owner of a large real estate in the city of Alexandria which was confiscated during the war, and said Crupper was apprehensive that the balance due C. A. Baldwin & Co. and the Cogan notes might also be confiscated; that Wm. H. Lambert stated that Robert Crupper acted generally as the agent of Wm. N. McVeigh, and assigned, as the acts of agency within his knowledge, the action of Crupper with the plaintiff in the matter of the Cogan notes, the check of C. A. Baldwin & Co., the payment of the notes endorsed by Wm. N. McVeigh, the possession of Wm. N. McVeigh's bank book, and his renting out one of his houses.

The defendants then proved that after the occupation of Alexandria in 1861 they left their homes in Alexandria as aforesaid, and that C. A. Baldwin & Co., whilst residing in Richmond, gave the check above described to Mrs. Baldwin, to be carried through the lines, or sent it to her through the hostile lines; that after the close of the war, Wm. N. McVeigh wrote to the officers of the Bank of the Old Dominion for his papers and books, which had been
 792 left at the bank *when he left his home in 1861. Sometime in 1865 the papers, including the bank book and check, were forwarded to him in Richmond, but by whom it was not known or proved. There was also returned the receipt of George H. Smoot, president pro tem. of the bank, in the following words and figures, to wit: "Received, Alexandria, June 10th, 1863, of J. H. McVeigh & Son, per Maria L. Baldwin, \$1,814.95, which sum is endorsed as a part payment of J. H. McVeigh & Son's note for \$2,500, dated May 17, 1861, and endorsed by Wm. N. McVeigh, due August 15th-18th, 1861, discounted and due to Bank of Old Dominion, and lying over under protest, as will appear per bank book. Geo. H. Smoot, president pro tem.;" that on the 30th day of May 1864, James H. McVeigh & Son paid to the branch bank of the Bank of the Old Dominion at Pearisburg the full amount of the notes sued upon in Confederate currency, which was received by said branch; that, at that date, the average value of one dollar in gold, compared with

Confederate notes, was from eighteen to twenty-one; that the said C. A. Baldwin & Co., upon the receipt of the said papers and book from the Bank of the Old Dominion, on the 12th of February 1866, addressed a communication to the bank in the following words and figures, to wit:

Richmond, Va., Feb. 12, 1866.

Mr. Geo. H. Smoot, President Bank of the Old Dominion, Alexandria, Va.:

Sir,—We hold statement of our account with Bank of the Old Dominion, showing a balance due to us of \$1,815.05. No part of that fund has ever been drawn with our authority, and we hold the bank responsible for the same. The amount pretended
 793 to have been *paid on check, dated January 29th, 1863, to Mrs. Maria L. Baldwin, of \$1,814.95, we repudiate as a fraudulent transaction.

Very resp'y, your ob't serv't,

C. A. Baldwin & Co."

It was further proved that the plaintiff, in the fall of 1865, sent commissioners to take possession of the assets of the branch bank at Pearisburg, which was done, and the plaintiff, on the 30th of June 1866, published a statement, of which a copy is inserted in the bill of exceptions. It was also proved that J. H. McVeigh & Son were within the Confederate lines during the war, and that C. A. Baldwin and Wm. N. McVeigh were at Richmond during the war, doing business there, and have so continued until the present time (to wit: the time of the trial); that Crupper died in November 1865; that Wm. N. McVeigh was in Alexandria twice after the close of the war, and before the death of Crupper, and saw Crupper on both occasions; that Crupper was an honorable and high-minded gentleman; that the earliest disaffirmance of the agency of Crupper by Wm. N. McVeigh was the letter of C. A. Baldwin & Co. from Richmond, of February 12th, 1866; that the notes of the 8th and 17th of June 1861 were renewals of notes given before the war.

And this being all the evidence, the plaintiff prayed for eleven instructions, of which the court gave the first, second, third, fourth, sixth, seventh and tenth, and refused the rest. The defendants then prayed for twelve instructions, of which the court gave the first, second, eighth, ninth, tenth and twelfth in the form in which they were asked, refused the fourth and fifth in the form in which they were asked, but gave them with a modification, and refused
 794 the rest altogether. To *which several rulings of the court, in granting instructions prayed for by the plaintiff, refusing instructions prayed for by the defendants, and giving with a modification the fourth and fifth prayed for by the defendants, the latter excepted.

The jury having returned a verdict in favor of the plaintiff, the defendants moved the court for a new trial, because the verdict was contrary to law and the evidence; but the court overruled said motion; to which ruling of the court the defendants also ex-

cepted. And these two exceptions are embraced, and are all that are embraced in the defendants' second bill of exceptions.

I will now proceed to consider the questions presented by this bill of exceptions in the order in which they arise, commencing with the first instruction asked for by the plaintiff, which was given.

The first instruction asked for by the plaintiff is in these words: "If the jury shall believe from the evidence that the notes sued on were duly protested, and due notice of the protest given to the endorser, they must find for the plaintiff, although they believe from the evidence, that the amount of said notes was paid by the defendants at the branch of the Bank of the Old Dominion at Pearisburg in the month of May 1864, in depreciated Confederate currency, while the notes sued on were in the possession of the plaintiff, in the city of Alexandria."

That the court below did not err in giving this instruction, is, I think, conclusively shown by the case of the Bank of the Old Dominion v. McVeigh, 20 Gratt. 457, which is, in all material respects, identical with this case, in regard to the question involved in this instruction. The counsel for the defendants insists that there was error in granting so much of this instruction

795 *as is embraced in these words:

"If the jury shall believe from the evidence that the notes sued on were duly protested, and due notice of the protest given to the endorser, they must find for the plaintiff," &c.; and that whether "due notice of the protest was given to the endorser," was a question of law or a mixed question of law and fact, and ought not to have been indiscriminately referred, as it was, to the jury. Certainly it was a mixed question of law and fact; and so was the whole question involved in the general issue joined on the plea of nil debet, which the jury were sworn to try. The object of that instruction was, not to refer to the jury the particular question of the sufficiency of the protest and notice, but to declare to them that, supposing such sufficiency to exist, they must find for the plaintiff, although they might believe from the evidence that the amount of said notes was paid by the defendants at the branch of the Bank of the Old Dominion, Pearisburg, in the month of May 1864, in depreciated Confederate currency, while the notes sued on were in possession of the plaintiff in the city of Alexandria. In other words, the object was to declare to the jury, that what was relied on by the defendants as payment of the notes, was in fact no payment at all. The question of the sufficiency of the protest and notice was referred to the jury by other instructions. The plaintiff asked for eleven, and the defendants for twelve instructions, which, or such of them as were given, seem to inform the jury upon all the questions of law arising in the case. I think there is no error in the plaintiff's first instruction.

The second instruction asked for by the plaintiff is in these words: "If the jury

shall believe from the evidence that the endorser Wm. N. McVeigh, after the making and endorsing of the said notes, left 796 the *city of Alexandria, and was absent from said city at the time of the maturity of said notes; and that notice of demand and protest was left by the notary at the residence of the said endorser, with a white servant of the endorser; such notice is sufficient in law, and the jury must find for the plaintiff; provided they also find, that at the time of said notice, the said McVeigh had a residence in the city of Alexandria."

I think there is no error in this instruction. It merely declared to the jury this plain proposition: that if the endorser's place of residence, both at the date and maturity of the notes, was in the city of Alexandria, and notice of the dishonor of the notes was left by the notary at such place of residence; such notice is sufficient in law; although the endorser, after the making and endorsing of the notes, left the said city, and was absent therefrom at the time of the maturity of the notes. That the word residence was used in two different senses in the same instruction, can make no difference. It is very plain in what sense it is used in each instance; and that it involved a question of law as well as of fact, is an objection that has already been sufficiently answered.

The plaintiff's third instruction is in these words: "If the jury shall believe from the evidence that after the making and endorsing of the notes sued on, the endorser Wm. N. McVeigh, left the city of Alexandria, and was absent from said city at the time of the maturity of said notes, and the same were duly protested, and due notice of demand and protest left at the place of business of said endorser, with a white person employed at such place, such notice was sufficient to bind the endorser, and the jury must find for the plaintiff; provided they also find that at the time of said notice, 797 *the said McVeigh had a place of business in the city of Alexandria."

I think there is no error in the instruction, for the same reasons which have been assigned in answer to the objections made to the 1st and 2d instructions. It merely declares to the jury the same principle in regard to place of business, which the 2d instruction declares in regard to place of residence. A notice of dishonor is sufficiently served by being left, either at the place of residence, or the place of business of the person entitled to such notice. It is objected by the defendants' counsel, that "there is not a particle of evidence disclosed in the record" to show who Ramsey was, to whom, at the Bank of the Old Dominion, the notice of protest directed to W. N. McVeigh was delivered; whether he was white or black, or what connection he had with the bank or the said McVeigh, &c. I think it may be plainly inferred from the evidence that he was a white person, and an officer of the bank, a part of whose duty it was to receive such notices.

The plaintiff's 4th instruction was: "If the jury shall believe from the evidence, that any of the notes sued on were made by James H. McVeigh & Son for the accommodation of the said Wm. N. McVeigh, and that they were discounted for the use of W. N. McVeigh, and that he received the proceeds of the same; then no notice of demand and of protest of such notes was necessary to bind the said endorser, and the jury must find for the plaintiff as to such notes."

In the cases supposed by the instruction, Wm. N. McVeigh was in fact the principal debtor, though in form a mere endorser; and it seems to be admitted by the counsel of the defendants (which is certainly true in fact), that in an action of indebitatus assumpsit, the said endorser might be made liable for the debt as a principal debtor. But it seems to be supposed by the counsel, that in a special action of assumpsit, founded on the endorsement of the notes, there must be, not only an averment, but also proof, of demand, dishonor, protest and due notice of the same to the endorser, to authorize a recovery against him. There can be no doubt but that if the action in such a case be specially upon the endorsement of the notes, the plaintiff might aver that the notes were made, endorsed and discounted solely for the accommodation of the endorser, and such an averment would be a sufficient excuse for not averring demand, dishonor, protest and notice as aforesaid. The only doubt, if there be one, in the case, is, whether it is necessary for the plaintiff, where he sues specially upon the endorsement of the notes, to set forth his matter of excuse specially in his declaration; or whether he may, in the common form, aver therein demand, dishonor and protest of the notes and due notice of the same to the endorser, and prove his matter of excuse on the trial, in support of his averment in the declaration. Would this apparent variance between the allegata and the probata be real and fatal? Certainly the objection is purely technical. Is it valid?

According to the English practice, as it seems to be now settled, if no notice has been given at any time, because the holder had an excuse for not giving it, the excuse ought to be set out on the record—4 Rob. Pr. 443. "If," says Parke B., "it has been given, but at a time which would be too late in usual course, the matter of excuse might, probably, be used to show that it was, under the circumstances, in reasonable time; but if never given at all, the record must show a sufficient excuse." Id; Carter v. Flower, 16 Mees. & Welsb. R. 743. The circumstances amounting to a dispensation of notice must be pleaded as such. Allen v. Edmundson, 2 Welsb., Hurlst. & Gord. R. 719. Both of these cases are cited in 4 Rob. Pr. 443. On the other hand the American practice seems to be well settled otherwise. Id. 441-2, and the cases cited; 2 Smith's Leading Cases, Wallace's notes, p. 74. In Shirley v. Fellows,

Wadsworth & Co., 9 Porter R. 300. the analogous cases are examined, and it is decided that the declaration may be in the ordinary way, and proof of such facts as dispense with the necessity of notice will, in law, be proof of notice. See also Campbell v. Bates, 11 Conn. R. 487, 493; Patton v. McFarlane, 3 Penn. & Watts. R. 419; Spann v. Baltzell, 1 Florida R. 302, 326. Also Norton v. Lewis, 2 Conn. R. 478, and Windham Bank v. Norton, &c., 22 Id. 213; Redfield & Bigelow's Lead. Ca. 417.

I prefer the American to the English practice; as our growing policy has been to discourage technical objections, which are apt to stand in the way of the justice of a case; and there has yet been no decision of this court on the subject. I am therefore of opinion, that the court below did not err in giving the 4th instruction asked for by the plaintiff.

The 5th instruction asked for by him was refused. His 6th is in these words: "If the jury shall believe from the evidence, that Robert Crupper was the agent of Wm. N. McVeigh, during the war, and authorized by him to act as his agent under appointment made while the said Crupper, plaintiff and McVeigh were on the same side of the belligerent lines, and as such agent demanded and received the Cogan notes from the bank; and that the said Crupper, as such agent, collected the amount of the said notes, and paid the amount collected on the note in suit upon which said credit appears endorsed; and that said note was one

800 *that was made for the accommodation of said endorser and the proceeds of which were received by him; such credit binds the said McVeigh, and the jury must find accordingly."

I think there was a sufficient foundation for this instruction in the evidence, and if so there can be no valid objection to it. I therefore think the court below did not err in giving it.

The 7th instruction asked for by the plaintiff is in these words: "If the jury shall believe from the evidence that Robert Crupper was the agent of Wm. N. McVeigh, under appointment made while the said Crupper, plaintiff and McVeigh were on the same side of the belligerent lines, and as such agent called on the officers of the Bank of the Old Dominion with the check of C. A. Baldwin & Co., written and signed by McVeigh as a member of said firm, and endorsed by Maria J. Baldwin in the form required by the terms of said check, and directed such officer to apply the same to the credit of the note sued on, upon which said credit is endorsed, and that said note is one made for the accommodation of the said Wm. N. McVeigh, and discounted for his use, then such credit is binding upon the said McVeigh, and the jury must find accordingly."

The only objection taken to this instruction is, that it is "clearly in the teeth of Bilgerry v. Branch & Sons, 19 Gratt. 393." I do not think that it is. That case might have applied if this suit had been brought

upon the check. But this suit was brought upon the note to which the money on which the check was drawn was applied as a credit. By the agency of Crupper, and by the means of the check, the balance standing on the books of the plaintiff, to the credit of C. A. Baldwin & Co., was applied to the credit of a debt due *by 801 Wm. N. McVeigh, one of the firm of C. A. Baldwin & Co. and the draftsman of the check, to the plaintiff. I can see nothing in this transaction, which is contrary to the case of *Bilgerry v. Branch*. If the plaintiff has given to McVeigh a credit to which he is not entitled, the latter has no good cause to complain of it; and if by that means an improper appropriation has been made of the funds of C. A. Baldwin & Co. in the Bank of the Old Dominion, the latter would still remain liable to the former for those funds. I am therefore of opinion that there was no error in giving this instruction.

The 8th, 9th and 11th instructions asked for by the plaintiff were refused. The 10th was given, and is in these words: "If the jury shall believe from the evidence that the said Wm. N. McVeigh and C. A. Baldwin & Co. were notified of the fact that Robert Crupper, as their agent, had made said transactions with the plaintiff, and did not, as soon as they received such notice, or in a reasonable time thereafter, disaffirm such agency, they are bound by the acts of said Crupper."

This instruction is founded on the well-settled rule of law, that a principal who is informed of the acts of his agent, done under color of his authority, and does not in a reasonable time thereafter object to such acts as unauthorized by the terms of the agency, is presumed to acquiesce in and confirm the said acts. This rule of law is not denied; but it is insisted in behalf of the defendants that the evidence does not warrant its application to this case, and does not afford a sufficient foundation for the instruction. I am of a different opinion, and therefore think the court did not err in giving the instruction.

802 Having considered all the instructions asked for by *the plaintiff and given by the court, I will now consider the instructions asked for by the defendants and refused by the court, or given with a modification.

The 1st and 2nd instructions asked for by the defendants were given. The 3rd was refused, and is in these words: "If the jury shall believe from the evidence aforesaid that the only notice of the non-payment and dishonor of the notes sued on, given to Wm. N. McVeigh, was the notice contained in the notarial certificate of protest, the said notice was invalid and inoperative to bind said Wm. N. McVeigh, and they must find for him."

Supposing the residence and place of business of Wm. N. McVeigh to have been in Alexandria at the times of the maturity of the notes, then certainly notice of dishonor could lawfully be served on him by being

left either at his said residence or place of business, and the notarial certificates of protest show that such notice was so served on him according to the rules of the common law on this subject, or, as it is called, the law merchant. But the defendant's counsel contended that the rules of the common law have been modified by the Code of 1860, ch. 167, § 1, (which is the same as the Code of 1873, ch. 163, § 1,) and which provides that "a notice, no particular mode of serving which is prescribed, may be served by delivering a copy thereof in writing to the party in person; or, if he be not found at his usual place of abode, by delivering such copy, and giving information of its purport to his wife, or any white person found there, who is a member of his family, and above the age of sixteen years; or, if neither he nor his wife, nor any such white person be found there, by leaving such copy posted at the front door of said place of abode." By the Code of 1860, ch. 144, 803 § 8, (which is the same as *the Code of 1873, ch. 141, § 8,) it is provided that the protest therein mentioned "shall be prima facie evidence of what is stated therein, or at the foot or on the back thereof in relation to presentment, dishonor, and notice thereof." In the petition for a writ of error in this case, the defendants by their counsel argued, that as "the certificates of protest" of the notes sued on in this case "all show that the notices were left at the dwelling of the endorser in the hands of his white servant, without alleging that the servant was over the age of 16" years—"a fact not to be presumed, but to be shown affirmatively"—the said certificates show upon their face that the law was not complied with, and that the notice required was not served in the mode prescribed by law; and therefore that the said endorser is not liable.

The counsel who argued this case in this court seemed not to rely on that ground, and, at all events, I think it very clear that the statute before referred to, in regard to the mode of serving notices, was not intended to embrace notices of dishonor of negotiable paper, which are still governed by the law merchant, as they were before the enactment of the said statute.

The defendant's 3rd instruction seems to have been asked for solely with the view of declaring that the statute aforesaid applied to the case, and that, according to the statute, due notice of the dishonor of the notes had not been given to the endorser, who is therefore not liable.

But one of the counsel who argued the case for the defendants in this court, while not seeming to rely on the said ground taken in the petition, insisted in his argument that the said 3rd instruction ought to have been given on another ground: that "it brought up directly for adjudication

804 the question of the sufficiency *of the formal notices of the demand and protest, left at the abandoned late residence of the endorser, when it was known by the holder that, in the sudden and awful emer-

gency of a great civil war, he had observed his allegiance to their common state, and had joined his family within her bosom, and that communication of notice to him was both illegal and impossible;" "that such a futile formality was, under the anomalous and altogether extraordinary and exceptional circumstances, no notice at all; that notice for the time was impossible, without any misconduct on the part of the endorser; and that impossibility of notice excused delay in giving it, but that the excuse of impossibility was only an excuse for delay until the impossibility was removed. And as the facts upon which the instruction was based were ascertained and undisputed, the question raised was a pure question of law, and should have been decided by the court upon those facts in favor of the defendants, and thus ended the case."

I do not think that the facts upon which it is thus sought to raise that question, from the action of the court in refusing to give this instruction, were ascertained and undisputed; and the court might, therefore, on that ground, have properly refused to give the instruction. But as the question must be considered and decided, if not now at all events when we come to consider the action of the court in overruling the motion for a new trial, it may be as well to consider it at once. I therefore proceed to do so.

The question then is, whether, admitting the facts to have been as supposed by the defendants' counsel, this was a case in which notice of the dishonor of the notes, by the holder to the endorser, was duly given or wholly excused; or was a case
805 in which it was impossible *to give such notice at the regular time, by reason of war, and the giving of it at that time was therefore excused; but the excuse was not permanent, and was only for a delay until the impossibility was removed. See 1 Parsons on Notes and Bills 522, 531-2, cited by the counsel for the defendants.

Where the holder and endorser of a negotiable note reside in the same city at the time of the dishonor of the note, notice of such dishonor may be given by being left at the residence or place of business of the endorser; as was done in this case. Where they reside in different cities, or at different places, between which there is a regular mail communication, such notice may be sent by post; and that is the best mode of giving it. Where they reside in different states or countries when the contract of endorsement is entered into, such notice must still be given, or due diligence must be used by the holder to give it. Where the endorser changes his residence from one place to another in the same state, after endorsing the note and before its maturity, he is still entitled to notice of its dishonor, if his new place of residence is known to the holder, or can be ascertained by him by using due diligence; but where such change of residence is from one state to another state or

country, the holder is not bound to give such notice, and the liability of the endorser becomes absolute and unconditional without it. Where the holder and endorser reside in different states or countries at the time of the endorsement and maturity of the note, and war arises between such states or countries between those periods, and continues to exist at the time of such maturity, the impossibility which thus arises of then giving such notice is a legal excuse for not doing so. The excuse, however, is not permanent, but is only for a delay
806 until the impossibility *ceases, when due notice must be given. Where the holder and endorser resided in Virginia at the time of the endorsement of the note, but before its maturity the late civil war broke out and a military line was drawn between the places of residence of the two, which rendered it impossible to give notice of the dishonor of the note at the regular time, it was necessary to give it in due time after the impossibility was removed. Where the holder uses due diligence to ascertain the place of residence of the endorser at the time of the maturity of the note without being able to do so, he is altogether excused from giving such notice, and the liability of the endorser then becomes fixed and absolute, and the holder is under no obligation to give such notice, even though he may afterwards discover the place of residence of the endorser. So also, where the holder, using such due diligence, is wrongly informed as to the place of residence of the endorser, and transmits notice by post according to such information, the liability of the endorser becomes thereby fixed and absolute, and the holder is not bound to give any other notice, even though he be afterwards correctly informed as to the residence of the endorser. The foregoing seem to be well settled principles of law, as the following authorities will show: 2 Rob. Pr. new ed., pp. 176, 177, 191, 192, 193, 194 and 195 and the cases cited; 1 Parsons on Notes and Bills, pp. 477, 487-490, 522, 527, 528, 531, 532, 448-463; Leading cases upon Bills of Exchange and Promissory Notes by Redfield & Bigelow, pp. 404, 410, 447, 450, 452; McGruder v. The Bank of Washington, 9 Wheat. R. 598; Bank of Columbia v. Lawrence, 1 Peters R. 578; Williams v. Bank of the U. S., 2 Peters R. 96; Bank of Utica v. Bender, 21 Wend. R. 643; Hopkirk v. Page, 2 Brock. R. 20; House v. Adams & Co., 48 Penn. State
807 *R. 261; Taylor v. Snyder, 3 Denio R. 145; Foster v. Julien, 24 New York 28; Adams v. Leland, 30 Id. 309; Lambert & al. v. Ghiselin, 9 How. U. S. R. 552; Farmers Bank of Va. v. Gunnell's adm'r, supra, 131.

The case under consideration is peculiar in some of its circumstances; and the question arises, what principles apply to it, and whether, according to those principles, the endorser is liable?

At the date and discount of all the notes, except two of them which will be hereafter noticed, all the parties thereto, the makers,

endorser and holder, resided, and had places of business, in the city of Alexandria, and the holder, the Bank of the Old Dominion, continued to reside, and have its place of business there, until and after the maturity of the notes. But before the maturity of the notes the late civil war broke out, and the forces of the United States invaded and took possession of the city of Alexandria, and continued to hold such possession until the end of active hostilities, in April 1865. A few days after such invasion, the makers and endorser of the notes left the city of Alexandria, crossed the military lines into that part of the state of Virginia which was under Confederate authority, and remained there during the war, engaged in business most or nearly all of the time. When Wm. N. McVeigh left Alexandria, he had been preceded by his family, who then in the neighboring county of Fauquier, on a visit, where they were rejoined by him. It does not appear that he left with any intention to change his residence; at least unless he should be compelled to do so, by the continuance and effects of the war; but, on the contrary, no doubt he expected the war to terminate much sooner than it did, and intended to return and continue to reside, and

808 transact business in, Alexandria. *He was president of the Bank of the Old Dominion, and his place of business was the said Bank, when he left in May 1861; and at the expiration of his term of office he was re-elected president in 1862. He left a white person in care of his mansion house, and an agent, Robert Crupper, at least to watch over and preserve his real estate, of which he had a great deal in the city. Under all these circumstances, no doubt both the Bank of the Old Dominion and Wm. N. McVeigh considered, that the latter continued to have his place of residence and of business in the city of Alexandria at the time of the maturity of the said notes; that he had left there cum animo revertendi; and that he would soon be able to return, and would return, to the said city. The first battle of Manassas was fought in July 1861, and won by the Confederates; and about the same time but shortly thereafter all these notes were protested for non-payment. After that victory was won, no forward movement was made by the enemy for a long time, and the highest hopes were indulged by us that the war would soon be ended in our favor. Accordingly notice of the dishonor of the notes was left at the said residence or place of business of the said endorser McVeigh in Alexandria; the notice in the former case being left in the hands of his white servant at his said residence, and in the latter being delivered to G. W. D. Ramsey at the said bank; the said servant and said Ramsey being respectively informed at the time, that said endorser was held liable for the payment of said notes respectively. In all of the cases except one the notice was left at his said residence, or "dwelling" as it is called in the certificates of protest, "in the hands

of his white servant." If due notice was given, or due diligence used to give it, according to the circumstances existing at the time of the dishonor, the rights of the parties then become fixed, and are not changed by a change of circumstances afterwards.

Now the question is, did the holder, the Bank of the Old Dominion, do all that was necessary to be done to fix the liability of the endorser McVeigh and make it absolute? Certainly that was the case if it can be considered that at the time of the maturity of the notes McVeigh's place of residence and of business continued, in contemplation of law, to be in Alexandria; at least for the purpose of giving notice of dishonor?

How far then, if at all, is the case altered by the facts aforesaid, in regard to the removal of McVeigh from Alexandria, and his crossing the military lines into that part of the state which was under Confederate authority, and remaining there until after the war? Did those facts render it necessary that notice of the dishonor of the said notes should be given to him after the end of the war, to make his liable as endorser?

Certainly I do not doubt his perfect right, if it was not his duty, to leave Alexandria, cross the military lines, and remain on the Confederate side during the war, as he did. And certainly I do not think that he ought to be punished for having done so.

But the question is, who ought to bear the loss of these dishonored notes, the holder or the endorser; and that question must depend upon the settled rules of law. Each of these parties has his rights, which must be accorded to him. The holder advanced the amount of the notes on the faith of the liability of the endorser; which liability, it is true, was merely conditional. But has not the holder performed the condition? Did he not give due notice

810 of the dishonor? *And has he not done everything that due diligence required of him? If the endorser did not actually know that the notes were not paid at maturity, and that he was held liable for their payment, (the makers of the notes, his brother and nephew, I believe, having left Alexandria at the same time and for the same cause with himself, and having remained on the same side of the military lines with him,) he could easily have ascertained that fact by enquiry, at least after the war was over. And under the circumstances, was it not incumbent on him to make such enquiry if he was interested in knowing the fact, and did not already know it, as he no doubt did? The holder, the Bank of the Old Dominion, was certainly not in fault in bringing on the war and producing the cause which induced the endorser to leave Alexandria and cross the military lines. And when the notes were dishonored, the holder gave all the notice of such dishonor which could then possibly be given. How then can it be said that the holder was in default?

The endorser had, undoubtedly, a right of election to remain in Alexandria or to cross the lines. Had he remained in Alexandria, the notice of dishonor which was given by the holder would certainly have been sufficient. He chose to cross the lines, and in doing so, no doubt acted patriotically. But he thereby took upon himself the burden of enquiring into the fact of the payment or non-payment of the notes at maturity, and did not throw upon the holder the burden, of not only giving such notice as they could and did when the notes were dishonored, but also a new notice to the endorser after the war was over. If he did not actually appoint an agent to receive such notices during his absence, he might and ought to have done so.

I have seen no case, and we have 811 been referred to *none, precisely in point with this, and those which seem to bear the closest analogy to it, are *McGruder v. The Bank of Washington*, 9 Wheat. R. 598; *Redfield & Bigelow's Leading Cases* 447, S. C.; and the cases which have followed it, referred to in the note to that case in the *Leading Cases* p. 449; and the cases referred to in 2 Rob. Pr. (new) p. 176. In that case it was held by the Supreme Court of the United States, that the removal of the maker of a note after its date and before its maturity, into another jurisdiction from that in which the note was executed, will excuse the holder from making a personal presentation and demand. For the same reason, a like removal of an endorser will excuse the holders from giving notice of dishonor. In the note, *Id.*, it is said that "the doctrine of the above case is well settled. See *Taylor v. Snyder*, ante p. 145, and note; *Adams v. Leland*, 30 New York R. 309; *Foster v. Julien*, 24 New York R. 28. But the question, whether, in case of removal into another jurisdiction, presentment should be made at the payer's last abode, has given rise to some conflict;" and cases on each side of the question are referred to in the note. But as the notices in this case were left at the endorser's last place of abode, except one of them which was left at his last place of business in Alexandria, it is unnecessary to examine those cases. In the case of *McGruder v. The Bank of Washington*, supra, presentment was made at the maker's last place of abode, which was of course held sufficient; but it was not decided in that case, because the question did not arise, that such presentment was necessary. That it was sufficient, however, is enough for the purposes of this case.

I have not relied upon the case of *Ludlow v. Ramsey*, 11 Wall. U. S. R. 581, 812 although it seems to show *that if this case were before the Supreme Court of the United States, the judgment would be affirmed on the grounds on which that case was decided. But I am unwilling to place the decision of this case upon those grounds, the correctness of which I do not admit; and I think the grounds on which I have relied, and about the correctness of

which I have no doubt, are amply sufficient to sustain the view I take of the case.

I am therefore of opinion that sufficient notice of the dishonor of the notes was given by the holder to the endorser in this case, and the former was under no obligation to give any other, to fix and make absolute the liability of the latter.

As the subject I have just been considering is, by far, the most important branch of the case, I will, at the risk of some repetition, present the following additional views thereon, which have been suggested to my mind since I wrote the foregoing, and which seem to me to be not only appropriate but conclusive.

There can be no commercial intercourse between persons on different sides of a belligerent line, during the war; and a civil war, such as our late war, stands in this respect, on the same footing with a war inter gentes. These are well settled propositions, and are affirmed by the late decisions of this court in *Billgerry v. Branch & Sons*, 19 Gratt. 393; and *Taylor v. Hutchinson*, 25 Id. 536. I was one of the court when each of these decisions was made, and concurred in each; and I do not now, at all, doubt their correctness.

But this case involves a very different question from the one involved in those two cases. Here, there was no commercial or other intercourse between persons on different sides of a belligerent line. Here, the question is: Was the notice of dishonor sufficiently served by being left at the 813 residence or place of business *of the endorser? Or, if not, was the giving of such notice excused, under the circumstances of the case?

1st. Was the notice sufficiently served as aforesaid? Such a notice is always sufficiently served by being left, in due time, at the place of residence, or place of business of the endorser, whether it be ever actually received by him or not. If the endorser in this case had personally remained in Alexandria until after the dishonor of the notes, certainly such service of the notice would have been sufficient, notwithstanding he was attached to the Confederate cause. Suppose that on leaving Alexandria in May 1861, after the Federal forces had entered that city, he had informed the directors of the bank (he being then the president thereof,) that he expected and intended in a short time to return; and had requested, that if any notes endorsed by him and discounted at the bank, should be protested during his absence, notices of such protest should be left at his dwelling in said city, with a white servant he would leave there; would not notices left accordingly, have been sufficiently served? There cannot I presume, be a doubt that they would. Was not that precisely the effect of what actually occurred? He left Alexandria with a manifest expectation and intention to return as soon as the cause which induced his departure ceased to exist. He did not resign his office of president of the bank. He knew he

ras the endorser of several notes which had been discounted at the bank, and which would soon become due there, and no doubt could be protested, and that he would be asked to for payment. He gave no express instruction as to the manner in which he should be served with notice of protest in such cases. Why did he not do so?

Plainly because he knew, or had 814 the *best reason to believe, that such notice would be left with his white servant at his dwelling house, as the best possible mode of giving such notice to him. That mode was precisely the one which he desired to be pursued. If he did not so desire, was it not his duty as president of the bank, its chief officer, to leave such instructions on the subject as were proper with the officers of the bank who were to remain at their posts? Was it not necessary for him to do so, in order to conserve and to guard those interests which had been intrusted to his care? The interests of widows and orphans and others who owned the stock of the bank? Was not his counsel peculiarly called for in this trying exigency? If he considered it to be his duty as a patriot to leave Alexandria at that time and cross the belligerent line, was it not equally his duty, as an honest man and faithful officer, to advise his board of directors what to do in regard to the notes due to the bank on which he was an endorser, in order to ensure his liability for them? Was there any conflict in this case between patriotism on the one hand, and honesty and fidelity on the other? Could he not be patriotic, and at the same time honest and faithful? I think he could; and I think he intended to be so. I think he intended and expected the bank to do what it did do, in regard to these notes; and that the notice of dishonor was sufficiently served. But whether he so intended and expected or not, I think the notice was sufficiently served. He manifestly left Alexandria intending to return to the city as soon as the Federal forces left it; which he and everybody else interested in the subject, expected soon would be the case. Alexandria continued to be his place of residence when the notices of dishonor were left with a white servant in his dwelling house there. And therefore they were 815 *sufficiently served. But if not, I proceed to consider,

2dly. Was the giving of such notices excused, under the circumstances of the case?

When the federal forces entered and took possession of Alexandria, it did not thenceforward cease to be a part of Virginia, though the control of the state authorities over it was temporarily suspended during such hostile occupation, the prospective duration of which was wholly uncertain. It might terminate at any time. The citizens of Alexandria at the time of such occupation, or most of them, were attached to the Confederate cause. Many of them crossed over the belligerent line to the Confederate side, especially of those who were of suitable age to render military service.

But many, and probably most of them, especially of those who, from their age or otherwise, were non-combatant, remained at their homes; and remained with perfect safety, notwithstanding their natural and known predilections in favor of the Confederate cause. It does not appear from the record whether the plaintiff in error was of suitable age to render military service. The presumption is he was not, as it does not appear that he actually did engage in such service after he crossed the line. Had he so engaged, he would doubtless have brought the fact into the record. But I consider the fact as wholly immaterial. Whatever may be said, in a patriotic point of view, in regard to the propriety of a removal from Alexandria at that time to the Confederate side of the belligerent line, of those who were friendly to the Confederate cause, it cannot be said that there was any necessity for such a removal. It was purely a matter of voluntary election, however strong the patriotic motive may have been to make such removal, especially with those who could render military service.

In a commercial sense, and according 816 *to the *lex mercatoria* in regard to dealings with negotiable paper, the removal was voluntary. The Bank, the holder of the negotiable notes in this case, could not, legally, be expected to know what motives induced the endorser to cross the belligerent line, or what he intended to do after crossing it, or how long he intended or expected to remain there, and when he intended or expected to return to his home and place of business in Alexandria. And the necessity of giving notice of dishonor, and the manner of giving it, cannot depend upon considerations of that kind. The law merchant is a certain law, and its rules, especially in regard to negotiable paper, are fixed and definite. Here then the endorser, after endorsing these notes and before their maturity, voluntarily left his home and his place of business and crossed the belligerent line, whereby he interposed an insuperable barrier between himself and the bank, and made it impossible for the bank, at the time of the dishonor of the notes, to give him notice thereof, either personally or by communication through the mail. Was not the duty of giving such notice thereby excused? What did he lose by not receiving such notice? It would have been notice only of a fact which he well knew without such notice. And if he wished to know it better, if possible, or to be otherwise informed of it, he could easily have informed himself, at least after the war and as soon as notice could then have been given to him. It is true that it is immaterial under the law merchant, whether he was actually damaged or not by the failure to give notice, and he is entitled to his discharge irrespectively of that question, if, according to the certain and definite rules of that law his liability is not fixed. Still the question is a material element in determining whether, according to those rules, the 817 *duty of giving such notice is ex-

cused under the circumstances. If he desired to cross the line and remain on the Confederate side during the war, it was a small price to pay for the gratification of such desire, that the holder's duty of giving him notice of a fact which he already knew, should be dispensed with, and that he should be subjected to the little trouble of informing himself after the war was over, in regard to the dishonor of the notes, if he desired to be further informed on the subject; rather than the bank should be subjected to that trouble which it had no agency in causing. I am therefore of opinion that the duty of giving such notice was excused. But if it was not I am of opinion, and I think I have already demonstrated, that sufficient notice was actually given.

There could have been no difficulty in regard to demand of payment of the notes at the Bank of the Old Dominion, arising from the fact, that at the time of the maturity of the notes the makers and endorsers were on the Confederate side of the belligerent line. They could not, of course, cross the line to make such payment, nor send the money across for that purpose. But they could either have remained until after the maturity of the notes where they were when the notes were executed; or if they preferred it, as they did, they could have crossed over the line, taking care in the latter case to provide for the payment of the notes at maturity by the appointment of an agent for that purpose before they left Alexandria. Certainly it was the right and duty of the bank to receive payment of the notes at maturity from any person who might make such payment, provided there was nothing unlawful in the act of payment, as there certainly would not be in either of the two alternatives above stated. There is no

necessity for any actual demand of
818 payment of the notes in such cases by the holder of the maker, nor is any such demand ever made. It is only necessary that the notes should be at the bank at the time therein named for payment, ready to be delivered to the payer upon such payment. If payment be not made the notes are dishonored, and may forthwith be handed to a notary for protest, and notice to the endorsers. Thus there is, in all this operation, no need for any communication between persons on different sides of a belligerent line, and no necessity for any violation of international or other law. But whatever difficulty the war may have interposed in the way of payment of these notes at the time of their maturity, and even though it may have been impossible in consequence of the war to make such payment, the makers were not thereby legally discharged from their obligation to pay; them according to the terms of their contract; but both they and the endorsers were liable for all the consequences of non-payment, just as if there had been no war. Neither the act of God, nor of the public enemy, was sufficient to discharge or excuse them from the obligation to perform their contract. Such has been the settled law of

the land ever since the leading case of *Paradine v. Jane* was decided by Chief Justice Rolfe.

In every view of this question, therefore, I think the endorser is liable.

The 4th instruction asked for by the defendants was in these words: "If the jury shall believe from the evidence, that on and after the 7th day of June 1861 the said James H. McVeigh and Wm. N. McVeigh were residing within territory held in the firm occupation of the forces of the Confederate States, and so continued to reside until the close of the war; and that the

said plaintiff had its domicile from
819 said date, and ever since in the city of Alexandria, held in the firm occupation of the forces of the United States during the war; then that the two notes sued on, one bearing date the 8th of June 1861, and the other June the 17th, 1861, are illegal and void, and they must on these notes find for the defendants." The court refused to give the instruction in this form, but gave it with the addition of these words: "Unless they also find that said notes were given in renewal of notes made before the war, and by an agent acting under authority conferred before the war."

The evidence tended to prove the facts stated in the addition made by the court to the instruction, and such being the facts, the court would have erred in giving the instruction as asked for, but did not err in modifying it and giving it in its modified form as aforesaid. An accommodation note given to be discounted at bank is generally given for a certain number of days, say 60 or 90, with the understanding that the accommodation is to be continued for a much longer time by a renewal of the note from time to time until the end of the period of the accommodation. In such case the successive renewals are not considered as new debts or contracts, but merely continuations of the original one; and though the original debt could not have been created between belligerents, yet if the original debt had been created between them when they were at peace with each other, and before they became belligerents, with an understanding and agreement between them that the accommodation should be continued beyond the time named in the note, by a renewal of it from time to time, then a note given for such renewal by an agent acting under authority conferred before the war, such agent and the holder being at the time
820 of such renewal on the same side of the military lines, would be legal and valid.

The 5th instruction asked for by the defendants is in these words: "If the jury shall believe from the evidence aforesaid, that the said notes bearing date respectively the 8th and 17th days of June 1861 were made by the defendants whilst residing within the lines occupied and firmly held by the forces of the Confederate States, and that said notes were discounted by the plaintiff whilst the said defendants were within the Confederate lines as afore-

said, and that the plaintiff was at the time of the making and discounting of the said notes located and doing business within the lines firmly held and occupied by the forces of the United States, then that said making and discounting were illegal and void, and not binding on the defendants." The court refused to give the instruction in this form, but gave it with the addition of these words: "Unless said notes were given in renewal of notes made and delivered before the war, by an agent residing within the lines of the same belligerent with the plaintiff, and acting under an authority conferred before the war."

For the same reasons assigned in regard to the 4th instruction and modification thereof as aforesaid, I am of opinion that the court did not err in refusing to give the 5th instruction as asked for by the defendants, nor in giving it with the modification thereof as aforesaid.

The 6th and 7th instructions asked for by the defendants are in these words:

"6. If the jury shall believe from the evidence aforesaid, that the defendant, James H. McVeigh, in the year 1864 paid the notes sued on to the branch bank of the Bank of the Old Dominion at Pearisburg 821 *in Giles county, Virginia, and that said payment was accepted by said branch bank, then that said payment is a discharge of the said notes, although the same was made in Confederate money."

"7. But if said branch bank at Pearisburg had no lawful right to accept said payment in discharge of the notes sued on, yet if the jury shall believe from the evidence aforesaid, that after the close of the late civil war the plaintiff took possession of all the assets of the branch bank at Pearisburg, amongst which were means and assets acquired during the war by dealing in Confederate currency, and in which were embraced the payments made by James H. McVeigh & Son, and appropriated said assets to their own use, then such appropriation is an adoption and ratification of the act of the said branch at Pearisburg, and they must find for the defendants."

That the court did not err in refusing to give the said 6th instruction, is, I think, fully shown by the case of the Bank of the Old Dominion against McVeigh. 20 Gratt. 457, and by what has been already said in regard to the 1st instruction asked for by the plaintiff. Nor did the court err in refusing to give the said 7th instruction. If the defendants can have any claim against the plaintiff, arising from the latter's taking possession of the assets of the branch bank at Pearisburg, as stated in the said instruction (which is not admitted), their remedy for its recovery is not by way of defence to this suit, in which no such claim has, if it could have, been put in issue.

The 8th, 9th, 10th and 12th instructions asked for by the defendants were given by the court. The 11th was refused, and is in these words: "If the jury shall believe from the evidence aforesaid, that the check of

C. A. Baldwin & Co. on the plaintiff, 822 dated the 29th *day of January 1863, was drawn by the firm of C. A. Baldwin & Co. at that time in the city of Richmond, with a view of being sent through the hostile lines, and was so sent, received and acted on by the plaintiff, then such appropriation of the proceeds of a balance due C. A. Baldwin & Co. by the plaintiff, to the note of James H. McVeigh & Son, was illegal and void."

This is not an action brought upon the check, in which the legality of the check would be a material question. If, as the evidence tends to prove, Crupper, as agent of the parties concerned, with authority, conferred before the war, applied the balance in the Bank of the Old Dominion standing to the credit of C. A. Baldwin & Co., to the payment of the note of James H. McVeigh & Son, as mentioned in the instruction; such appropriation of the said balance was not illegal and void, even though such check may have been used in making it. But a sufficient reason for refusing this instruction is, that the defendants, instead of being prejudiced, are benefited, by the appropriation aforesaid; and if C. A. Baldwin & Co., who are not parties to this action, are injured by said appropriation, they have their remedy against the Bank of the Old Dominion, which, in that view, would still owe the said balance to them.

Having noticed all the instructions on both sides which are subjects of exception on the side of the defendants, I will now notice their exception to the ruling of the court refusing to grant a new trial because the verdict was contrary to law and the evidence. The main, if not the only, question relied on in support of the motion for a new trial seems to be, as to the want or insufficiency of notice to the endorers of the notes. This question has already been fully considered by me in disposing of the 823 subject of the instructions, *and especially the 3d instruction asked for by the defendants. I will not therefore repeat here what I have already said in this opinion, in regard to this question. One of the counsel of the defendants contends that the verdict of the jury should have been in their favor, in conformity with the first and second instructions asked for by them and given by the court. I think both of these instructions ought to have been refused by the court; the first being in conflict with the case of *McGruder v. The Bank of Washington*, 9 Wheat. R. 598, and other cases of that class before cited; and the second being also in conflict with those cases, or else being a mere abstraction, and if given at all, ought at all events to have been so modified as to make it applicable to the evidence in the case. The jury no doubt considered from the evidence, that at the maturity of the notes, the endorser had not abandoned his residence in the city of Alexandria and acquired a residence within the lines of the forces of the Confederate States, but was only temporarily absent with the

lature that a defendant as to whom an action might be thus discontinued, should be thereby discharged from liability for the debt. The object of the law was to enable a plaintiff to obtain judgment against the defendants in a joint action as he might be able to mature his action against them;

without being compelled, as formerly, 827 *to wait until he could mature the case for judgment against all at the same time. And it gives him the right, after taking judgment against such of the defendants as may have been served with process, to proceed in the same action to have it matured against the rest, and as matured to take judgments against them; or, at his election, to discontinue the action against the rest. In which latter case, the plaintiff may bring a new action against the defendants as to whom the original action may have been discontinued; who may, in such new action, make the same defence they might have made in the original action, whether served with process originally or afterwards. They would have the same advantage in making their defence in a new action, as they would have in the original one; and there is as much reason why the plaintiff should have a right to bring a new action against a defendant as to whom the original action may have been discontinued, as to proceed to have the original action matured and tried against the same defendants.

To be sure the act does not expressly reserve to the plaintiff the right to bring such new action. But the legislature could not have intended, if even it had the power, to discharge the defendant as to whom the action is discontinued, from liability. And it is more reasonable to infer an intention to reserve such right than an intention to give such discharge. Formerly, as we have seen, the law directed an action to be abated as to a defendant against whom the process was returned, "no inhabitant," and authorized the plaintiff to proceed to trial and judgment against the defendants who may have been served with process. Suppose the action was for a joint debt; could the law have intended that the defendant as to whom the action was thus abated,

828 should be discharged *from the debt?

The abatement, in that case certainly, was involuntarily on the part of the plaintiff, and was a legal necessity. It occurred very frequently, and whenever joint debtors resided in different counties and were sued in one of them. Could the legislature have intended, in every such case, to deprive the creditor of a part of the security for the payment of the debt due to him by his joint debtors? I think not. It may be said that the discontinuance is voluntary on the part of the plaintiff. But it stands in the place of an abatement on a return of "no inhabitant" under the former law. Each was intended for the benefit of the plaintiff, and to facilitate his remedy, though neither was intended to do any harm to the defendant as to whom the action is abated or discontinued; and certainly none could be done

to him by leaving his liability for the plaintiff's claim just where it was before such abatement or discontinuance, and fully reserving to him all his rights of defence. This is not like the case in which a creditor voluntarily takes a bond of one of several joint debtors by simple contract; 5 Rob. Pr. p. 808; or brings an action and obtains a judgment against one of several joint debtors; Id. 622; in which cases, according to the common law rule, the debt would be merged in the bond or the judgment. But it is a case in which the common law rule is modified under the operation of a statute, and the doctrine of merger does not apply. Id. 823; *Mason v. Eldred &c.*, 6 Wall. U. S. R. 231.

I am therefore of opinion that the discontinuance of the action against Edgar McVeigh does not affect the validity of the judgment against the other defendants.

Only one question more remains to be disposed of, and that question was argued 829 with great ingenuity by *the learned counsel for the defendants. It is, whether the notes come within the meaning of section 7, of chapter 144 of the Code of 1860; for, if they do not, it is argued that they do not come within the meaning of section eight of the same chapter, and the protest is not therefore legal evidence; and that being the only evidence introduced by the plaintiff to prove presentment, dishonor and notice thereof, there was no evidence before the jury of these indispensable facts to sustain their verdict; which ought, therefore, to have been set aside.

The Code of 1860, ch. 144, § 7 (which corresponds with the Code of 1873, ch. 141, § 7), is in these words: "Every promissory note, or check for money payable in this state at a particular bank, or at a particular office thereof for discount and deposit, or at the place of business of a savings institution or savings bank, and every inland bill of exchange payable in this state shall be deemed negotiable, and may upon being dishonored for non-acceptance or non-payment be protested, and the protest be in such case evidence of dishonor, in like manner as in the case of a foreign bill of exchange."

Section 8 (which is like the corresponding section of the Code of 1873) is in these words: "The protest, both in the case of a foreign bill, and in the other cases mentioned in the preceding section, shall be prima facie evidence of what is stated therein, or at the foot, or on the back thereof, in relation to presentment, dishonor and notice thereof."

It is argued that a promissory note or other instrument, to come within the meaning of § 7 aforesaid, must on its face be expressly payable in this state.

Now it is certainly true that such note, &c., must on its face be payable in this state, because the section so "requires."

But it does not require that the state shall be expressly named in the note, &c. It is sufficient if the note, &c., on its face be "payable in this state," according to

the legal rules for the construction of written instruments. The same rules which apply to the construction of wills, deeds and contracts, apply to the construction of promissory notes, &c. In all such cases the court of construction, in order to ascertain the meaning of the words used in the instrument, must, when necessary, be placed in the situation of the author of the instrument at the time of its execution, in the midst of all the circumstances which then surrounded him, and then read the instrument in the light of these circumstances. In that way the meaning, where at all doubtful on the face of the instrument, may almost always be ascertained with unerring certainty; and this is especially the case where there is a latent ambiguity:—as, for instance, where a city or a bank is named in the instrument, without designating therein the state in which the city or bank referred to is located. And it turns out, as is very often the case, that there are cities and banks of the same name in other states and countries than ours. Here is a plain and common case for the introduction of extrinsic evidence to remove the ambiguity which extrinsic evidence has disclosed; and almost always such evidence does remove it beyond all controversy.

Applying these rules to this case, it is perfectly certain that the Bank of the Old Dominion in the city of Alexandria in the state of Virginia, is the place at which these notes, on their face, are payable. They are dated at "Alexandria." They are payable at "Bank Old Dominion." There is a Bank of the Old Dominion in the city of Alexandria, in the state of Virginia. These notes were discounted at that bank, *were presented for payment and were protested for non-payment at that bank. They, or some of them, were renewals of notes previously discounted at that bank. All the parties to the notes, makers and endorsers, resided and transacted business at the time of the discount of the notes in the city of Alexandria, Virginia; and the endorser was president of the Bank of the Old Dominion there, and had his place of business at the said bank. Is it not then perfectly certain that these notes, dated at "Alexandria," and payable at "Bank Old Dominion," were in fact payable "in this state?" Would not such have been the construction of these words had they been used in any will, deed, or other written instrument, executed by an author surrounded by the same circumstances?

But it seems to be supposed, that because these notes are made negotiable, it was intended that everything which affected the question of their negotiability should expressly appear on their face; so as to exclude all possibility of the existence of any extrinsic fact which would show them not to be negotiable. If the legislature had intended to make so great a difference as this between the construction of these and other written instruments, it would surely have said so in plain terms. But where is

the necessity for such a difference? If parties choose to express their meaning in their notes in such words as to make it doubtful, without the aid of extrinsic evidence, whether they were intended to be payable in this state, and therefore to be negotiable, this might make it necessary for parties to whom the notes were offered to be endorsed, to enquire, and satisfy themselves as to the fact of negotiability. This would, of course, make the currency of the notes more difficult. But that would be the only consequence. The notes

832 being in *fact "payable in this state," according to the legal rules of construction, they would be in fact negotiable: just as much as if the state were expressly named on their face. In this case there could have been no doubt in regard to the place at which the notes were payable. They were not made for general circulation, but for discount at the Bank of the Old Dominion in Alexandria, Virginia, and it must have been perfectly well known by all the parties that they were payable in this state.

But they would have been negotiable had they been payable in another state, as the 11th section of the same chapter of the Code plainly shows. So that the omission of the name of the state on the face of the notes, could not possibly have affected or impaired the negotiability of the notes; and at most could only have affected the question as to the extent to which the protest would be evidence on the trial of an action upon the notes. Surely so small a consideration would be insufficient to account for so radical a change in the rules of construction of written instruments in regard to this class of them, when such change is not expressly made by law, and if made at all, must be matter of mere inference.

I am therefore of opinion that the notes sued on in this case are "promissory notes payable in this state at a particular bank," within the meaning of section 7 of the chapter of the Code referred to, and the certificates of protest accompanying them are, *prima facie*, evidence of what is stated in them, as provided by the 8th section of the same chapter.

Upon the whole I am of opinion that there is no error in the judgment of the Corporation court for the city of Alexandria, and that it ought to be affirmed.

833 *Anderson J. James H. McVeigh & Son, of the city of Alexandria, Va., were the makers of seven promissory notes, amounting together to \$16,500, which were made payable at the Bank of the Old Dominion, to Wm. N. McVeigh, who was then also a citizen of Alexandria. The notes are as follows: one for \$2,500, bearing date March 30, 1861; one for \$1,200, bearing date April 20, 1861; one for \$5,000, bearing date April 27, 1861; one for \$800, bearing date May 11, 1861; one for \$2,500, bearing date May 17, 1861; one for \$2,000, bearing date June 8, 1861; and another for \$2,500, bearing date June 17, 1861; each payable ninety days after date, and maturing in July,

August and September 1861. The last two were renewal of notes, and one of which, and the one of date May 17th, are alleged to have been made and discounted for the accommodation of the endorser. All the rest were made and discounted as accommodation notes, for the benefit of the makers. It is alleged that each of them was duly presented at maturity, demand made, and refused, and thereupon protested, and notice thereof given to the indorser. And this suit was brought by the Bank of the Old Dominion in August 1870, against the makers and endorser, to recover the amount of said notes, with interest and charges of protest.

Said notes were made and indorsed whilst the makers and indorser were residents of the city of Alexandria, before the beginning of the late war, or before the parties were separated by belligerent lines—except the last two. But before their maturity war was flagrant between the northern states and the state of Virginia, which had withdrawn from the Federal Union, and had united with the Confederate States. And

834 long before the time when presentment and demand *of payment is alleged to have been made and refused and protest, and the alleged notice to the indorser, the enemy had invaded and taken military occupation of said city, to wit: on the 24th of May 1861; and James H. McVeigh and Wm. N. McVeigh had left the city, to wit: on the 30th of May, and gone within the Confederate lines, with the knowledge of the officers of the bank (the family of the latter having preceded him), and neither of them had returned to Alexandria, but both remained within the Confederate lines during the war—Wm. N. McVeigh engaged in business in the city of Richmond, the capital of the Confederacy.

The record does not show the precise time when Edgar McVeigh, the son and partner of James H. McVeigh, left; whether before or after the departure of his father. But it is certified as a fact proved, that James H. McVeigh & Son were within the Confederate lines during the war.

The existence of war was recognized by the government of the United States more than a month before the invasion and military occupation of Alexandria. On the 19th of April 1861 proclamation of the blockade was made by the president. This was of itself conclusive evidence that a state of war existed. The Prize Cases, 2 Black's R. 635; *Cuyler v. Ferrill*, 8 Amer. L. Reg., N. S., p. 100. In *Bigler v. Waller & al.*, a Circuit court case (Amer. L. Times Rep., vol. 3, No. 9, p. 159), Chase, C. J., delivering the opinion of the court, said: "The actual beginning of the war against the United States doubtless preceded the proclamation of the president of 15th of April 1861, calling out the militia to suppress insurrection; but the proclamation declaring the blockade of the ports of the insurgent states, must be regarded as

835 the first formal recognition *of the

existence of civil war by the national government. That proclamation was issued on the 19th of April, and that date therefore must be taken as the date of the commencement of the war."

It would be needless and a waste of time at this day to argue that the late conflict between the American states was a war, in the legal sense, with all the incidents and consequences of a war, as they are known to the international law, since it has been so held repeatedly by the highest Federal and State courts.

In *Brown v. Hiatts*, 15 Wall. U. S. R. 177, 184, Mr. Justice Field says, speaking of the late war, "it is sufficient to state, that the war was accompanied by the general incidents of a war between independent nations; that the inhabitants of the Confederate States on the one hand, and the loyal states on the other, became thereby reciprocal enemies to each other, and were liable to be so treated without reference to their individual dispositions or opinions; that, during its continuance, all commercial intercourse and correspondence between them were interdicted by principles of public law, as well as by express enactments of congress; that all contracts previously made between them were suspended," &c.

In *Harden v. Boyce, Brady, J.* said: "The following cases establish the proposition that in the late rebellion there existed between the government of the United States and the Confederate States a state of civil war, in the sense of the international law, which brought with it the common incidents of war, and arrested all commercial intercourse and communication between the citizens of those states respectively. He cites the Prize Cases, 2 Black's R. 635; *The Venice*, 2 Wall. U. S. R. 258; *The Wm. Bagaley*, 5 Wall. U. S. R. 377; *Hanger v. Abbott*, 6 Wall. U. S. R. 532; *Allen*

836 *v. Russell, 12 Amer. L. Reg. 362.

To which may be added *Billgerry v. Branch & Sons*, 19 Gratt. 425, and numerous other and more recent cases.

After the invasion of Alexandria, and its subjugation by the United States, although it was a city of Virginia, and claimed by the state to the last, its status and that of the Bank of the Old Dominion, and of all the inhabitants of the city, whatever might have been their individual dispositions or opinions, was that of hostility to the Confederacy and to the rest of Virginia which adhered to the Confederate government and to the inhabitants thereof. *Billgerry v. Branch & Sons*, supra; *Brown v. Hiatts*, supra, Mr. Justice Field; and the consequences and incidents of a war inter gentes applies to them. The foregoing propositions will hardly be controverted. With regard to them we are all of one opinion. They being conceded,

It is equally incontrovertible, that the McVeighs having cast their fortunes with the Confederacy, and thrown themselves under the protection of its government, to which they were giving aid and comfort, and living upon its territory, whilst the Bank of

the Old Dominion remained on the United States side of the belligerent lines, within the power and under the government and control of that belligerent, it would have been unlawful for the makers to pay, or for the bank to receive payment from them of the notes in question at their maturity.

When the McVeigh's abandoned their homes in Alexandria, after they had been overrun by the northern power, and removed to keep within the Confederate military lines and under the Confederate flag, there can be no question which side they had espoused, the north or the south, the United States or the Confederacy; to

which government they felt that their
837 *allegiance was due, to which they were friends, and to which they were foes. It matters not whether they abandoned their residences in Alexandria with the intention of returning or not. They evidently had no intention of returning as long as the city remained in the occupancy and under the dominion of the government of the United States waging war against their native State and the Confederacy. They were enemies to that government as long as it maintained the attitude of hostility and waged war against their country. On the other hand, the Bank of the Old Dominion adhered to the government of the United States. It remained on its side of the military lines, and continued subject to its power and control during the war; whilst the McVeigh's, from the time they left Alexandria as before stated, continued subject to the government of the Confederacy as long as the war lasted. They were thenceforth, upon well established principles of international law, enemies.

It was not lawful for the makers, whilst this relation subsisted, to pay the notes in question, or for the holder to receive payment from them. There is perhaps no principle of international law in relation to wars inter gentes, better established than this. In *Griswold v. Waddington*, 16 Johns. R. 438, Chancellor Kent says, The idea that any remission of money may lawfully be made to an enemy is repugnant to the very rights of war. The law that forbids intercourse and trade must equally forbid remittances and payments. Payments or remittances of money by a subject or citizen of one belligerent to a subject or citizen of the other during the war is unlawful. See also *Hoare v. Allen*, 2 Dallas' R. 102; *Willison v. Patterson*, 7 Taunt. R. 438; *Conn. v. Penn.*, 1 Peters C. C. R. 496. This principle has been repeatedly applied to
838 our war. **Life Ins. Co. v. Hall*, 7

Amer. L. Reg. 606; *Coppell v. Hall*, 7 Wall. U. S. R. 542, 557; *Billgerry v. Branch & Sons*, 19 Gratt. 397.

This being established, I hold that it was not lawful for the holder to demand payment, or to cause the notes to be dishonored for non-payment. It could not be lawful to demand of another what it is not lawful for him to pay or for you to receive. And the makers could not be held to be in default for not paying at maturity when the

law forbade them to make payment and the holder to receive payment. In this I am sustained by this court in the case last cited. It follows that the protest was illegal and void.

Whilst demand of payment is not necessary where the place of payment is named in the instrument, to give the holder right of action against the maker of the note, it is necessary to give him right of action against the indorser, and to fix his liability. The indorser by his contract, only undertook to pay the note in case it was not paid by the maker upon due presentment and demand and refusal, and upon due notice thereof to him. They are precedent conditions, and unless complied with by the holder, there is no contract or undertaking, by the indorser to pay the note. *Edwards on Bills & Prom. Notes*, pp. 265, 268. The holder is required to do two distinct acts in order to charge the indorser. First, to make presentment and demand of payment of the maker; and if not paid, second, to give notice to the indorser of the dishonor of the note. *Id.* p. 483. In this case, we have seen, that it was unlawful for the makers to pay, or the holder to receive payment, by reason of their being separated as enemies by war; and therefore the makers could not be held in default for non-payment. A man cannot be held in default for not doing

839 what *the law forbids. "No default can arise from a compliance with the law." And the indorser by his contract only undertook to be liable in case of the default of the makers. To hold him liable because of the non-payment by the makers when by the intervention of the war, which he did not create and was powerless to prevent, it was made unlawful, not to say criminal, for the makers to pay or the holder to receive, it seems to me, would be unreasonable, unjust, and arbitrary.

But if there had been a lawful demand on the makers, and protest of the notes in question, has there been due notice of their dishonor, so as to make the conditional undertaking of the indorser absolute and to fix his liability to pay them? It is true the protest states that notice was left at his residence in Alexandria, with his white servant, in all the cases except one, and in that one at the Bank of the Old Dominion, which is described as his place of business.

At the date of the first notice the existence of the war had been formally recognized by the government at Washington, more than two months, and at the date of the last it had been raging for nearly five months and a half; nearly as long as it took, in the late French and German war, to overthrow one of the most powerful empires in the world. And when those notices to McVeigh were left at his house, or the Bank of the Old Dominion, in Alexandria, they, together with the whole city had been in the military occupation of the enemy, and subject to its control and dominion for thirty odd days, to near five months, and had ceased to be the residence

and place of business of Wm. N. McVeigh, for about the same length of time; he being with his family, within the Confederate lines, and separated from them as by a wall of fire: And this was known to the officers of the bank at the *time.

How could such acts be regarded as notice to him? They were but idle forms.

Dean v. Nelson, 10 Wall. U. S. R. 158, was a proceeding in Memphis, during the late war, whilst it was in the occupation of the United States, to foreclose a mortgage of shares of stock, which had been executed by Nelson to secure a debt of which Dean, a northern citizen, was then assignee. A portion of the stock had been assigned by Nelson to Benjamin Day, and the residue to his wife, and they with Nelson were made defendants to the proceeding. All the defendants were then within the Confederate lines, and it was unlawful for them to cross them. Two of them had been expelled from the Union lines, and were not permitted to return. The other, Benjamin Day, had never left the Confederate lines. Held, that the notice was a nullity. Mr. Justice Bradley, speaking for the court, said: "A notice directed to them and published in a newspaper was a mere idle form. They could not lawfully see it, nor obey it. As to them the proceedings were wholly void and inoperative. How much better would have been a notice left at their late residence or place of business in Memphis?"

In a recent case decided by the Superior court of Chicago (*Life Ins. Co. v. Hall & al.*, 7 Amer. L. Reg., new series, p. 606), it was held that the publication of notice in a newspaper in Chicago, of a suit depending in that city, addressed to parties residing in Louisiana, within the Confederate lines, during the late war, has no validity, and is void. The court said: "The only principle upon which it could be justified would be, that the debtor, being an enemy, had no rights which a court of justice was bound to respect." To divest a man of his rights or property on such a notice, the court says, "could rest only on a basis of robbery." *How much better would be a notice left at his abandoned place of business or residence than in the hands of his enemy?

The New York case of *Harden v. Boyce* (59 Barb. Supr. Court R., p. 426) is still more directly in point. That was an action against the indorser of a negotiable note made in New York October 1st, 1860, and payable at the Bank of the Republic twelve months after date. The note at maturity, in October 1861, was presented at the Bank of the Republic, and payment demanded and refused, and thereupon protested. Notice of the dishonor of the note to the defendant, the indorser, who was a resident of Greenville, South Carolina, and within the Confederate lines at the date of the protest, was deposited in the post office, directed to him at his residence. It was held that the notice was a nullity. Brady, J. who delivered the opinion of the court, in a very clear and condensed opinion, says: "When a

war is commenced between nations it arrests eo instanti all commercial intercourse and voluntary communication with the enemy without permission of the government; and the citizens or subjects of one belligerent become the enemies of the other, and of all its citizens or subjects." (Citing *Griswold v. Waddington*, 16 Johns. 438; *The Rapid*, 8 Cranch 161; and *The Julia*, Id. 193.) "And these results of war intergentes (he says) were substantially applied to the citizens of the Confederate States during the late war." Then referring to numerous cases sustaining this proposition he thus concludes: "The existence and character of the hostilities mentioned, and the consequences flowing therefrom, rendered the attempted service of notice of protest on the defendant a nullity. The defendant's engagement was a conditional one, to be made absolute upon the observance

of such formulae as are prescribed by law, unless waived or rendered unnecessary by facts and circumstances attending the maturity, demand and refusal of payment recognized by commercial law. In this case there was no pretence that notice of dishonor had been waived or was necessary (unnecessary), and the defendant was therefore entitled to it. The plaintiff was under no obligation to send it as long as the impediment occasioned by war existed. * * * It was his duty, however, to send it when the interruption of intercourse ceased." And such is declared to be the law by Chitty and Edwards. Edwards on Bills and Promiss. Notes, 458-9. See also 3 Wend. R. 488; 6 East's R. 16.

I think it must then be conceded, upon reason and authority, that the attempted service of notice on the indorser in this case was wholly inoperative and void; and that to fix his liability, in other words, to make absolute his conditional contract to pay the notes, it was necessary that the holder should have notified him of their dishonor in a reasonable time after the impediment was removed, by the termination of the war.

This conclusion is irresistible unless it can be successfully maintained, that Wm. N. McVeigh by abandoning his residence and place of business in Alexandria to keep within the Confederate lines and under the protection of the Confederate government, forfeited his right to notice and made his contracts absolute.

He violated no condition or requirement of his contracts, expressed or implied, by removing from his residence and place of business in Alexandria before the maturity of the notes,—nor did the makers. If he (the indorser) chose to leave Alexandria and remove to any part of Virginia, or to another State, or beyond the seas, he would thereby have violated no obligation *of his contract. And it would have been necessary for the holder to have followed him with notice of the dishonor, in order to hold him liable, if he knew where he was, or could find out by reasonable inquiry, and due diligence.

Story on Promiss. Notes § 316. Wm. N. Mc-

Veigh, like Benjamin Day, in *Dean v. Nelson supra*, never left the Confederacy. He was in the Confederacy when the war commenced, at the place where the notes were made, indorsed and payable, and like Day he never left it.

It was not leaving his home and place of business, which he had a right to do under his contract, which prevented its execution, or caused its suspension. It was the war, for which he was not responsible, and which he doubtless regarded as a great public calamity. But as it had burst upon the country it threw upon him, as it did upon others, the necessity of deciding questions of duty and responsibility for himself as a citizen. It was a war which divided states and communities, and individuals, that were before under one common federal government. But these individuals were also amenable to their local state governments, which still retained their powers of sovereignty, except only so far as they had delegated a part of them to the general government by the bond of union. To their respective state governments the citizens of each owed allegiance, qualified only by the powers which had been delegated to the common government. In this unhappy conflict between states and sections the citizen had to decide for himself, on which side of the conflict his duty placed him. And it being a civil war, and having been previous to the removal of the McVeighs from Alexandria, recognized as such by the government at Washington, the citizen had the right of election, to which side he **844** would *adhere. It was so held by the Supreme court of the U. S. *Inglis v. Trustees of the Sailor's Snug Harbor*, 3 Peters R. 99. Mr. Justice Thompson delivering the opinion of the court says, "This right of election must necessarily exist in all revolutions like ours, and is so well established by adjudged cases, that it is entirely unnecessary to enter into an examination of the authorities." Mr. Justice Story, who dissented from the opinion of the court on some points, concurred on this point. He says, "Under the peculiar circumstances of the revolution, the general, I do not say the universal, principle adopted was, to consider all persons, whether natives or inhabitants, upon the *occurrence of the revolution*, entitled to make *their choice*, either to remain subjects of the British crown, or to become members of the United States." (The italics are mine). Again he says, "It appears to me that there is sound sense and public policy on the doctrine, and there is no pretence to say that it is incompatible with the known law, or general usages of nations."

But the decision of this question is not necessary to the decision of this cause. For if in a political aspect the McVeighs had not the right of election, and were guilty of an offence against the public in electing to go with the Confederacy, for which they might be held responsible in a prosecution, they cannot by reason thereof

be held liable to this private party beyond their undertaking in the contract.

It seems that McVeigh elected to adhere to his native state of Virginia, which had withdrawn from the Federal union and united with the Southern Confederacy. And earnest and deep and overpowering must have been his convictions of duty **845** to have impelled *him to so great a sacrifice of property, comfort, and material prosperity, as he made by this decision.

It is not like the case of a man absenting himself from his home, or absconding, to evade notice, or to avoid a just responsibility. Wm. N. McVeigh by leaving, sacrificed large pecuniary interests and left a valuable estate at the mercy of the invader. It cannot be doubted, that he was impelled to this great pecuniary sacrifice by a high sense of duty and moral feeling; like thousand of as generous, virtuous, honorable and patriotic men, as ever lived in any age or in any land—many of whose names, by their exalted virtues, will adorn the annals of time till time shall be no more. No one will be disposed to attribute ignoble motives to Wm. N. McVeigh, or McVeigh & Son, whether they regard them as right or wrong in their convictions; a question which it is not necessary to decide, and which it would be futile and to no purpose to investigate in this opinion.

As McVeigh violated no requirement nor condition of his contract, to hold that he forfeited it to the bank by an infraction of a public duty would be tantamount to subjecting him to confiscation, not to the government, but to a private party to a contract which he had not violated; a conclusion which must be repulsive to every fair mind. If he were liable to this sort of punishment or forfeiture, how would it be with those Confederates who did not recede before the advancing armies of the United States, but met them, and invaded their territory?

I cannot see that the McVeighs differ from all other non-combatant Confederates who were hostile to the United States as a power that was waging war against their state. They did not leave their country to carry on hostilities against it. And **846** if they had, the public offence *could not create an obligation on the part of Wm. N. McVeigh, to pay to a private party a debt which his contract did not bind him to pay. He did not leave his state. He elected to adhere to the Confederacy in the conflict of arms, and endeavored to keep within its military lines and under the protection of its flag. If he were wrong, it could not entitle a private party to coerce him to pay further than his contract bound him. Nor can we say that the McVeighs of their free will abandoned their homes in Alexandria. It cannot justly be said, that a man voluntarily does that which if he did not do he would be in danger of loss of life or liberty from a power which it was impossible for him to resist, or be required to subject himself to moral degradation. Such the McVeighs most probably regarded

the alternative presented to them. And if so, though they were mistaken, it cannot be said that they voluntarily abandoned their homes.

But however Wm. N. McVeigh's removal from Alexandria may be regarded as a political question, in that respect we have nothing to do with it. We have seen that by his removal he violated no part of his contract with the holder of the notes in question, and that if guilty of an infraction of a public duty that could not create in him a private obligation to pay money to the holder which by his contract he is not liable to pay. He is not asking aid of the courts to relieve him from the operation of legal proceedings, or from the effect of his absentsing himself from his home. And in this there is a broad distinction between our case and *Ludlow v. Ramsey*.

I am further of opinion, that the court erred, in overruling the motion for a new trial, the verdict being plainly contrary to the law, as herein expressed, and to the first and second instructions given by the
847 *court for the defendant. It is said that the McVeighs had not been domiciled in Virginia outside of the Union lines, because they left their homes in Alexandria with the intention of returning. Let it be that they did—that they expected the enemy would be expelled, and they would be able to return even before the maturity of their notes. They were grievously disappointed. They found that at the date of the maturity of these notes, and before and afterwards, as long as the war lasted, there was an impassable barrier between them and their former homes in Alexandria and the holder of these notes. But did we not hold, in *Hutchison v. Taylor*, 25 Gratt. 536, Judge Christian delivering the opinion, that *Hutchison* had changed his domicil, and become domiciled in Virginia although he may have left Washington with the intention of returning? and that he and his partner *Taylor*, who remained in Washington, thereby became enemies; and upon that ground that the partnership was dissolved? One rule ought not to be applied to *Hutchison*, and a different rule to *McVeigh*, under substantially the same circumstances.

As well might it be held that *General Lee* had not changed his domicil, and that a notice left at *Arlington* after it fell under the dominion of the enemy, as his place of residence, was a good service, as to hold that the notice was good in the case before us. He brought his family away; but suppose he left furniture, books, papers and servants too, as I think he did, would that validate the notice?

The grave question for this court to determine, is the legal liability of Wm. N. McVeigh under these contracts as indorser. And if it were a fact that orphans and widows would be affected by our decision, and I do not know whether they will
848 or not, I am at a *loss to know what aid it can give us in coming to a right conclusion. If Wm. N. McVeigh is not

liable to pay them by his contract, as implied by his indorsation, according to commercial law and usage, there is no obligation on him, moral or legal, to pay them, even though orphans and widows had an interest in them. He only undertook to pay them, as we have seen, on the compliance of the holder with certain precedent conditions, one of which was due notice of their dishonor. And in as much as the holder could not comply with that condition by reason of the war, the contract was suspended, and the holder was excused from giving the notice until the impediment was removed, which, in this case, was the termination of the war. In such case Chief Justice Marshall says, in *Hopkirk v. Page*, 2 Brock. R. 20-34: "To charge the drawer, notice of the dishonor of his bill ought to be given within a reasonable time after the removal of the impediment."

Notice to the indorser cannot be presumed, as has been contended, from the fact of payment to the branch bank during the war in Confederate money. The payment was made by the makers, and accepted by the branch of the Bank of the Old Dominion on the 30th of May 1864. The makers, of course, then knew that they had not been paid. And if the fact of payment was communicated to the indorser, which is also probable, the inference for him was plain that they had not been previously paid. But it is not fair to presume from that fact that he inferred, or had reason to believe, that they had been protested at maturity, when he knew that no demand of payment had been made, or could have been made. It was natural that the makers, knowing that the notes were not paid, would avail themselves of the authority given by
849 the *act of assembly in such cases to pay them, if they had the means to pay them, and the branch bank was willing to receive payment in such currency as all the other banks of the commonwealth were receiving.

No presumption can be raised from this fact, in connection with the fact, that subsequently, said act of assembly was held to be unconstitutional by a majority of this court, so far as it authorized payments to be made in such cases to the branch bank, that the indorser knew in a reasonable time after communication was restored by the termination of the war or had any reason to believe, that said notes were unpaid, and that the bank looked to him for payment. That decision was made more than five years after the termination of the war; and until then no judicial doubt, had ever been suggested, as to the constitutionality of the law, or as to the validity of payments made by its authority. But it had received high judicial approval and sanction as far as it had been passed on by the courts.

No notice had been given to the indorser by the mother bank within a reasonable time after the termination of the war, that she repudiated the payment made by the makers of her branch, and looked to him for payment. But on the contrary, as soon

after the war as the fall of 1865, the mother bank appropriated all the assets of her branch, including the proceeds of the payment made by the makers of these notes, without even an offer, so far as this record shows, to return to the makers the value of the Confederate money paid by them, or to credit it on their notes.

So far from these facts raising a presumption, that the indorser had notice in a reasonable time, after the termination of the war, and the restoration of communication *between him and the bank, that the notes in question had not been paid, and that they had been dishonored, and that the bank looked to him for payment, the presumption is the other way. They raise a strong presumption amounting in fact to an assurance, that the notes were discharged, and that the bank did not look to him for payment. Judge Marshall says, in *Ogden v. Saunders*, 12 Wheat. R. 213-14, "He," meaning the drawer, "has a right to expect notice of its non-performance, because his conduct may be materially influenced by this failure of the drawee. He ought to have notice that his bill is disgraced, because this notice enables him to take measures for his own security." The same is applicable to the indorser of a note. And if Wm. N. McVeigh had received due notice of the non-payment of the notes, and that the bank looked to him for payment, he might have taken measures for his security.

But it is said, it was the duty of the indorser to have made inquiry himself, of the holder of the notes whether they had been paid, or whether they had been dishonored and he was looked to for payment, and that inasmuch as he did not do so he is liable to pay. This, it seems to me, would introduce a new principle into the commercial law, and totally change the character of an indorser's contract, as it has already been explained. The fact that the indorser was the president of the bank cannot affect the question of his liability. He stands precisely upon the footing, as to his rights and liabilities that he would if he were not president, and can be held liable no further than his contract makes him liable. Did we not hold but recently, in a case decided at Staunton, and not yet reported, Christian

J. delivering the opinion, in which
851 *we all concurred, the case of *Tardy v. Boyd*, that Boyd as indorser was discharged from liability to pay the debt, for want of notice of its dishonor, although he was a director of the bank, and afterwards offered to pay it in Confederate money? But McVeigh in fact ceased to be president of the bank before any of these notes matured; was never afterwards privy to its proceedings, and was cut off from all communication with it.

With regard to the instructions, as this opinion has already occupied so much of our time, I will only say, that so far as the instructions are in harmony with the principles herein declared, they are proper to be given to the jury, and so far as they are in

conflict with them, they ought to be refused.

I am of opinion upon the whole to reverse the judgment of the court below with costs, and to remand the cause, to be proceeded with in conformity with the principles herein declared.

Christian J. concurred in the opinion of Moncure P.

Staples J. was of opinion that the notices left at the defendant Wm. N. McVeigh's house and the bank were not sufficient; and that notice of the dishonor of the notes should have been given after the close of the war in a reasonable time. He concurred in the opinion of Anderson J. on the question of the sufficiency of the notice. In all other respects he concurred in the opinion of Moncure P.

Bouldin J. concurred in omnibus in the opinion of Anderson J.

The judgment was as follows:

852 *The court is of opinion, for reasons stated in writing and filed with the record, that the judgment of the court below is erroneous, and that whilst it did not err in refusing to give the fifth, eighth, ninth and eleventh instructions moved by the plaintiff below, or in giving the first, second, fourth, fifth, eighth, ninth, and tenth instructions moved by the defendant, it did err in giving the second and third instructions moved by the said plaintiff. The court is further of opinion that the notices addressed to Wm. N. McVeigh, delivered to his white servant at his residence in Alexandria, and the notice delivered to Ramsay at the Bank of the Old Dominion, under the facts and circumstances disclosed by the record, were insufficient in law; and that in order to bind the said McVeigh as indorser, it was incumbent upon the defendant in error, within a reasonable time after communication was restored between the parties by the termination of the war, to give the said indorser notice of the non-payment and dishonor of the notes in controversy, which were indorsed by him for the accommodation of the makers. And as to the other two notes which do not appear to have been indorsed for the accommodation of the makers, there is no error in the fourth instruction given by the court for the plaintiff with regard to them; and that for the foregoing reasons which are more fully set forth in the opinion filed with the record as aforesaid, the court erred in refusing to give the defendant's third instruction, and also in overruling his motion for a new trial.

It is therefore considered that the judgment of the Corporation court of the city of Alexandria be reversed and annulled, the verdict of the jury set aside, and a new trial awarded the plaintiff in error. And
853 *that the defendant in error do pay to the plaintiff in error his costs expended in the prosecution of his writ of supersedeas here. And the cause is remanded

to said Corporation court for further proceedings therein in conformity with the principles herein declared, and in the opinion of the court filed with the record.

Judgment reversed.

854 *West Rockingham Mutual Fire Ins. Co. v. Sheets & Co.

November Term, 1875, Richmond.

Absent, BOULDIN, J.

1. **Fire Insurance—Pleading.**—In an action on a policy of insurance on buildings, if the declaration is framed as authorized by the statute, Code of 1873, ch. 36, § 44, it ought regularly perhaps to notice the fact, that the policy or a sworn copy of it is filed with it.

2. **Same—Same—Objections to—Appellate Court.**—But when it does not so appear that the policy was filed with the declaration, yet if the parties proceed in the case without its being called for by the defendant, and it is obvious that the defendant knew what it was without calling for it, the objection that it was not filed with the declaration cannot be taken for the first time in the appellate court, though there was a demurrer to the declaration.

3. **Same—Construction of Policy—Notice of Loss.**—S & Co. have a policy of insurance against fire on buildings in a company of which R is president. The buildings are burned; and two days after the fire S writes to R describing the fire, and stating the loss, and then referring to what will be necessary to be done by the company, and expressing himself as wishing to comply strictly with the rules and regulations of the company. Upon the receipt of this letter by R the company proceed to act upon it. The letter having been intended by S as the notice required by the policy, and the company having acted upon it as such, the fact that it was not signed by S & Co., or addressed to R as president of the company, or to the company, as required by its rules, will be considered as waived, and the letter is competent evidence of notice.

4. **Same—Same—Proofs—Waiver.**—If the evidence shows that the preliminary proofs, required by a policy of insurance, have been waived by the company, the insured is entitled to recover, though no such proofs were in fact taken.

5. **Same—Same—Same—Same.**—Where, when an insurance company is informed of a fire by the insured, and the company not saying any-

855 thing about the preliminary *proofs, proceed to enquire whether the insurance is valid upon a specific ground independent of these proofs, and decide that upon this specific ground the insurance is not valid; this is a waiver of all objection to the insufficiency of these proofs.

6. **Same—Constitution of Company—Creditors.**—By the constitution of a Mutual Assurance Company, no person who has claimed a homestead exemption shall be a member of the company. One of the members of the firm of S & Co. has claimed his homestead; and S & Co. sign the constitution and take out a policy on their partnership property. The fact that one of the partners has claimed his homestead does not impair the validity of the policy issued to the partnership.

See note on "Fire Insurance Generally," appended to Mut., etc., So. v. Holt, 29 Gratt. 612.

7. Same—Same—Failure to Voluntarily State Title.—

If a policy of insurance does not require that the insured shall give in the liens or incumbrances on the property insured, or state what is his title to it, and no questions are asked of the insured by the insurer, the policy is not avoided by the failure of the insured, without any fraudulent intent, to mention a lien upon it.

8. **Same—Misrepresentations of Insured.**—If there be a warranty, or a representation, which amounts to warranty, that there are no incumbrances on the property insured, whether such warranty or representation be given in answer to a question or not, if it be untrue the policy is void, even though the insured was not guilty of actual fraud.

9. **Same—Performance of Conditions—Waiver.**—In the declaration on a policy of insurance framed under the statute, plaintiffs say they have performed on their part all the conditions of the policy, and have violated none of its prohibitions. Under this declaration they may prove a waiver of performance of the conditions of the policy by the insurer; and this will be equivalent to proof of the performance of such conditions.

This case was argued at the September term of the court at Staunton, and was decided at the November term in Richmond. The case is sufficiently stated by Judge Moncure in his opinion.

Compton, for the appellants.

Jno. Paul and Haas, for the appellees.

Moncure P. This is a supersedeas to a judgment of the Circuit court of Rockingham county, rendered on *the 16th day of September 1874, affirming a judgment of the county court of said county, rendered on the 10th day of June 1873, in an action of assumpsit brought by Felix T. Sheets & Co. against The West Rockingham Mutual Fire Insurance Company, founded on a policy of insurance whereby the said company insured a certain paper mill, machinery and buildings connected therewith, belonging to the said plaintiffs. The declaration contained but one count, which was special, though in the general form authorized by the Code, chap. 36, sec. 44. There was a bill of particulars filed with the declaration, charging the defendant as Dr. to the plaintiff, "1872, July 17th. To loss by destruction of paper mill and machinery by fire, and of damage of house designated in policy of insurance as No. 3, \$6,266."

The defendant demurred to the declaration, and plead non-assumpsit; and the plaintiff joined in the demurrer, and replied generally to the plea. The demurrer being argued was overruled by the court. The defendant then offered to file several pleas, to which the plaintiffs objected; but the court overruled the objection, and permitted the pleas to be filed; to which the plaintiffs replied generally, and thereupon the issues were tried by a jury, which rendered a verdict for the plaintiffs, and assessed their damages at \$4,930.44, with interest from the 7th of September 1872 until paid. The defendant moved the court to set aside the verdict and grant a new trial; which motion

the court overruled; and judgment was accordingly rendered on the verdict.

Three bills of exception were tendered by the defendant and signed by the court, during the progress of the trial of the case, which will be noticed in detail hereafter.

The defendant applied to the judge of 857 the *said Circuit court for a supersedeas to the said judgment of the County court; which was accordingly awarded. The Circuit court afterwards heard the case upon the said supersedeas, and affirmed the said judgment of the County court. The defendant then applied to a judge of this court for a supersedeas to the said judgment of the Circuit court; which was accordingly awarded: and that is the case which we now have to dispose of.

Sundry errors in the judgment of the Circuit court, affirming the judgment of the County court, are assigned in the petition to this court for a supersedeas; which errors we will notice in the order of their assignment.

"First—The County court erred in overruling the demurrer to the plaintiff's declaration. The act of assembly, approved February 8, 1872, which simplifies declarations on policies of insurance, and on which the plaintiff relied, requires the plaintiff to file with his declaration the original policy of insurance or a sworn copy thereof; neither of which was done in this case. The declaration therefore was not sufficient under the statute. The declaration should, therefore, have set forth every condition or promise of said policy, and an averment that the plaintiff had observed the same, *seriatim*. Code of 1873, chapter 36, sec. 44, page 372. The demurrer therefore should have been sustained."

It does not appear from the record whether the policy was filed with the declaration or not. It ought regularly perhaps, to have been noticed in the declaration as having been filed therewith. It was in possession of the plaintiffs, and might, easily, have been filed therewith; and the plaintiffs 858 could have had no motive for not filing it. They intended that it should *be

considered as so filed; for they filed their declaration in the form authorized by law in case the plaintiff files with his declaration or complaint the original policy, or a sworn copy thereof. If it had not been actually filed, the defendant might have called for it, and compelled its production. It was not so called for, either because it was already filed, or because the plaintiff well knew what it was, without calling for its production. It was in the form prescribed by the defendant, and in the same form with the other policies entered into by the defendants. It was before the defendant when the special pleas were prepared, in which the terms of the policy, or some of them, are set forth, and it was the first evidence which was introduced by the plaintiffs on the trial of the issues by the jury. It is too late to object, for the first time, in the appellate court, that the policy was not filed with the declaration. If it

was not so filed, and there was any error in that respect, it did not prejudice, and was in effect waived by the defendant.

"2nd. The County court erred in permitting the private letter of F. T. Sheets to John H. Rolston to go to the jury as proof of notice of the loss. The letter was not addressed to the company, nor to said Rolston in his official capacity as president; nor was it in the form required by the conditions annexed to the policy; and it was not signed by said firm of Felix T. Sheets & Co., and was not intended as a notice of loss. The 4th condition annexed to the policy required the notice to be given forthwith 'to the company;' and intended that the notice should be addressed to the company, and signed by the insured."

This is the subject of the first of the three bills of exception aforesaid.

The notice given by the letter here 859 referred to was *certainly given in due time. The loss occurred on the 7th of July 1872; the letter bears date two days thereafter, on the 9th of July, and was duly sent by mail, and received by the president of the company, to whom, personally, it was directed. It is very specific in detailing the facts in regard to the fire, and refers, unmistakably, to a loss under the policy of insurance in question. It was clearly intended to be a notice given in pursuance of the policy. After detailing the particulars in regard to the fire, the writer says: "The old mill is burnt, and it will be necessary to have some commissioners appointed to assess the machinery on hand; though not worth much, yet it should have a value attached; and I am informed that that duty devolves upon you," &c. "Wishing to comply strictly with the rules and regulations of the company, I shall not attempt to move or change anything until further advised by yourself or the authorities of the company."

It is objected, that this letter was signed only by F. T. Sheets, one of the firm of F. T. Sheets & Co.; and was addressed only to John H. Rolston (personally), and not as president of the company. But it was intended by the writer, and perfectly understood by all persons concerned, to be a notice under the policy; and the company derived from it all the benefit which they could possibly have derived from such a notice written in the most perfect form. The company forthwith took action upon it as such a notice, and after proceeding, as invited by the letter, to assess the value of the machinery remaining on hand, and to consider the subject and consult counsel in regard to their liability, they base their defence to the claim on a ground entirely independent of the question of notice. Thereby any formal objection that might

have been made to the notice, such as 860 is the objection now made, was *clearly waived; as is shown by the authorities referred to in the argument of the counsel of the appellees. *Flanders on Insurance* 518-520; *May on Insurance* 567; and cases cited.

"3d. The County court erred in refusing to give the first instruction as asked for by the defendants' counsel, which correctly embodied the law. See Angell on Fire and Life Insurance, page 257, sections 226, 227 and 228; also Columbian Insurance Co. v. Lawrence, 10 Pet. R. 507; and the Circuit court erred in refusing to reverse said judgment of the County court upon said ground."

The defendants' objections to the action of the County court, upon the instructions asked for, are the subject of the 2d of the said three bills of exception.

The first instruction relates to the necessity of giving the notice and furnishing the preliminary proofs required by the policy. As asked for, the 1st instruction is in these words:

"1st. That it was the duty of the plaintiffs, within a reasonable time after the fire, to give the defendant notice of their loss and damage, and as soon thereafter as possible to deliver to the defendant as particular an account of the loss and damage as the nature of the case admitted, signed with their own hands; and also to accompany the same with their oaths or affirmation, declaring the said account to be true and just, showing also the ownership of the property insured; what was the whole cash value of the subject insured; in what manner the buildings insured, or containing the subject insured in the several parts thereof, were occupied at the time of the loss; who were the occupants of the building; and when and how the fire originated, so far as they know or believe. And also to produce

861 a certificate under the hand and seal of a magistrate or *notary public, most contiguous to the place of fire, and not concerned in the loss; stating that he had examined the circumstances attending the fire, loss or damage alleged; that he is acquainted with the character and circumstances of the claimants; and that he verily believed that such claimants had by misfortune, and without fraud or evil practice, sustained loss and damage to the subject insured to the amount which such magistrate or notary should certify; and unless the jury is satisfied from the evidence that the plaintiffs complied substantially with these requirements of the conditions annexed to the policy, and made part of it before they brought this suit, they must find for the defendant."

The County court modified this instruction by adding at the end of it these words: "Unless they believe from the evidence the defendant waived said preliminary proof;" and then gave it with that modification.

Undoubtedly if the defendant waived the preliminary proof the plaintiff was not bound to furnish it; and if there was evidence before the jury tending to show that the defendant did waive the said preliminary proof, then it was proper for the County court to make the said addition; and the jury would have been misled by giving the instruction without it. Was such evidence before the jury?

I think there was. The fire occurred on

the 7th of July 1872. Two days thereafter, to wit: on the 9th of July, the letter before referred to, from F. T. Sheets to Rolston, the president of the company, was written, giving notice of the loss, which was sent and received in due course of mail. The said Rolston, in consequence of said letter, called a meeting of the board of directors

of said company, which met accordingly in *Harrisonburg on the 15th of July, just eight days after the fire, and six after the date of the letter. At that meeting, the burning of the mill of Sheets & Co. being presented for consideration, "a committee of five was appointed to investigate the matter as to the firm having taken the homestead;" and a general meeting of the company was called to take place in the courthouse July 29th, and notice of it was directed to be published in the Rockingham Register. On the 29th of July it seems there was a general meeting of the company according to the notice; and there were also, at the same time and place, two meetings of the board of directors; at one of which, the committee appointed to investigate the matter of the homestead, reported that the homestead of Vanlear (one of the firm of F. T. Sheets & Co.) was on record in the clerk's office, Staunton, Va., but the homestead of Sheets (the other member) was not recorded. At the same meeting of the board, the case of Sheets & Co. was placed in the hands of Woodson & Co., as counsel of the insurance company, and said counsel were to report to the board at a future day.

After the adjournment of the meetings held on the 24th of July 1872—at which the only subject of discussion was, whether the plaintiffs, or either of them, had taken the benefit of the homestead law—F. T. Sheets met with A. S. Byrd, who was an agent of the insurance company, to obtain policies of insurance, and asked him what had been done in the meeting. Byrd told Sheets that the meeting had turned the case over to Woodson & Compton as counsel of the company for their opinion; that he thought there was an article in the constitution which operated against the claim of the plaintiffs. Byrd then read the 11th article

863 of the constitution and by-laws of the *company forbidding any one to become a member who had taken the benefit of the homestead or bankrupt law, when Sheets remarked, "that knocks us out; if I had read that article I would not have signed the constitution." Sheets at the same time remarked that his partner, Vanlear, had taken the benefit of the homestead law, and had it recorded; but that all that he (Sheets) had done was to get his counsel, N. K. Trout, to write a note to the sheriff that he (Sheets) claimed the benefit of the homestead law, which notice Sheets signed and delivered to the sheriff, and said Trout told him to be effective it must be recorded; but Sheets did not execute any deed of homestead for record, and the notice was given in the year 1870 prior to the passage of the homestead act of June 1870. The

notice was exhibited on the trial, and is copied in the record.

In August or September 1872, the plaintiff Sheets met with Rolston, president of the insurance company, in Harrisonburg, and remarked to him that he had heard that the counsel of the company had decided against his claim; to which Rolston replied, that he had so understood, and that he did not see how the company could pay him unless the matter was tested by a suit: and Sheets then informed him that he would sue the company; and directed his counsel to bring suit. The letter of July 9th, 1872, was the only paper which passed between the plaintiffs, or either of them, and the company, until after the suit was brought on the 3d of October 1872; and no reference had been made in any conversation between the plaintiffs, or either of them, and the insurance company, or any of its agents, about the sufficiency of said letter as notice of the loss, or upon the subject of the preliminary proofs required by sect. 4th of the conditions of insurance, until after the 6th

864 *of November 1872, more than a month after the suit was brought.

The company had not refused to pay the plaintiffs their claim for insurance, but was holding the same under advisement until after they were sued; and they did not finally refuse to pay until a meeting on the 24th of February 1873, when they resolved that F. T. Sheets & Co. had forfeited their rights to become members of the company under article 11th of the constitution, by having taken the benefit of the homestead, and that therefore their policy was null and void and of no effect. In all the conversations between the plaintiffs and the officers and agents of the company, and in the company meetings, the only question discussed or mentioned was, the effect of the alleged taking of the benefit of the homestead law by the plaintiffs upon their policy, and no other objection to their claim was stated.

I think, according to the authorities referred to by the counsel for the appellees, the facts proved as before stated show, that the appellant waived the preliminary proofs. In *Flanders on Fire Insurance*, pp. 541, 542, that writer says: "The insurer may waive, in whole or in part, any of the ordinary proofs. Their requirement is a formal condition, introduced solely for his benefit, and their waiver, in effect, strikes the condition out of the contract. The waiver need not be express. It may be inferred from the acts of the insurers which evidence a recognition of liability, or from their denial of obligation exclusively for other reasons. That is, if the refusal to pay the loss is put upon grounds other than the insufficiency or defectiveness of the notice or proofs furnished, the insurers will be held to have waived objections of that character." "The

865 refusal to recognize the existence of any claim, *or a general refusal to pay, renders the delivery of notice and proofs a useless ceremony, and is treated as waiving a strict compliance with the

condition as to preliminary notice and proofs, both in respect to form and time."

In *May on Insurance*, pp. 573, 574, that writer says: "A distinct denial of liability and refusal to pay on the ground that there is no liability, is a waiver of the condition requiring proof of the loss. It is equivalent to a declaration, that they will not pay though the proof be furnished; and to require the presentation of proof in such a case, when it can be of no importance to either party, and the conduct of the party in favor of whom the stipulation is made, has rendered it practically superfluous, is but an idle formality, the observance of which the law will not sustain."

The cases cited by these writers fully sustain them in the views they present. They are collected in *Littleton & Blatchley's Digest of Fire Insurance Decisions*, Baite's edition, title Waiver pp. 700-709. Among them are the cases of *Taylor v. The Merchants Fire Insurance Co.*, 9 How. U. S. R. 390, and *Blake v. Exchange Mutual Insurance Co.*, 12 Gray's R. 265; which have a strong bearing on this case.

I have examined the authorities cited on the other side, but they do not show that the law is not as above stated. The case of the *Columbian Insurance Co. v. Lawrence*, 2 Peters R. 25, is explained in 9 How. U. S. R. 390, 404; where it is said that "the doctrine of the case in 2 Peters on this point of waiver, was virtually overruled in the same case reported a second time in 10 Peters R. 507. The case of *O'Neal v. Buffalo Fire Insurance Co.*, 3 Comst. R. 122, sustains

866 the views contended for on the side of the appellees. *Home Ins. Co. v. Cohen*, 20 Gratt. 312, is certainly not in conflict with them, but rather the contrary. Nor is what is said in *Angell on Fire and Life Insurance*, sec. 226 and 227, in such conflict.

I therefore think the County court did not err in refusing to give the 1st instruction, as asked for by the defendant; nor in giving it, as modified by the court.

"4th. The County court erred in refusing to give the second instruction asked for by the defendant. The substance of this instruction was, that the mere taking into consideration of the question of the homestead was not of itself a waiver of the preliminary proof of loss. In other words that there was no waiver unless there was an intent to waive the preliminary proof. This instruction was wholly refused. See *Columbian Ins. Co. v. Lawrence*; also *Home Ins. Co. v. Cohen*, supra; and the Circuit court should have reversed said judgment on that ground."

The question raised by this assignment of error has already been disposed of. The 2nd instruction therein referred to states the facts, proved by the evidence and concludes that this state of facts does not constitute a waiver of the preliminary proofs and the jury should find for the defendant. I have already stated that I think the facts proved show that the appellant waived the preliminary proofs. It follows, therefore,

that in my opinion the County court did not err in refusing to give the 2d instruction asked for by the defendant.

"5th. The Circuit court should have reversed the action of the County court in refusing to give the 3d instruction asked for by the defendant. It was a fraud on the company for Van Lear & Sheets to sign the constitution and seek to become members of the company, when they had taken 867 the benefit of the *homestead law, which was prohibited by said constitution. See Angell on Life & F. Ins., page 223, sec. 188."

The 3d instruction, as asked for, is in these words: "3d. If the jury believe from the evidence, that the plaintiffs or either of them, had, prior to their signing the constitution of the West Rockingham Mutual Fire Insurance Company, taken the benefit of the homestead law of Virginia, they should find for the defendant."

The County court modified this instruction by adding at the end of it these words: "unless they further believe from the evidence, that the defendant, or its agents, undertook and intended to insure the property of the plaintiffs as a firm, regardless of the homestead prohibition;" and then gave it with that modification.

Nothing is said in the policy of insurance about taking the benefit of the homestead law of Virginia, unless the constitution of the company be regarded as a part of the said policy; and all that is contained in the constitution on the subject is embraced in article 11th of the constitution, which is in these words: "No person shall become a member of this company who has taken the benefit of the homestead or bankrupt law; and any person that may hereafter take such steps shall forfeit his policy."

Conceding for the purposes of this case, that the constitution is a part of the policy, and that a violation of the 11th article of the constitution would vacate the policy or render it void; then the question arises, whether F. T. Sheets & Co., when they became members of the company, and obtained the policy, had taken the benefit of the homestead law?

D. N. Vanlear, one of the two members of the firm of F. T. Sheets & Co., and 868 who, it seems, owned but *one-sixth of the property insured, had taken the benefit of the homestead law, and had his deed recorded. But F. T. Sheets, the other member of the firm, and who, it seems, owned the remaining five-sixths of the property, only gave notice of his claim of homestead to the sheriff who had an execution against him, and never perfected his claim by executing a deed and having it recorded according to law.

But F. T. Sheets & Co. signed the constitution and obtained the policy in their partnership name, and the insurance was of their partnership property. They became members of the company as partners, and in their partnership name of F. T. Sheets &

Co., in which name they signed the constitution. They had not taken, and they could not take the benefit of the homestead law as partners. Only one of them, and he owning a comparatively small interest in the subject, took such benefit as an individual. But if both had taken it as individuals, still it could not have been said that they took it as partners, or that the partnership took it. There is a wide difference between these two persons as individuals, and the trading partnership formed of the two. The former might be worth nothing, while the latter might be worth a great deal. All the property of the former might be covered by a claim of homestead, while none of the property of the latter could be covered by such a claim. All the debts of the latter, including their debts and liabilities to the insurance company, must be discharged before the individual partners or their individual creditors can have a right to appropriate the partnership property to their benefit. "As the language of an insurance policy is the language of the company, and they can therefore provide for every proper case, it is to be taken in the sense 869 most favorable to the assured." *Flinders on Insurance p. 72, and cases cited. See also p. 209 and seq.

Then the policy has not been vacated or avoided by anything done under the 11th article of the constitution; and the County court did not err in refusing to give the third instruction as asked for by the defendant. Though the said court may have erred in giving it with an addition thereto; but that error, if any, is not to the prejudice of the plaintiff in error, who cannot complain of it.

"6th. The Circuit court erred in refusing to reverse the action of the County court in refusing the 4th instruction asked for by the defendant."

The 4th instruction as asked for is in these words: "If the jury believe from the evidence, that the plaintiffs, at the time of the procurement of the alleged policy of insurance on which this suit is brought, made any material concealment from the defendant or its agent, in regard to the title, or liens or incumbrances on the property insured, they must find for the defendant, no matter whether questioned in regard to liens, title or incumbrances or not."

The County court modified this instruction by inserting therein the words: "wilfully, with intent to deceive or defraud," before the words: "made any material concealment," and then gave it with that modification.

The concealment referred to in this instruction was of a vendor's lien on the mill property insured of about \$1700, which lien existed at the time of the insurance. The insurance company contends that the mere omission, without more, on the part of the insured, to give notice of this lien to the company, avoids the policy. While the plaintiffs, Sheets & Co., contend that such

omission has not that effect, unless
 870 *it occurred "wilfully, with intent to deceive or defraud." And the question involved in this issue is the one presented by the 6th assignment of error now under consideration.

There is nothing in the policy which requires a disclosure by the insured of the liens upon the insured property. There was no question propounded by the insurers to the insured in regard to the existence of such liens. The insurers might have examined the records for such liens, and made enquiries about them, either of the insured or others. But they failed to do so. Can they now avoid the obligation of the policy, on the ground that the insured, without being enquired of, and without any fraud, omitted to give notice of the lien at the time of obtaining the policy? I think they cannot.

In *Flanders on Fire Insurance*, p. 277, that writer says: "In general the insured is only required to disclose the matters inquired about, and not the particulars of his title, unless interrogated in respect thereto, or unless it is made imperative upon him by a condition of the policy." "But an untrue answer in an application for an insurance, in reply to a question respecting incumbrances, or the interest of the insured, renders the policy void; and this, whether the company has a lien on the property or not. By asking the question, it would be manifest that the company deemed the information material, and it would be material that the applicant should answer it truly." Many authorities are cited in support of what is here said and fully sustain it. Without repeating the citations here, they can readily be found by referring to the notes to that work. In one of them, *Tyler v. Aetna Ins. Co.*, 12 Wend. R. 507, Nelson J., in stating the reason why a disclosure of title
 871 is not *essential, says: "The rights of the insurer are sufficiently guarded by having it in his power to exact, by enquiry, a description of the interest of the applicant, and by the recovery being limited, in case of loss, to the value of the interest proved on the trial."

Again, on p. 338, the same writer says: "A policy cannot be avoided for encumbrances, unless upon the applicant's false and fraudulent answers to interrogatories," &c.

Of course if there be a warranty, or a representation which amounts to a warranty, that there are no incumbrances on the property, whether such warranty or representation be given in answer to a question or not, if it be untrue the policy would be void even though the insured might not be guilty of actual fraud.

In 2 *Fire Insurance Cases* by Bennett, p. 665, is a report of the case of *Delahay v. Memphis Ins. Co.*, 8 Humph. R. 684, in which it was held in 1848, that a failure on the part of the assured to disclose the existence of a mortgage on the property, is not a circumstance material to the risk and will not avoid the policy. See the many cases cited in the note to that case.

In 3 Id., p. 527, is a report of the case of *Morrison's adm'r v. Tennessee Marine & Fire Ins. Co.*, 18 Missouri R. 262, in which it was held in 1853 that the failure of the insured to disclose the state of his title, or the extent of his interest in the insured property, where there is no enquiry, will not avoid the policy, unless there is a fraudulent concealment or misrepresentation. The court in this case refers to the conflict which seems to exist between the decisions of the Supreme court of the United States on this subject, or some of them, and especially the case of *Columbian*

Ins. Co. v. Lawrence, 2 Peters' R. 218, 872 and the decisions *in New York and Massachusetts, or some of them, on the same subject, and gives a decided preference to the latter. After stating the grounds relied on in support of the latter, the court say: "These views commend themselves to our judgment by their justice, and we are satisfied will effect more solid justice between the assured and the insurer than the contrary doctrine. It cannot have escaped observation, that at first sight many of the principles of the law of insurance are seemingly very arbitrary, and their necessity and policy can only be seen and felt by those who are called upon to give them a practical application. The man without guile, who asks for insurance on his property, is not aware of the necessity of disclosures which long experience in insurance offices has shown to the underwriter to be necessary; and to hold his policy void for not making disclosures of the importance of which he is not aware, would be gross injustice. If applicants for insurance are to be held to a strict representation and proof of the nature and extent of their interest in property on which they apply for insurance, they will almost invariably lose the benefit of their policies. Are the liens of taxes, judgments, and such like, to avoid policies, unless they are disclosed, when they may be entirely out of mind and forgotten? If from a want of knowledge of the law the assured mistakes the nature of his title, although he may have one equally valuable, is his policy to be avoided? It is no answer to say that the misrepresentation must be material. What is material must be determined from the circumstances of each case. What is material in one case may not be so in another, and so a wide field for litigation will be opened. The ends of justice will be best subserved by holding the assured only responsible for fraud. Insurance companies may

873 *protect themselves by enquiries in relation to these things, and after filling their policies with so much detail and such minutiae of information in regard to other matters, as to create the impression that they are satisfied, to hold that they are not bound by their contract unless information of another kind is communicated by the assured, which is not sought for, would be enabling them to commit the rankest injustice."

These views are very strong, and I am

decidedly of opinion that they are correct. Nothing more need be added to them. If the company by the terms of its charter had a lien on property insured by it for its dues, as is the case with some mutual assurance companies, and as was the case with the Mutual Assurance Society against fire on buildings in the State of Virginia, there would be more reason in holding that a party applying for insurance was bound to disclose the existence of incumbrances on the property, whether enquired for by the insurers or not. The disclosure might be considered as material in that case, and as necessary to the validity of the policy. Sections 187 and 188 of Angell on Fire and Life Insurance illustrate the distinction between cases of a failure to disclose incumbrances where the insurer acquires no lien, and where he acquires one on the property insured. As to cases in which the insurers had a lien on the property, see *May on Insurance*, § 563, and cases cited; and *Shirley v. Mutual Assurance Society*, 2 Rob. R. (Va.) 705.

The insurance company in this case have no lien, either by the terms of the charter or any other law, or by any contract on the property insured.

I am therefore of opinion that the County court did not err in refusing to give 874 the 4th instruction as asked *for by the defendant, or in giving it with the addition made thereto by the court.

"7th. The Circuit court ought to have reversed the judgment of the County court for refusing to give the 5th instruction asked for by the defendant."

That instruction is in these words: "In this action, the proof of the plaintiffs must correspond with the allegations of the declaration, and the plaintiffs having averred in their declaration that they have complied with all the conditions of the policy sued on, they must prove the same, and are not permitted to avoid performance of said conditions by proof of waiver of performance on the part of the defendant; if therefore the jury believe from the evidence that the plaintiffs have failed to prove a substantial compliance with all the conditions and requirements of said policy, they must find for the defendant."

When the plaintiffs say in their declaration that they have on their part performed all the conditions of the policy of insurance and have violated none of its prohibitions, of course they mean such as were not waived by the defendant. Such as were waived are, in effect, as if they had never been inserted in the contract. If the act of 1871-2, ch. 79, § 1, p. 58, Code ch. 36, § 44, p. 372, had not been passed, proof of waiver of performance of any of the conditions of the policy would have been equivalent to proof of performance of such conditions under a declaration averring such performance. I think that the American authorities, or a decided preponderance of them, show that to be a correct rule with us, while the English rule appears to be different. See 4 Rob. Pr. 443; and 2 Smith's Leading

Cases, Wallace's Notes p. 74, and the cases cited. See also *Ketchum v. Protection Ins. Co.*, 1 Allen N. B. 136; and *Lycorning 875 County Mut. *Ins. Co., v. Schellenberger*, 44 Penn. St. R. 257, cited in the brief of the counsel for the appellees; and 5 Rob. Pr. 252; and 1 Greenleaf sec. 2, cited in the brief of the counsel for the appellees. I prefer the view taken of this subject in the American cases, as tending, more than the English view, to favor justice against technicalities, which is the growing tendency of our courts.

But under the act aforesaid, which was passed to simplify the form of declarations on policies of insurance, and in pursuance of which the declaration in this case was prepared, I do not think there can be a doubt but that proof of waiver of performance of any of the conditions of the policy was admissible in this case.

I therefore think the County court did not err in refusing to give the 5th instruction asked for by the defendant.

"8th. The Circuit court erred in refusing to reverse the action of the County court for refusing to give the jury the 6th instruction asked for by the defendant."

That instruction is in these words: "If an insurance company takes into consideration, the loss or damage sustained by a policy-holder, and decides that they will not pay the loss or damage and put their refusal to pay on other grounds than defects in the preliminary proofs or want of such proofs, this is a waiver of the necessity of furnishing the preliminary proofs required by the policy; but if the company take the matter into consideration, and make no decision as to whether they will or will not pay until after the suit is brought against them by the party insured; this does not operate a waiver of the preliminary proofs required by the policy."

I think the conduct of the defendant 876 in placing its *defence solely upon the ground that the plaintiffs or one of them had taken the benefit of the homestead law before they obtained the policy, and in its proceedings in regard to the claim of the plaintiffs, amounted to a waiver of the preliminary proofs required by the policy, although the company may not have formally decided until after the suit was brought, that it would not pay the claim on the ground aforesaid. After the company had had the claim under consideration for two or three months, the president informed the claimants that he understood the counsel of the company had decided against the claimants, and that he did not see how the company could pay it unless the matter was tested by a suit. They then informed him they would sue the company, and accordingly instructed their counsel to bring such suit. The only matter referred by the company to its counsel, was the matter in regard to the homestead, and that was no doubt the matter which the plaintiffs understood was to be tested by a suit.

I am therefore of opinion that the County

court did not err in refusing to give the 6th instruction asked for by the defendant.

"9th. The Circuit court should have reversed the judgment of the County court for failing to set aside the verdict of the jury on the ground that it was contrary to the law and the evidence."

This assignment of error involves only questions which have already been considered by me; and for reasons already given, I think the County court did not err in overruling the motion to set aside the verdict and grant a new trial.

"10th. The instruction asked for by the plaintiff and given to the jury was calculated to mislead the jury, and did not apply to the case."

877 *That instruction was: "that if they believe from the evidence, that the defendant resisted the payment of the plaintiffs on the ground that they had taken the benefit of the homestead, and no other, that is a waiver of defective notice of loss and preliminary proofs."

There was no error in giving this instruction, as I have already sufficiently shown. And upon the whole I am of opinion that there is no error in the judgments, either of the Circuit or County court, and that they ought to be affirmed.

The other judges concurred in the opinion of Moncure P.

Judgment affirmed.

878 *Darnall & Wife v. Smith's Adm'r & als.

November Term, 1875, Richmond.

I. Married Women—Separate Estate—Charging with Debts.—A married woman, possessed of a separate estate, may charge the same with her debts in like manner and to the same extent as a *feme sole*.

II. Same—Same—Same—Intention.—The liability of the separate estate of a married woman can only arise out of the supposed intention of the wife. And no pecuniary engagement can be a charge upon the wife's estate which is not connected by agreement, either express or implied, with said estate.

III. Same—Same—Same—Same.—If a married woman having separate property enters into a pecuniary engagement, whether by ordering goods or otherwise, which if she were a *feme sole* would constitute her a debtor, and in entering into such an engagement she purports to contract not for her husband but for herself, and on the credit of her separate estate, and it was so intended by her, and so under-

*Married Women—Separate Estate—Charging with Debts.—The cases on this subject have been collected in *Annotations* to Leake v. Benson, 29 Gratt. 153; Garland v. Pamplin, 32 Gratt. 305; Irvine v. Greever, 32 Gratt. 411; Justis v. English, 30 Gratt. 565; Ropp v. Minor, 33 Gratt. 97; Frank v. Lillienfeld, 33 Gratt. 377. These cases with their notes are practically exhaustive of the law in Virginia on this still important subject. In West Virginia the principal case is cited with approval in Radford v. Carwile, 13 W. Va. 668.

stood by the person with whom she is contracting; that constitutes an obligation for which the person with whom she contracts has the right to make her separate estate liable; and the question whether the obligation was contracted in this manner must depend upon the facts and circumstances of each particular case.

IV. Same—Same—Same—Same.—As the charge is a mere question of intention, the wife may extend it to the whole, or confine it to a part of her separate estate. If no specific part is appointed for the payment of the debt, the fair implication is, that the whole estate was intended to be made liable. If, on the other hand, only a part of the estate, expressly or by fair inference, is designed to be charged, no liability whatever can attach to the residue.

V. Same—Personal Liability.—A wife is exempt from all personal liability, and from all personal decrees and judgments upon her contracts. Her undertaking, so far as it is recognized by the courts, is not that she will pay the debt, but that her separate estate shall be answerable for it. And that is bound so far only as she has agreed it shall be bound.

879 *VI. Facts—Married Women—Separate Estate

—Liability.—W was insolvent, and E, his wife, owned a separate estate, part of it under her father's will, which was given in trust for her. In August 1860 W and E purchase a crop of tobacco from S, and they execute a paper by which they bind themselves to convey to S a sufficient interest in the Peatross estate to secure him for the tobacco. In October 1860, E directs her agent L, to give to S an order from her on the Peatross estate for \$4,153.22, to be drawn on whoever the court may appoint to distribute the estate. In 1862 S's adm'r files her bill to sell E's separate estate for the payment of this debt, and claims that E's whole separate estate is liable. E and her present husband do not answer, but her trustee does, and denies her estate is liable. And without directing any enquiry as to the Peatross estate, or what had been done with E's interest in it, there is a decree for the sale of E's land for the payment of the debt. **Held:**

1. Liability of Married Woman's Separate Estate.—*Prima facie* E's interest in the Peatross estate is alone liable to the payment of the debt.

2. Same—Burden of Proof.—If plaintiff insists that the other separate estate of E is liable, and that her interest in the Peatross estate was only taken as collateral security, the burden is on the plaintiff to establish the fact.

3. Same.—Before the plaintiff can subject the other separate estate of E, she must show that due diligence has been used by S in pursuing the interest of E in the Peatross estate, and that he has failed to make the debt out of that interest.

4. Same—Defendants.—Though a married woman is to be treated as a *feme sole*, so far as the capacity to charge her estate with her pecuniary engagements is concerned; yet if in a litigation involving that question, the husband does not choose to defend her interests, and the trustee is negligent of his duty, it is incumbent upon the court to direct such enquiries as will prevent the sacrifice of her rights.

5. Same—Practice.—The plaintiff having failed to furnish the necessary evidence as to S's prosecution of his claim as assignee of E's interest in the Peatross fund, ordinarily the bill should be

dismissed. But as it is apparent that the case has not been investigated upon its merits, a result attributable to the conduct of the defendants in a very great measure, the cause will be remanded for further proceedings in conformity to the views expressed by this court.

880 *This was an appeal from the decree of the Circuit court of Pittsylvania, made in a cause depending in said court, in which the personal representative of A. A. Smith was plaintiff and Andrew M. Darnall and Eliza P. his wife, Wm. J. Fulton, her trustee, and others were defendants. The bill which was filed in 1866, charged that Robert W. Williams, deceased, was in his lifetime the husband of said Eliza P. Darnall; and that he was utterly insolvent. That the said Eliza P. held a separate estate; and that the said Robert W. Williams and his wife Eliza P. made a joint purchase of a crop of tobacco of A. A. Smith, for the sum of \$4,153.22, in the year 1860; that said contract of sale was made on the part of said Eliza P. on the faith of her separate property. That at the time of said sale she was possessed and entitled to several tracts of land, derived under deeds, referred to, and also an interest in the estate of her father, Joseph Martin, Sr., deceased. The prayer of the bill is that the said Eliza P. be required to pay the claim of the plaintiff, out of the rents and profits of the said real estate, and for general relief.

The bill was taken for confessed as to Darnall and Eliza P. his wife. Fulton the trustee, answered. He says he knows nothing of the alleged purchase of tobacco by Williams and wife from the plaintiff's testator; except that a crop was bought by one or both said Williams and wife; the terms of said contract he knows not. He is advised that no such contract as that stated in the bill could have been made to bind the property mentioned in the bill, as will be seen by reference to the deeds mentioned. He does not admit that any property coming to the said Eliza P. by the will of her father, is liable to the plaintiff's demand; but is advised that it comes under

881 *the same trust as that declared in the deed from her father to Joseph Martin trustee.

By deed bearing date the 20th of November 1849, Joseph Martin, Sr., conveyed to Joseph Martin, Jr., a tract of land of seven hundred and sixty-one acres, a number of slaves and other personal property, in trust to the sole and separate use of Eliza P. Williams, during her life, and for the education and rearing of such children as she then had or might thereafter have. And after a provision for her husband Robert W. Williams, if he survived her, it was provided, that on her death the property should pass to her children and their descendants; or if she died without descendants it should revert to his estate. There were two other conveyances of small tracts of land to a trustee upon the same trusts, which were paid for out of the rents and profits of the property first conveyed.

By the 6th clause of his will, Joseph Martin, Sr., gives to his daughter Elizabeth, to be secured in trust to his son William Martin, an equal portion with his other children, after deducting what he had theretofore advanced to her and her husband Robert W. Williams.

In November 1868 the court directed a commissioner to take an account of the administration of the estate of Joseph Martin, Sr., by his executor Wm. Martin, so far as to enable the commissioner to report what amount and description of property was devised and bequeathed to his daughter Eliza P. (in trust or otherwise) under the 6th clause of Joseph Martin's will; which the commissioner was directed to report to the court.

The commissioner reported that Mrs. Darnall had received under the 6th clause of her father's will one tract of land of three hundred and fifty acres, valued **882** *at \$8 per acre, \$2,800; that there was due to her from the executor \$994.48, of which \$949.25 was principal; and there were outstanding debts due to the estate of which her share was \$318.18 2-11.

The plaintiff proved that her testator A. A. Smith, in 1860, sold to Robert W. Williams and his wife his crop of tobacco made on two plantations; and introduced as evidence two papers, the first signed by Mrs. Williams, and the other wholly in her handwriting. The first is as follows:

"August 7th, 1860.

"We Robert W. Williams and Elizabeth his wife promise and bind ourselves to convey to A. A. Smith a sufficient interest in the Peatross estate to secure him for his crop of tobacco that we have bought of him: this the day and date above named.

(Signed) Robert W. Williams,
E. P. Williams.

The second is as follows:

Mr. R. W. Lyle. Dear Sir. You will please give Mr. A. A. Smith an order from me on the Peatross estate for \$4,153.22, to be drawn on whomsoever the court may appoint to distribute the estate.

Yours respectfully,
E. P. Williams.

Homewood, October 6th, 1860.

The only notice of the Peatross estate in the record, is in these two papers.

The cause came on to be heard on the 5th of June 1872, when the court held, that the debt of the testator A. A. Smith of \$4,153.22 due October 6th 1860, was contracted on the faith of the separate estate of the said E. P. Williams now E. P. **883** Darnall, and that she designed *to charge her separate estate with the payment of the same; and the said debt is still due; that the property devised to Wm. Martin, trustee, for the use of the said E. P. Darnall, is subject to the payment of the debt of the said plaintiff; and that the personal estate and the rents and profits of the real estate devised by the 6th clause of the will of Joseph Martin deceased, would

not be sufficient to pay said debt of \$4,153.22 in five years; and it was decreed that Wm. Martin do out of his own estate, pay to the plaintiff the said sum of \$949.25, with interest from the 1st of January 1871 till paid, to be credited on the debt of \$4,153.22 due said estate. And it was further decreed that unless the said E. P. Darnall, or some one for her, should pay the said debt of \$4,153.22 with interest, within sixty days from the date of the decree, a special commissioner named, should proceed to sell the tract of land mentioned in the commissioner's report, in the mode and upon the terms stated in the decree. And thereupon A. M. Darnall and Elizabeth P. his wife applied to a judge of this court for an appeal; which was allowed.

Dabney, Barksdale and Williams, for the appellants.

Jones & Bouldin and E. E. Bouldin, for the appellee.

Staples J. delivered the opinion of the court.

The authorities are generally agreed, that a married woman possessed of a separate estate, may charge the same with her debts in like manner and to the same extent as a feme sole; but they are not agreed as to the mode by which the charge may be affected. Some of the cases hold that the intention to charge the separate
884 *estate must be stated in the instrument evidencing the contract, or the consideration must be one going to the direct benefit of the estate. In other cases it is held, that the execution of a bond or note by the wife, whether as principal or as surety, whether for her own benefit, or that of some other person, is indicative of an intention to charge the separate estate; since in no other way can the instrument have any effect. And this was the view taken in this court in *Burnett & wife v. Haupe*, 25 Gratt. 481.

Whatever conflict of opinion there may be upon this point, there is a great weight of authority in favor of the proposition, that the liability of the separate estate can only arise out of the supposed intention of the wife. And no pecuniary engagement can be a charge which is not connected by agreement, either express or implied, with the estate. The rule is thus laid down in a recent English case: If a married woman having separate property, enters into a pecuniary engagement, whether by ordering goods or otherwise, which if she were a feme sole would constitute her a debtor, and in entering into such engagement she purports to contract, not for her husband, but for herself, and on the credit of her separate estate; and it was so intended by her, and so understood by the person with whom she is contracting; that constitutes an obligation for which the person with whom she contracts has the right to make her separate estate liable; and the question whether the obligation

was contracted in this manner must depend upon the facts and circumstances of each particular case. *Mrs. Matthewman's case*, Law R. 3 Eq. 787, 7 Eq. Cases 19; *Johnson v. Gallagher*, 7 Jurist N. S. 273. And the same view is taken generally in other cases. The engagement must appear to have been made with reference to and upon the
885 faith *of the separate estate, or it cannot be enforced against it. 2 Perry on Trusts, sec. 659.

As the charge is a mere question of intention, the wife may of course extend it to the whole, or confine it to a part, of the separate estate. If no specific part is appointed for the payment of the debt, the fair implication is, that the whole estate was intended to be made liable. If on the other hand, only a part of the estate, expressly or by fair inference, is designed to be charged, no liability whatever can attach to the residue. In all cases the remedies of the creditor will be confined to the particular property upon the faith of which it may reasonably be presumed he chose to rely.

This is a necessary consequence of the rule which exempts the wife from all personal liability, and from all personal decrees and judgments upon her contracts. Her undertaking, so far as it is recognized by the courts, is, not that she will pay the debt, but that her separate estate shall be answerable for it. And that is bound only so far as she has agreed it shall be bound.

In the case before us, at the date of the contract hereafter mentioned, Mrs. Williams, who is now Mrs. Darnall, was entitled to the estate conveyed by the deed of 20th November 1849, to that conveyed by the deeds of 29th April 1853, and of the 5th January 1857, respectively; also to the estate derived under the will of her father; and it seems to an interest in the "Peatross estate." Being thus entitled, Mrs. Williams, on the 7th August 1860, united with her husband in the purchase of a crop of tobacco from the appellee's intestate. And on the same day they entered into a written obligation, by which they promised and bound themselves to "convey to the intestate a sufficient interest in the Peatross estate
886 to *secure him for his crop of tobacco."

There is no evidence of any engagement on the part of Mrs. Williams previous to the execution of this bond. The fair inference is, that the purchase of the tobacco and the execution of the paper were contemporaneous acts—parts of the same transaction. At that time Mr. Robert Williams, the husband, was notoriously insolvent. His only means of paying his part of the purchase money was by an advantageous sale of the tobacco. If that failed the whole burden would fall upon Mrs. Williams' property. Under these circumstances she might be willing to convey or pledge her interest in the Peatross estate, as a security for the purchase money. She accordingly does convey it; but she does not agree to convey anything beyond that.

It is to be inferred that the intestate had

made all necessary inquiries upon the subject, and that he was fully satisfied with the security provided for the payment of his debt. Two months after the purchase and the execution of the bond, and after the amplest opportunity of informing himself, he procures from Mrs. Williams an order upon her attorney for \$4,153.22, the price of the tobacco, "to be drawn on whosoever the court may appoint to distribute the Peatross estate."

This plainly indicated that there was a fund belonging to Mrs. Williams under the control of some court; that her share had been ascertained, and that all parties considered it sufficient to pay the purchase money for the tobacco. From that day down to the bringing of this suit, nothing is heard of the order on the Peatross estate, or even the claim of the appellee's intestate—so far as this record informs us.

There is no suggestion of any misrepresentation, or *fraud, or imposition, practiced upon the latter by Mrs. Williams in regard to the Peatross estate, or the extent and value of her interest therein. The court is left to grope its way entirely in the dark, as to the nature, character and final results of the transaction. The only satisfactory solution of the matter is, that Mrs. Williams was willing to charge her interest in the Peatross estate with the debt in question; and the intestate was content to accept the assignment as a sufficient security for his indemnity.

The bill alleges that the sale was made and the contract executed on the credit of the entire separate estate. It is true that Mrs. Williams did not answer; but her trustee did, and his answer sufficiently puts the complainant upon proof of all his material allegations. If in fact the assignment of the Peatross fund was merely by way of collateral security, and not intended to impair the creditor's remedies against the property generally, it was incumbent upon him to offer some proof of the fact.

But if the complainant had supplied this proof it would then have devolved on him to account for the failure to collect the Peatross fund: what became of the order; whether it was ever presented; what was done with that fund; whether the intestate received any part of it; if he did not the reasons of his failure, are questions to which this record furnishes no answer. The bill does not even offer a word of explanation on the subject. And yet the Circuit court, in the absence of any information upon the subject, and without enquiry, has decreed the sale and application of Mrs. Williams' entire estate, real and personal, derived under the will of her father in satisfaction of complainant's debt.

It may be very true, that a married woman is to be *treated as a feme sole so far as the capacity to charge the estate with her pecuniary engagements is concerned: but if in a litigation involving that question, the husband does not choose to defend her interests, and the trustee is negligent of his duty, it is incumbent upon

the court to direct such enquiries as will prevent the sacrifice of her rights. The intestate having taken an assignment of the Peatross estate, he was bound as assignee to exercise due diligence in prosecuting the claim, and in no event could he have any recourse upon the other estate of Mrs. Williams unless he made it appear he had failed to make the claim available without any default on his part.

The complainant having wholly failed to furnish the necessary evidence upon these two points, under ordinary circumstances a dismissal of his bill would necessarily follow. But it is very apparent that the case has not been investigated upon its merits; a result attributable to the conduct of the defendants in the court below in a very great measure. The purposes of justice will be best subserved by remanding the cause to the Circuit court, for further proceedings, in conformity with the views herein announced. It will then be incumbent upon the complainant to make good the averment of the bill that the sale was made upon the credit of the separate estate generally; that the assignment of the Peatross fund was not intended to affect the creditor's right to resort to that estate; and that the failure to receive it was without default on the part of the intestate or his representatives.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, 889 that the bond executed by *Mr. and Mrs. Williams on the 7th of August 1860, and the order given by Mrs. Williams on the 6th October, 1860, constituted an assignment of her interest in the Peatross estate; and that it was incumbent upon the appellee, before he could proceed against the separate property of Mrs. Williams devised under the will of her father, to show that his testator, as such assignee, had exercised due diligence in prosecuting that claim; and that he had failed to recover the same without default on his part.

The court is further of opinion, that in the absence of any opposing evidence, said bond and order are to be regarded as showing simply an intention on the part of Mrs. Williams to charge her interest in the Peatross estate with the payment of the debt due the appellee's intestate; and if in fact said debt was contracted with reference to Mrs. Williams' separate property generally, as alleged in the bill, it devolved upon the appellee to establish the fact.

The court is further of opinion, that the said Circuit court erred in decreeing against the estate derived under the will, without inquiry and satisfactory information upon these points. It is therefore adjudged and ordered that the decree of 5th of June 1872 be reversed and annulled; and that the appellee, out of the assets in his hands to be administered, do pay to the appellants their costs by them expended in the prosecution of their appeal aforesaid here. And this cause is remanded to said Circuit court, to be proceeded with in conformity with these

views. And liberty is given complainant to show that the assignment of the Peatross estate as aforesaid, was a mere collateral security, not designed to impair his equitable right to proceed against Mrs. Williams' other separate property; and

890 *further to show, that he or her testator had failed to collect any part of said estate; and that his failure so to collect, was without default on the part of said intestate or his representative. If satisfactory evidence on these points is not adduced within a reasonable time, to be judged by the said Circuit court, a decree is to be entered dismissing complainant's bill.

Decree reversed.

891 *Shelton v. Jones' Adm'x & als.

November Term, 1875, Richmond.

Orders of Court—Change of Trustees.—D dies in 1845, and by his will gives real and personal estate to his daughter, S, for her life, and then to her children; and he directs that his executor shall act as trustee for S and her children, and he appoints W his executor: who qualifies. In 1851 the County court of P, in which the will was admitted to probate, made an order, that W, trustee of S and her children, being in court and assenting to the same, and S by her letter to the court desiring the same, the court doth appoint B trustee for the said S and her children, in the place of W; and thereupon B, with J as his surety, entered into and acknowledged their bond in. &c. In 1871 B and J having died, S files a bill against the administratrix of B and of J, to have a settlement of the trust and payment. **Held:**

1. **Same—Collateral Questioning.**—The County court of P being a court of general jurisdiction, the validity of its order cannot be questioned in any collateral proceeding.
2. **Same—Same.**—The order having been made with the assent of W in court, and upon the written request of S, the order and the bond are valid and binding upon B and his surety J, though the order was not based upon either bill or petition.
3. **Same—Laches.**—If the children, not having been parties to the proceeding, might have had it set aside, they having acquiesced in it for so long a period, the parties to the bond cannot avoid it on that ground.

In June 1871 Polly Shelton instituted a suit in equity in the Circuit court of Pittsylvania county, against the administrator of Coleman D. Bennett, deceased, and

***Orders of Court—Collateral Questioning.**—"Where a court of general jurisdiction acts within the scope of its general powers, its judgments will be presumed to be in accordance with its jurisdiction, and cannot be collaterally impeached." *Pulaski Co. v. Stuart, etc., Co.*, 28 Gratt. 879; *Lawson v. Moorman*, 85 Va. 890; *Pennybacker v. Switzer*, 75 Va. 671; *Brenge v. Richardson*, 78 Va. 406; *Marshall v. Cheatham*, 88 Va. 31; *Grigg v. Dalsheimer*, 88 Va. 508; *Hill v. Woodward*, 78 Va. 765; *Wimblish v. Breedén*, 77 Va. 824; *Pugh v. McCue*, 86 Va. 475; *Wilcher v. Robertson*, 78 Va. 602; *Woodhouse v. Fillbates*, 77 Va. 317; 12 Am. & Eng. Enc. Law 1471.

Thomas S. Jones' adm'x and heirs. In her bill and amended bill she set out:

892 That William *Davis was appointed trustee for the plaintiff under the will of her father Thomas Davis Sr. That subsequently Coleman D. Bennett was appointed trustee in the place of William Davis, and gave bond for the faithful discharge of his duties, with Wm. A. Anthony and Thomas S. Jones as his sureties, in the County court of Pittsylvania. That a considerable amount of money came into the hands of Bennett as trustee as aforesaid, which he had wasted. That Anthony had died a non-resident of the state and insolvent; that Jones was dead. That it was doubtful if the estate of Bennett will pay the debt due to the plaintiff, or that the personal estate of Jones, or the rents and profits of his real estate, would pay it in five years. The prayer was for a new trustee; that Bennett's adm'r be required to settle his account as trustee, and pay the amount due her, or that Jones' adm'x be required to pay it, or his land be sold for the purpose, and for general relief.

Jones' adm'x answered the bill. She says: She does not know, nor does she admit, that her testator ever signed any valid bond as surety for Bennett as trustee for the plaintiff, and she calls for strict proof of the fact. That by the will of Thomas Davis Sr. he appointed William Davis trustee of the plaintiff, and she submits to the court whether the appointment of Bennett in the place of Davis was regular and lawful, and whether her testator is bound by any bond signed by him as surety for the discharge of Bennett's duties in that behalf.

Thomas Davis Sr. died about 1845; and by his will he left a considerable property, real and personal, to his daughter Polly Shelton, for her life, and at her death to her children; and of these there were several. And after declaring that it is

893 his intention that *the husband of Polly Shelton shall have no control over the property left to her, and that the same shall not be subjected to the payment of his debts, he says: "to that end, I do hereby vest the said property or money, as the case may be, in my executor in trust, for the use and benefit of my said daughter Polly Shelton during her life, and at her death to be equally divided among her children." And he appointed his son William Davis his executor.

The will of Thomas Davis was admitted to probate on the 17th of February 1845, in the County court of Pittsylvania; and William Davis qualified as executor.

At the March term 1851 of the County court of Pittsylvania the following order was made:

"William Davis, trustee for Mary T. Shelton and her children, under the will of Thomas Davis deceased, being in court and assenting to the same, and the said Mary T. Shelton, by her letter to the court, desiring the same, the court doth appoint Coleman D. Bennett trustee for the said Mary T. Shelton and her children, in the

place of the said William Davis; and thereupon the said Coleman D. Bennett, as such trustee, with Wm. A. Anthony and Thomas S. Jones as his securities, entered into and acknowledged their bond in the penalty of three thousand dollars, conditioned according to law."

The bond referred to in the order, after reciting the provisions of the will of Thomas Davis in relation to his daughter Polly Shelton and her children, and the above order of the County court of Pittsylvania, bound the obligors for the faithful performance by Bennett of the duties of said trust; and it was executed by Bennett, Anthony and Jones.

In November 1872 the court directed a commissioner to take an account of 894 Bennett's actings as trustee, *and whether his estate would pay any indebtedness that the commissioner might report as due from him to the plaintiff or her children; and also as to the estates of Anthony and Jones.

The commissioner reported that there was due from Bennett's estate, to the trust fund with interest to October 10th 1873, \$2,027.21; that Bennett's estate would pay to it \$1,107.17; that the personal assets of Jones' estate were about \$550, and the rents of his real estate would much more than pay the balance of the debt in five years.

The cause came on to be heard on the 18th of February 1874, when the court held that the order of the County court appointing Bennett trustee of the plaintiff and her children, was illegal and void, and that the bond executed by him, and Anthony and Jones, as his sureties, was likewise illegal and void as to the sureties; and that they and their personal representatives and heirs were not liable under said bond for Bennett's default, or failure to discharge the duties imposed upon him by the court; but that the said Bennett having acted as trustee, although without authority of law, had rendered himself personally liable for the funds that came to his hands as trustee in his own wrong. And confirming the report of the commissioner, decreed that Bennett's adm'r, out of the assets of Bennett's estate in his hands, should pay into the court, to the clerk thereof, the sum of \$2,027.21, with interest from the 10th of October 1873; and that the bill be dismissed with costs, as to all the other defendants. And thereupon Mrs. Shelton applied to a judge of this court for an appeal; which was allowed.

E. E. Bouldin, for the appellant.

895 *Wm. M. Tredway Jr., for the appellees.

Staples, J. delivered the opinion of the court.

The main question before us is as to the effect of the order of the County court of Pittsylvania entered at the March term 1851, removing William Davis from his office of trustee, and appointing C. D. Bennett in his place. The learned judge of the Circuit

court was of opinion that this order is illegal and void; and that the bond given by Bennett, for the faithful discharge of his duties as trustee, is also illegal and void as to his sureties; and although Bennett may be held to account for any funds received by him belonging to the cestui que trusts, the sureties are in no wise responsible for the same.

The grounds of this decision are not given in the decree. They are no doubt correctly stated in the brief of the learned counsel for the appellee. This position is, that William Davis, after his acceptance of the trust, under the will of Thomas Davis, sen., could only divest himself of it in three ways—either by assent of all his cestui que trust; or, 2d, by means of some special power in the instrument creating the trust; and 3d, by an application to a court of chancery. That, in this case, neither of these conditions were complied with; that Mrs. Polly Shelton, the tenant for life, alone consented to the removal of Davis and the appointment of Bennett; the infant children, entitled to the estate in remainder, not being before the court, nor capable of consenting; that the will confessedly contains no provision on the subject; and, lastly, no proper application was made to a court of chancery; the order of March term 1851 being the first 896 and only proceeding in the case; that order was *made simply upon motion, without process or bill, or other proceeding to give the court jurisdiction in the premises. Its action was therefore a nullity.

It is unnecessary to consider the first two grounds of objection suggested by counsel; for if the court had no authority to act on the subject, if it was wholly without jurisdiction of the matter in controversy, both the order and bond must be regarded as invalid.

The question to be considered then is, first, as to the authority of the County court to act in the matter of removing and appointing trustees; and, second, how far its orders and decrees in such cases may be impeached in collateral proceedings.

At the time this order was entered, the County courts of Virginia were clothed with authority to hear and determine all cases at common law or in chancery within their respective counties and corporations, with the exception of certain criminal causes, and except civil cases not involving a greater amount or value than twenty dollars. Rev. Code 1860, page 663, sec. 16.

In the exercise of their chancery powers these courts were concurrent with the Circuit courts. In other words they were courts of general jurisdiction, and were inferior only in the sense that their judgments might be revised by an appellate court. Harvey v. Tyler, 2 Wall. U. S. R. 328. They had therefore complete jurisdiction in cases of trusts. In the exercise of this branch of that jurisdiction they might remove and appoint trustees, whether acting under deeds or wills.

The appointment of new trustees is an ordinary remedy enforced by courts of

equity in all cases where there is a failure of suitable trustees to perform the trusts, either from accident or from the refusal of the old trustees to act, or from their original or supervenient incapacity to act, 897 or from any other cause. 2 *Story Eq. Jur. sec. 1287. And so where the circumstances or conduct of any existing trustee renders it inexpedient for him to continue in the office, the court will adapt its relief to the exigencies of the case, and having first decided upon the removal of the trustee, will proceed to supply the vacancy by appointing another person to act in the trust; and by directing the transfer of the property to him. Hill on Trustees 190, 191.

The County court of Pittsylvania being then at the date of that order, a court of general jurisdiction in the administration of trusts, its orders and decrees for the appointment or removal of trustees must be treated as valid in every other tribunal until reversed by a proper proceeding before an appellate court, or before the court which rendered the decree.

It is said, however, that jurisdiction of the subject matter is not sufficient; there must be parties and a case in court; and in the present instance the order was entered without process, or bill, or other proceeding.

The object of the process is to bring the defendant before the court; by it he is required to appear and answer the bill. But jurisdiction of the person may be acquired by the voluntary appearance of the defendant without process, or by an attorney appearing and making defence for him. If parties without process or bill appear in open court and agree that a decree may be entered adjudicating their rights, and this agreement is entered of record, it can hardly be maintained that such a decree is a mere nullity. This mode of proceeding may be very irregular, but the decree being the adjudication of the tribunal having jurisdiction of the subject matter and of the parties, can never be collaterally impeached for any defect, *irregularity or error in the proceedings, however manifest or palpable it may be. In such case the question of jurisdiction enters into and becomes an essential part of the judgment of the court.

This principle has again and again been affirmed by this court. The cases of Fisher v. Bassett, 9 Leigh 119; Cook, sheriff, v. Hays, 9 Gratt. 142; Andrews v. Avory, 14 Gratt. 229; and Gibson v. Beckham, 16 Gratt. 321; are familiar illustrations.

It is unnecessary to consume time in quoting from these decisions, as they are well understood by the profession. In Gibson v. Beckham, Judge Allen entered into an exhaustive discussion of this whole doctrine, and a critical examination of all the authorities.

The rule as laid down in that case, is, that where a court has cognizance of the subject matter its judgment though it may be erroneous is not void; it is binding until set aside or reversed, and cannot be questioned incidentally; acts done and bonds

taken under it bind the obligors and sureties as well as principals.

Where the court has cognizance of the subject matter, or capacity to take a bond, or takes a bond which on its face is valid, but contains a recital of facts necessary to its validity, the obligors shall be estopped from denying the truth of such recitals. These principles firmly established are essential to the security of the public and individuals. The security can occupy no higher ground than his principal. It is his intervention which has enabled the principal to act, and he should be bound to the extent of his obligation for him.

The argument of the counsel for the appellee seems to assume, that when a 899 trustee is sought to be removed *by a court of equity a suit, or a bill, or some formal pleading is essential to effect that object.

It will be found, however, that the practice of the Chancery courts in this respect, varies in different countries. In England the uniform course is to proceed by bill. The object is, no doubt, to give the defendant (the trustee) the benefit of his answer. The mode of proceeding is of course only important when the trustee is resisting the application for his removal.

In several of the American States the usual course is to proceed by petition. This practice has been recognized and sanctioned by the Supreme Court of Georgia as proper in that State. Mitchel v. Pilner, 15 Georgia R. 319.

In *ex parte Knust*, 1 Bailey Eq. R. 489, the Supreme Court of South Carolina say—The English authorities certainly are, that to remove a trustee the proceeding must be by bill; and if it were right to remove a trustee for misconduct, I certainly should think he ought to have the means of defending himself by answer. The proceeding by petition is, however, more used by us than in the English practice, and if the office of trustee were vacant I think it might be filled upon petition. However this may be, it does not appear from the decree, that any objection to the form of the proceeding was taken at the hearing; nor does it form the ground of appeal. We think it is too late to take the objection now.

According to these cases, and others which could be cited, there is no fixed and unbending rule of proceeding in the equity courts for the removal of trustees. Whether in any of the states it may be done upon mere motion the books do not show. But if that mode of proceeding is adopted, with the consent of all the parties before 900 the court, especially the trustee, *whose office is to be vacated, the decree rendered therein, until reversed, is entitled to the same respect as any other decree of a competent court. To hold otherwise, is to substitute the mode in which an authority is exercised for the authority itself. Departure from the regular course of proceeding can never invalidate an act if the court has authority to do the act. A decree based upon a motion or petition cannot be a nul-

ity, if it would be valid when founded upon a regular bill in equity.

In the case before us, the application for the removal of the old trustee was made by Mrs. Shelton, one of the cestui que trusts in writing; and the trustee himself appeared in court and gave his consent. It would have been more regular to have proceeded by bill or by petition; but neither of those modes would have given the court jurisdiction of the parties more fully than was obtained by this voluntary appearance in open court.

It is very true that the children of Mrs. Shelton, who were entitled to the trust fund in remainder, were not parties to the proceeding. Whether these children could at any time have successfully objected to the order removing the old trustee, it is unnecessary now to decide. It has been nearly twenty-five years since that order was made. During all the time that has since elapsed, it does not appear to have been called in question by either of the children, although the youngest must have long since arrived at maturity. And now we are told that as they were not before the court, and might therefore have originally objected, these defendants who were before the court, and voluntarily assumed the obligation, are thereby released from all liability.

The case of the People v. Morton, 5 901 Seld. (N. Y. R.) *176, furnishes so complete and satisfactory an answer to this view; indeed, it is so apposite in every respect to the present case, as to justify an extended extract from the opinion of the court as delivered by Ruggles, C. J. "The court of chancery had general jurisdiction of all cases of trust, and had the power by its general authority, independent of any statute, to displace a trustee on good cause shown, and to substitute another in his stead. It is said that this must, in all cases, according to the course and practice of the court, be done by bill and not upon petition. But a departure from the usual practice of the court in doing an act, which the court has authority to do, does not render the act void. It may be irregular or erroneous, and upon a direct proceeding may be set aside or reversed; but its validity cannot be questioned in a collateral action.

"It does not appear, that the court of Chancery in substituting Lynch as trustee in the place of White and Nicholl, acted, or professed to act, by authority of the statute in relation to trusts of real estate, or otherwise than by virtue of its general jurisdiction in matters of trust. The true point of the objection to the validity of the change of trustee seems to be this: that it does not appear by the recital in the bond that the cestui que trust were parties to or had notice of the proceeding.

"But this is an objection which neither the trustee nor his surety can be allowed to make. Lynch got possession of the trust estate under the proceeding by color of which he claimed to be trustee, and Norton voluntarily undertook as his surety, that he should faithfully administer the trust. If

the proceeding was irregular for want of notice to the children of Mrs. Lynch, they might object to it in a proper manner for that cause; but Lynch after having 902 obtained the property *upon the pretence of being the trustee, cannot be permitted to deny the liability to account as such. The defendant who voluntarily became his surety in order that he might take the trust property, is for a like reason precluded from denying his liability. The order for changing the trustee and the bond given in pursuance of it must therefore be regarded as valid, and the defences in the answer which related to this point were properly overruled."

These views of Chief Justice Ruggles are fully sustained by the case of Curtis v. Smith, 60 Barb. R. 12; the case of Pontis v. Dilby, 9 Gill's R. 222, 240; the case of Budd v. Hiter, 3 Dutch. R. 43. And they are withal so satisfactory and convincing in themselves as to render any further discussion of the subject wholly unnecessary.

For the reasons stated the decree of the Circuit court must be reversed, and the case remanded for further proceedings.

Decree reversed.

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*Fultz v. Davis.

November Term, 1875, Richmond.

Absent, BOULDIN, J.

I. Debts—Confederate Money.—In April 1862 F lends to D \$7,000, and takes his bond, secured by a deed of trust on land, payable in six years "in current money of Virginia," the interest to be paid semi-annually. For the loan D receives the checks of F on a bank which is then paying Confederate money. Nothing is said, either before or at the time of the loan, as to the kind of money in which the bond is to be paid, except what is stated in the bond. D pays the interest in Confederate money up to April 1864. In September of that year he offers to pay the interest, but F refuses to receive the money. In December 1865, 1866, 1869, and in February 1869, D made payments on the bond.

Held:

1. **Same—Same—Time of Scaling.***—This is a Confederate contract, and is to be scaled as of the date of the contract.

2. **Same—Same—Planner of Scaling.**—In ascertaining the amount still due to F on the bond, the value of the bond in gold at its date is first to be ascertained, then interest is to be charged upon the amount so ascertained up to the time of the first payment, and the premium on the gold is then to be added to it; and the payments deducted at their nominal amount, from the amount so ascertained.

II. Same—Payment—Interest.†—Where payments are made from time to time, on a debt bearing interest, the interest is to be computed on the debt up

***Debts—Confederate Money—Time of Scaling.**—The authorities on this subject are collected in Ashby v. Porter, 26 Gratt. 455, and *note*.

†**Debts—Payment—Interest.**—See *note* on "Interest Generally" appended to Fred v. Dixon, 22 Gratt. 541.

"If the jury believe from the evidence, that John F. Slaughter, the plaintiff in the action, acquired the note sued upon with his own means, and for his own individual benefit; then the said plaintiff is entitled to recover against the defendant E. J. Burton, the full amount of said note, with interest thereon from the day it fell due, till paid with costs of protest; notwithstanding the said Slaughter may, at the time of obtaining the same, have been administrator with the will annexed of Samuel Garland dec'd, who was one of the endorsers of said note, and notwithstanding he may have paid for it in a depreciated currency."

918 *The defendant objected to the giving of this instruction to the jury; and the same was modified by the court as follows: "Unless the jury shall believe that he acquired it by means of or under color of his office as administrator; then, in that event, he is not entitled to recover more than he paid for it, although it may have been paid for, with his own money and not out of the estate of his testator." As thus modified, the instruction was given; and thereupon the defendant excepted.

There were other instructions asked by defendant, and refused by the court; and the case was then submitted to the jury, who rendered a verdict for the full amount of the note and notarial charges, with interest from the 15th November 1861 (the day of protest). The defendant then moved to set aside the verdict, and grant him a new trial; which motion was overruled by the court, and judgment entered for plaintiff according to the verdict. The defendant again excepted.

My opinion is, that the court erred in instructing the jury that a personal representative can under any circumstances, or in any event, either by purchase or payment, so acquire a credit or debt of the estate represented by him, as to secure to himself an individual benefit thereby. He is obliged to take notice, when he accepts the office of administrator, that he is entrusted by the terms of his office and the law of the land, with the exclusive charge of the rights and interest of his testator or intestate, in the subject matter before him; and these rights and interests cannot, under any circumstances, be ignored by him. He is bound, both in law and morals, to protect them. It is therefore the well settled law of this State, based on a wise public policy,

and sustained by the soundest principles of equity law, of morality, and of justice, that such fiduciary can in no event so deal with his trust as to secure to himself an individual benefit thereby, at the expense or hazard of the trust estate.

The effect of the instruction under consideration, (however intended), would be to enable the administrator to ignore this salutary rule, and to buy up a liability of his intestate at about one third of its real value; and then to enforce it for its full amount—even against his testator, if necessary; for such must be the result of the instruction; the fiduciary being regarded

thereby, in certain events, as a bona fide holder for value, in his own right, of the note endorsed by his testator: and thus by treating the transaction as a purchase by Slaughter individually, instead of a payment as administrator, as it should have been, Slaughter would be allowed to realize individually, about three times as much as he paid for a debt of his testator, with the right, should circumstances require it, to charge the entire amount to his testator's estate. Such dealing by a fiduciary with his trust, cannot, I think, be tolerated for a single moment, by this court.

My opinion therefore is, that we are bound both in law and morals, to treat the acquisition by Slaughter of the note in controversy as an acquisition by him in his fiduciary character, and not as a payment or purchase by him individually. I would here remark, that the proofs, in my opinion, shew a payment and not a purchase. Unless made then by Slaughter in his fiduciary character, it was officiously made by him as a mere stranger, without privity of contract or request of parties. For such voluntary payment made by a stranger to the contract, no action could be maintained. But as I have already stated,

920 I am of opinion, that the payment must be regarded as made by Slaughter as fiduciary. This is required, as well by the law of the land as by the interest of Slaughter himself; for we have seen, that he could acquire the note in question in no other way, under the facts of the case. Thus paying, however, he would acquire precisely the rights of Garland himself, had he paid the note in his lifetime and after protest: and the next question is, what are these rights?

Clearly, I think, as a general rule, the rights of a holder of the note who has acquired it by composition or payment as surety of the parties bound to him as principals: viz., the right of a full indemnity for the money paid for the principals; in other words, the right to recover of the principals the value paid by the surety for them—nothing more and nothing less. That this is so, especially in cases of accommodation paper, is abundantly shewn by the elementary writers and decided cases on the subject; but I will content myself with referring to only two recent cases in this court.

In *Barnett v. Cecil*, 21 Gratt. 95. Judge Moncure, delivering the opinion of the whole court, uses the following language: "It is certainly true, as a general rule, that the contract which the law implies between a principal and his surety, is merely a contract of indemnity; and that the measure of the liability of the principal to the surety is the amount which the latter has to pay for the former on account of his suretyship; so that if the discount at bank had been the origin of the transaction in this case, and the note had been made, endorsed and discounted for the accommodation of the

921 maker and first endorser, the last endorser, Cecil, would have been a mere surety of the other parties, and could have

plaintiff had a right to pay the interest up to the 10th of April 1865 in Confederate money and offered to do so, but Fultz refused to receive it, that interest should be remitted. And the said commissioner was instructed to charge the true value of said debt to Davis as of the 10th of April, 1865, after which interest was to be allowed, but not compounded, giving credit to Davis for all sums thereafter paid by him. But if said payments were paid in currency or greenbacks, the commissioner was directed to scale said payments as of the date of such payment, to their value in gold, and the amount less the gold premium, should be credited against said demand, and the gold premium at the time of the close of the account must be added to the balance found due to the defendant Fultz.

The commissioner made his report; but it is not necessary to state it, as the court adopted a special statement, by which the principal debt was scaled as of the 10th of April 1865; the interest was then charged thereon to the 4th of February 1874; and the premium on gold at $11\frac{1}{2}$ per cent. was added, making the debt as of that date \$8,154.17. The payments with interest on each from the date of its payment to the 4th of February 1874, amounting in the whole to \$4,586.56, was then deducted, leaving as due to Fultz, as of that date, the sum of \$3,937.51.

The cause came on to be finally heard on the 19th of March 1874, when the court confirmed the special statement, and decreed that the injunction awarded the plaintiff in the cause be dissolved as to the sum of \$3,937.51, with interest thereon from the 4th of February 1874 till paid. And it was further decreed that unless the plaintiff shall pay the said sum of money with interest as aforesaid, in lawful money of the

908 *United States, within sixty days from the date of the decree, then the trustee Wm. A. Burnett as commissioner of the court shall proceed to sell at public auction the tract of land in the bill mentioned, or so much thereof as may be necessary for the purpose of raising the amount due the defendant Fultz, for cash enough to defray the expenses of sale, and the residue on a credit of one, two and three years, &c.

From this decree Fultz applied to a judge of this court for an appeal; which was allowed.

A. H. Fultz, for the appellant.

Whitehead, for the appellee.

Staples J. delivered the opinion of the court.

This contract was entered into with reference to Confederate treasury notes as a standard of value. This, if not conceded by the parties, is clearly established by the evidence. The debt must therefore be scaled, unless it is made to appear, that according to the true understanding and agreement of the parties, it was to be dis-

charged in a currency not liable to the scale of depreciation. The appellant relies upon the bond to show that the debtor agreed to pay in a sound currency. The promise is to pay "six years after date in current money of Virginia." It is, however, very apparent, that these words were used not so much to designate a particular medium of payment, as to exclude the inference of a contract to pay in coin.

In none of the conversations or negotiations preceding or contemporaneous with the loan, was anything said as to the kind of currency in which the debt was to be paid. In the correspondence of the parties no reference whatever is made to the 909 subject. *The appellant, in his petition, admits there is no evidence of an agreement as to the kind of currency in which the debt was to be paid, other than what appears upon the face of the bond. The proposition to pay in six years emanated from the debtor, and was acceded to by the creditor, as a measure of indulgence. The promise to pay "in current money" does not necessarily indicate an agreement to pay the nominal amount of the debt in such money, at the maturity of the contract. These words are sometimes used to express a contract of hazard, in which both parties assume the risk of the currency in use when the debt is payable. This court is always reluctant, however, to adopt a construction of the contract which leads to a construction which might often deprive the creditor of any recovery whatever.

But in this case there is nothing from which it can be inferred, that either party contemplated an agreement of that kind. It was simply an application for a loan upon time, and the advancement of the money upon that application, followed by the execution of the bond and deed of trust.

In the deed of trust no reference is made to the kind of currency in which the debt is to be paid, although, in other respects, the terms of the contract are set out with great minuteness.

The next circumstance relied upon, as showing that both parties understood the debt as payable in a sound currency, at its nominal amount, is the correspondence between the appellee and appellant since the close of the war. The letters of the appellee certainly do not show that he at any time claimed the right to scale the debt. It may be said, on the other hand, they do not show any distinct admission of an obligation to pay the whole amount of the 910 bond. It is very probable *that the appellee supposed he was bound for the whole, and did not understand his right to insist upon the scale of depreciation. Still the court is not thereby precluded from an inquiry into the nature of the original transaction. It is very certain the letters contain nothing which changes the rights and obligations of the parties.

The debt being a proper one for the scale of depreciation, it is agreed that the scale must be applied as of the date of the contract. The real controversy is as to the mode of deal-

ing with the payments made from the years 1865 to 1869 inclusive. These payments were made in United States currency, which was then greatly depreciated, the depreciation varying considerably at the several periods of payment. In reducing the nominal amount of Confederate debts to their gold value under the statute, this court has adopted the practice of adding the premium to such value. The debtor may pay in gold if he pleases, or he may pay in currency; but the injustice can never be tolerated of allowing him to pay the gold value in a depreciated currency greatly less than such value.

Here, however, it is insisted that the payments must be also scaled to the gold value. It is urged with great force, that during all the time the appellee was making his payments and asking for indulgence, on no occasion did he ever intimate a purpose to insist upon scaling the debt; that his conduct was such as to delude the appellant into the belief that he intended to pay the face of the bond, and under this impression the appellant received the currency at its par value, and gave the credit accordingly.

To this it is answered, there is no rule of law authorizing payments to be scaled; that the creditor having consented to receive the currency as money it
 911 *operates necessarily as an extinguishment of the debt pro tanto. Besides it is a mere matter of conjecture what the appellant would have done. His necessities or the chance of a profitable speculation may have induced him to take the currency at par, although he must have known the debt was to be scaled. Instances are not rare in which creditors, both during and since the war, were very willing to accept a highly depreciated currency in payment of gold debts. It is very difficult to adopt any plan of scaling payments without injustice to the debtor, and great embarrassment in the administration of justice. All that can be safely done is to add the premium to the gold value of the debt as scaled, and then apply the payments to the aggregate thus ascertained. This as nearly approaches exact justice as any rule that can be adopted.

Complaint is made by the appellant, and very justly so, that the appellee is allowed interest upon these payments. The rule is well settled in Virginia, that interest is not to be computed on payments; but upon the debt to the time of payment; and the latter deducted from the sum of principal and interest. This rule is violated by the decree.

Another ground of complaint on the part of the appellant, is, that he is not allowed compound interest. The appellant might have collected his interest at the expiration of any six months according to his contract; but having failed to do so he cannot now convert that interest into principal so as to make it an interest-bearing fund. Even though the appellee had expressly agreed to pay such interest it would have been invalid, as hard and oppressive and tending to usury.

Childers v. Deane, 4 Rand. 408-9. There is no error in this respect in the decree of the Circuit court.

912 *But for the errors already mentioned the decree must be reversed.

Christian J. dissented.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the Circuit court did not err in holding that the contract evidenced by the bond bearing date 18th April 1862, was entered into with reference to Confederate notes as a standard of value, and that the debt was under the circumstances proper to be scaled as of the date of said contract. Nor did the said court err in holding that the payments made by the appellees were not subject to the scale of depreciation. Nor did said court err in holding that the appellant is not entitled to recover compound interest.

The court is of opinion that the Circuit court did err in holding that the appellee is entitled to interest upon the several payments made by him: The rule being well settled, that interest is not to be computed on payments, but upon the debt to the time of each payment, and the latter deducted from the sum of principal and interest; and in the present case there is nothing warranting a departure from this rule.

The court is further of opinion, that the Circuit court after reducing the appellant's debt to the gold standard, and calculating the interest thereon to the date of the first payment made December 7th 1865, ought to have added thereto the premium of 11½ per cent., and then to have deducted from the aggregate amount thus ascertained the several payments made by the appellee.

913 *The court is further of opinion, that the Circuit court erred in decreeing a sale of the land embraced in the deed of trust upon a credit of one, two and three years. The deed having provided for a sale for cash, the Circuit court was not authorized to vary the terms of said deed without the consent of the creditor.

It is therefore adjudged, ordered and decreed, that so much of the decree of the Circuit court as is in conflict with the views herein announced, be reversed and annulled; and that the appellant do pay, &c.

And the same is remanded to the said Circuit court for further proceedings in conformity with the views herein expressed. Decree reversed.

914 *Burton v. Slaughter.

November Term, 1875. Richmond.

1. Negotiable Notes—Accommodation Endorser—Rights of His Personal Representative.—The personal representative of the accommodation endorser of a negotiable note protested for non-payment, can only acquire the note, whether by purchase or payment, in his fiduciary character.

2. Same—Same—Same.—The personal representa-

*Rights of Personal Representatives.—The principal case is cited in Siron v. Ruleman, 32 Gratt. 223.

and that a like judgment had been recovered in April 1866 against Marr's adm'r and Moore: That on the 10th of April 1866 another judgment had been recovered 928 *by Forbes' ex'ors against Marr's adm'r, and all his sureties, for \$342.86, with 15 per cent. damages from the 31st of January 1866: and that plaintiff had paid off these judgments.

The plaintiff further states that on the 31st of March 1866 said T. L. Moore, finding that Marr's estate was insolvent, for the purpose of avoiding the payment of his share of said Marr's liabilities, and in fraud of the right of his co-sureties, conveyed all his property, consisting of a lot in Warrenton with an office on it and forty acres of land near that town, to Thomas Henderson, in consideration of fifty dollars which he owed Henderson, and maintaining, supporting and providing him with necessary clothing, and supplying also the attention of a servant, for and during the rest of the natural life of the said Thomas L. Moore." He charges that this deed was purely voluntary and fraudulent as to creditors: that Henderson knew that Moore was liable for the malfeasance in office of Marr, and for many other debts; and plaintiff charges that the conveyance to Henderson was made with the sole view of preventing the creditors of Moore from making their said debts. He states that Henderson had conveyed the forty acres of land to T. C. McLearn, and had taken a house and lot in Warrenton in part payment, and McLearn had sold to C. Bouckright; and that \$333.33 of the purchase money was still due from McLearn. He charges that the deed from Moore to Henderson is fraudulent and void, and that the property thereby conveyed is liable to the plaintiff and the other creditors of Moore. And making Marr's adm'r, and his co-sureties, and Henderson and McLearn and Bouckright defendants, he calls upon them to answer as fully all the allegations of the bill as if specially interrogated. The prayer of *the bill is 929 that Marr's adm'r may settle his account; that the solvent sureties may be compelled to pay the plaintiff their proportion of said debts paid by him; that the deed from Moore to Henderson may be declared fraudulent and void, and the real estate therein conveyed subjected to the payment of the legal liabilities of Moore; or if the sale to McLearn and Bouckright cannot be disturbed, that the house and lot conveyed by McLearn to Henderson, and the \$333.33 and interest, still due from McLearn, may be subjected to the payment of Moore's liabilities; and for general relief.

Henderson answered the bill. He admits the execution of the deed from Moore to himself, upon the consideration named in the deed as stated in the bill; but he denies that the deed was made by Moore for the purpose of avoiding his share of the liabilities of Marr and in fraud of the rights of his sureties. He denies that the deed was purely voluntary and fraudulent as to cred-

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For the same reasons the court is of opinion that the Circuit court erred in overruling the motion for a new trial.

It is therefore considered by the 925 court that the judgment ^{aforesaid} be reversed and annulled, with costs to the appellant, and a new trial be awarded him; and the cause is remanded to the said Circuit court to be further proceeded in, in accordance with the principles of this order. Judgment reversed.

926 *Henderson v. Hunton & als.

November Term, 1876, Richmond.

Fraudulent Conveyances.—M and H, with others, were sureties of J as sheriff, who, in 1865, was dead and insolvent. In January 1866 B recovered a judgment against H as surety for J, and in April 1866 B recovered a like judgment against M. M was an old man, not able to provide for himself, and there were several small judgments against him. In March 1866 he conveyed to his nephew T all his real estate, worth about \$2,100, in consideration of \$60 he owed T, and that T would provide for him during his life; T not knowing of the judgment against H, or that M was a surety of J. T paid off the judgments against M, to the amount of \$687.00, and he paid for the support of M after the deed, and before March 1869 about \$1,300. In March 1869 H files his bill against M and T, to set aside the deed on the ground of fraud; and T answers and denies fraud in himself, and any knowledge of a fraudulent intent on the part of M. **Held:**

1. **Same—Equitable Relief.**—Equity would vacate the deed and hold the land liable to the creditors of M if they interposed in due time in asserting their claim.
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the grantor in a deed founded upon a valuable consideration, and such intent is *unknown* to the grantee, the latter is not chargeable with want of good faith, since no rule is better established than that both parties must concur in the fraudulent intent to render the deed absolutely void. *Elmy v. Deltrick*, 85 Va. 45; *Skipwith v. Cunningham*, 114 Va. 271; *Norris v. Jones*, 99 Va. 183; *Hawlewood v. Fenn*, 94 Va. 709; *Bishoff v. Hartley*, 9 W. Va. 100; *Bank v. Wickham*, 29 Gratt. 628; *Bank v. Belts*, 10 E. Rep. 467; *Bogress v. Richards*, 20 W. Va. 100; *E. Rep. 590*, 45 Am. St. Rep. 938. An agreement to maintain and support another is a valuable consideration and will support a conveyance. See *Keener v. Keener*, 34 W. Va. 730, citing the principal case.

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*See citation of principal case in *Almond v. Wilson*, 75 Va. 627; *Livesay v. Beard*, 22 W. Va. 381; *Alexandria, etc., v. Thomas*, 29 Gratt. 491; *Cliff v. Foley*, 22 W. Va. 441.

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titled to recover from Moore on account of money paid as co-surety of Marr.

The commissioner reported, that the forty acres of land were worth \$1,500, the office and lot in Warrenton was worth \$600—\$2,100. That Henderson had sold the land for \$1,500, and had received all the purchase money except \$275. He reported debts of Moore paid by Henderson, all of them judgments against Moore before the deed was made, \$687.60; the amount paid after the deed for the support of Moore (including Henderson's own debt at \$250, and for putting a new roof on the office in Warrenton, \$78.72), \$1,529.50; making Henderson's payments for Moore \$2,217.10. The amount of debt paid in 1867 by Hunton as surety for Marr, with interest to September 1st 1870, was \$1,752.34; of which Hunton was entitled to recover from Moore \$876.17.

The judgment of Byrne against Hunton and others as sureties of Marr, was rendered in January 1866, and was not docketed; the judgment of the same plaintiff against Marr's adm'r and Moore, was rendered at the April term 1866, and the judgments of Forbes' ex'ors against Marr's adm'r and all the sureties for \$342.86, were rendered at the same term of the court. Henderson was the only witness examined. He says, Moore owed him about \$250; but he does not state the items. He further says, that at the time the deed was executed he did not know of any notices against Moore as the 932 surety of Marr; and at that time *had not heard that Moore was Marr's surety. Mr. Moore was about seventy-six years old, and he lived about three years and a half thereafter.

The cause came on to be heard on the 21st of April 1871, when the court held, that the deed from Moore to Henderson was fraudulent as to the creditors of Moore; sustained the sale of the forty acres of land to McLearn, and decreed a sale of the office lot in Warrenton; and that Henderson should account for the \$1,500 the price of the forty acres of land he had sold, with interest from the day of sale, in the following manner: first, to the liens existing and outstanding on said property paid off by Henderson; second, to any other liens existing at the date of the deed; third to the \$50 due by Moore to Henderson; and the balance distributed according to law, among the creditors of T. L. Moore dec'd. And to this end the report was recommitted, with directions to the commissioner to convene the creditors of Moore, &c.

From this decree Henderson applied to this court for an appeal; which was allowed.

Brooke & Scott, for the appellant.

Eppa Hunton, for the appellee.

Staples J. This is a creditor's bill to set aside a deed on the ground of fraud. The deed in question conveys all the real estate of the grantor, Thomas L. Moore, in the county of Fauquier, to Thomas L. Henderson, the grantee, in consideration of a debt of fifty dollars due by the former to the

latter, and for the further consideration of a comfortable support to be furnished the grantor during his life.

As Moore was much embarrassed with debt at the date of this transaction, 933 there is no doubt but that a court of equity would have vacated this deed and held the property liable to the demands of creditors if they had interposed in due time in asserting their claims. Although the law does not restrain the owner in the exercise of a just dominion and control of his estate, it does not permit him to defeat the just claims of creditors, by reservations of benefit to himself inconsistent with those claims.

But the creditors of Moore having failed to assert their demands against the property until Henderson had made considerable advances for the support of Moore, in performance of his contract, the question we are to consider is, whether the deed is a valid security to the extent of these advances.

A conveyance of property in consideration of an agreement to support the grantor is not regarded in law as merely voluntary. As it is impossible to foretell how long the grantor may live, or what expense the grantee may necessarily incur in maintaining him, the courts will not undertake to pronounce the consideration inadequate; unless indeed it is manifest that the services to be rendered and the expense to be incurred are grossly disproportionate to the value of the property. Such agreements are therefore treated as founded upon a valuable consideration. And consequently they are only fraudulent so far as the grantee is concerned, when mala fides is justly attributable to him. No rule is better settled than that both parties must concur in the fraudulent intent. The fraudulent design of the grantor, if unknown to the grantee, will not infect the latter with a want of good faith. 2 Lomax 420, margin 324.

When there is actual fraud, both parties participating, the deed is utterly void ab initio, and is not permitted to stand as 934 a security for any purpose. The fraud infects the whole transaction. So far has this doctrine been carried, that in a case before this court, it was held, that a deed could not operate as security for a valid debt, although the other provisions were forced upon the creditor as a condition of securing what was actually due him. In no instance will the courts afford any indemnity to a particeps criminis in case of actual fraud. Bump'on Fraudulent Conveyances 572.

When, however, the deed is merely constructively fraudulent, or when it appears that the grantee has acted bona fide, and did not participate in the fraud, the deed is permitted to stand as a security for what is justly due the grantee, or for advances made by him subsequent to its execution. This doctrine is not only just and reasonable in itself, but is supported by abundant authority. As, however, it is strongly controverted by the learned counsel for the

appellee, it may not be improper to mention some of the cases which sustain the proposition.

In *Albee v. Webster*, 16 New Hamp. R. 362, the court say: A sale may be actually fraudulent as to creditors for want of sufficient consideration, and yet be made good if full consideration be subsequently paid before creditors interfere. So a sale may be fraudulent as to creditors on account of a secret trust accompanying it; but if by a subsequent agreement, before creditors interfere, this secret trust is discharged and the sale is otherwise made valid, the fact that the trust once existed will not operate to vitiate the sale, the fraud being purged.

In *Thomas v. Goodwin & als.*, 12 Mass. R. 140, it was held, that where one summoned as trustee, had received goods of the principal debtor under circumstances indicative of fraud, and which would 935 have *fixed him as trustee, but before service of process upon him had paid debts of the principal to the amount of the goods received, he was discharged. The case of *Lynde et al. v. McGregor*, 13 Allen R. 181, is to the same effect; the court regarding the distinction between deeds actually fraudulent and deeds constructively so; and that the latter may be made effectual by subsequent advancements.

In *Gardner Bank v. Wheaton*, 8 Greenl. R. 373, the transaction was held to be fraudulent and void as against creditors; but there being no moral turpitude on the part of the grantee, he might charge upon the estate all his payments and expenses actually made and incurred under the agreement before the conveyance was impeached.

In *Bean v. Smith & als.*, 2 Mason's R. 252, 296, the language of Mr. Justice Story is very applicable to the case before us. After discussing the facts, he proceeds to say: The next question that arises is, whether the conveyances are to stand as securities for the sums which have been really advanced or paid by them for their father since the execution of these instruments. I agree to the doctrine laid down by Chancellor Kent in *Boyd & al. v. Dunlap*, 1 John. Ch. R. 478, and *Sands v. Codwise*, 4 John. R. 536-549, that a deed fraudulent in fact is absolutely void, and is not permitted to stand as a security for any purpose of reimbursement or indemnity; but it is otherwise with a deed obtained under suspicious circumstances, or which is only constructively fraudulent. * * * Again, cases are not unfrequent in equity, where the court upon setting aside a conveyance, has left some benefit to the grantee. But that is done only where there are circumstances which do not immediately affect the party against whom the decree is sought with original 936 *and meditated fraud; or if he holds a derivative title, where that title was attained without knowledge of the fraud. There are numerous other cases sustaining this view, which I shall content myself merely with citing. *Oriental Bank v. Haskins*, 3 Metc. R. 332; *Hutchins v. Sprague*,

4 New Hamp. R. 469; *Hopper, adm'r v. Sisk*, 1 Carter's R. 175. See also *Bump on Fraudulent Conveyances* 574, and the numerous authorities referred to in note. And see *Janney v. Barnes et als.*, 11 Leigh 100.

In the case before us there is not a scintilla of evidence to show that Henderson, at the time of the execution of the deed, had any notice of this claim, or of any indebtedness on the part of Moore, besides the judgments which were afterwards paid by him. At what time he acquired such notice does not appear. Moore's liability, as one of the sureties of Marr, was, of course, purely contingent. When the deed was made no judgment had been rendered against Moore, nor had the extent of his liability been fully ascertained: that, of course, would depend upon circumstances. If the principal was solvent, it would amount to nothing; if insolvent, but the sureties were all responsible, the measure of his liability would be very small. Now what is there to show that Henderson had any information whatever upon these subjects? Absolutely nothing. The conduct of the appellee was well calculated to delude him into a feeling of security. The judgment against Moore was recovered upon notice and motion on the 20th April 1866, but a few weeks after the date of the deed: and yet no execution was issued upon it, and no effort made to enforce it. It does not appear that it was even docketed. The payments of complainant were made in 1867;

but no proceedings were instituted to 937 annul the deed until *the filing of this bill in March 1869. In the meantime no claim was asserted against Henderson; no notice given him to withhold any advances to Moore, although the deed under which he claimed was duly recorded, and must have been known in the community. During all this time, from March 1866 to March 1869 he is permitted to incur heavy expense in the support of Moore, who was his uncle, without a word of warning or objection from those most interested in looking after this property. In the language of the Supreme court of Pennsylvania, in *Pearson v. Chapin*, 44 Penn. St. R. 1, 14, "while a creditor does not confirm by doing nothing, and the contract must be a nullity as against his rights, by its performance it may be very far from being a nullity: or if he be not prompt in asserting his rights it may dispose of all the property so that he can never reach it."

The evidence shows that Henderson paid valid judgments constituting liens on the land to the amount of \$687.60; and that he expended about \$1,200 in supplying Moore with board and clothing and other things essential to his comfort. There is every reason to believe that Henderson has not derived the slightest advantage from the transaction. He may be guilty of fraud as charged in the bill; but the record does not show it. And I had always supposed the rule well established, that as a charge of fraud is against the presumption of honesty,

is an imputation of the gravest character, the courts require to sustain it by proof of the clearest and most satisfactory nature.

It is said, however, that the deed being void at the time of its execution, it is a mere nullity, and cannot be made good by any matter *ex post facto*. It has been already seen that this rule applies only to conveyances tainted with actual fraud con-
 938 curred in by both parties. *It has no application to cases like the present, in which an innocent purchaser contracts to pay the value of the property in the support of the grantor. Such conveyances may be voidable at the suit of creditors; but they are not utterly void. The legal title rests in the grantee by operation of the deed, good against all the world except the creditors; subject to be divested by them if they see fit to impeach the conveyance in due time.

But the title remains in the grantee until the deed is vacated; and when it is vacated, it is not rendered void *ab initio*; but only from the time of the decree so declaring. *Fupp v. Talbird*, 1 Hill Ch. R. 99; *Backhouse's adm'r v. Jett's adm'r*, 1 Brock. R. 500; *Pearsoll v. Chapin*, 44 Penn. St. R. 1, 15.

It is very true that judgment was obtained against Moore before the advances were made by Henderson; but the title was not thereby divested. A judgment lien constituted no interest in the land itself; nor does it confer any right of property therein. The lien operates as a charge upon whatever the debtor possesses at the time; but it cannot operate beyond that. Until the deed is vacated the title remains in the grantee; and there is nothing upon which the judgment can operate. The grantee having purchased the property in consideration of a support furnished the grantor, every advance by him is a payment of purchase money *pro tanto*. It is not materially different from a payment in money to the grantor himself, and its expenditure by him in the purchase of the means of subsistence. If the payment is *bona fide* made, it will not be affected by the existence of a judgment lien obtained after the execution of the deed of conveyance. It is competent for the creditor at any time to interfere,

and by proper proceedings, to require
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It appears from the report of the commissioner, that the real estate embraced in the deed was worth about twenty-one hundred dollars. The amount of Henderson's account for judgments paid and expenses incurred is about two thousand dollars. This does not include a claim of \$250 asserted by him against Moore upon a previous indebtedness, as he maintains. The debt secured by the deed is put down at

fifty dollars; and Henderson does not satisfactorily explain the discrepancy. This item of \$250 must therefore be rejected from the account. But if it be excluded, the amount actually paid and not controverted in the court below, falls but little short of the value of the property. If we regard Henderson as a *bona fide* purchaser he is of course entitled to all the rights appertaining to that position. A small excess of the value of the property over the amount of the purchase money will not justify the interference of the courts. The gravamen of the bill is fraud in the debtor, with the knowledge of the purchaser. It is positively denied in the answer, and is not established by the proofs. The only alternative is the dismissal of the bill. The decree of the Circuit court must therefore be reversed, and a decree entered dismissing the bill.

The other judges concurred in the opinion of Staples J.

Decree reversed.

940 **Otterback v. Alex. & Fred. Railway Co.*

November Term, 1875, Richmond.

Appeals—Supersedeas Bond—Time within Which Bond Must Be Given.—A judgment is rendered on the 18th of May 1872, and one of the parties obtains an award of a supersedeas to the judgment on the 9th of November 1872, but the supersedeas bond is not given until the 15th of April 1875; though counsel had marked his name on the docket as counsel for the appellee. The bond not having been given within the time prescribed by the statute the appeal must be dismissed; and the counsel marking his name on the docket, though it may be a waiver of the process, is not a waiver of the bond. Code of 1873, ch. 178, s. 17, p. 1140.

This was a motion by the Alexandria & Fredericksburg Railway Company to dismiss an appeal which had been allowed to Mrs. Sarah Otterback, from the judgment of the circuit court of Prince William county, affirming a judgment of the County court of said county, in a cause in which the appellee here was plaintiff and the appellant was defendant. The judgment of the Circuit court was rendered on the 13th of May 1872. Though a supersedeas to this judgment was awarded by a judge of this court on the 9th of November 1872, the supersedeas bond was not executed until the 15th of April 1875; though counsel had put his name on the docket as counsel for the appellee.

F. L. Smith and F. L. Smith, Jr., counsel for the appellant.

941 **Wm. H. Payne and Jones & Boukkin* for the appellee.

***Appeals—Supersedeas Bond—Time within Which Bond Must Be Given.**—This limit is still prescribed by statute in Va. Code 1887, § 2474; see also, 4 Minor's Inst. (2d Ed.) 961; Barton's Law Pr. (2d Ed.) 1168; *Acker v. A. & P. R. R. Co.*, 84 Va. 648; *Pace v. Ficklin*, 76 Va. 292; *Frazier v. Frazier*, 77 Va. 775.

Moncure P. delivered the opinion of the court.

This is a motion to dismiss the supersedeas in this case for the failure of the plaintiff in error to execute the bond required of her for the prosecution of the same within the time prescribed by law.

The law under which the supersedeas was issued in this case, is to be found in the Code, chapter 178, section 17, page 1140, which declares that "no process shall issue upon any appeal, writ of error, or supersedeas, allowed to or from a final judgment, decree or order, if when the record is delivered to the clerk of the appellate court, there shall have elapsed two years since the date of such final judgment, decree or order; but the appeal, writ of error, or supersedeas, shall be dismissed, whenever it appears that two years have elapsed since the said date before the said record is delivered to such clerk, or before such bond is given, as is required to be given, before the appeal, writ of error, or supersedeas takes effect;" &c.

The date of the final judgment, to which the supersedeas applies in this case, is the 13th day of May 1872. The supersedeas bond was not given until the 15th day of April 1875, when more than two years had elapsed since the date of the said judgment. It seems to follow therefore, as a necessary consequence, that the supersedeas must be dismissed under the said law.

This question has, in effect, been decided by this court in the case of *Yarborough & wife v. Deshazo*, 7 Gratt. 374; the only difference between the law under which that case arose, and the one under which this case arises, being that the limitation 942 prescribed by the law in that case was five years, while the limitation prescribed by the law in this case is two years.

The law is now, and was when that case was decided, very different from what it was when *Williamson v. Gayle, &c.*, 4 Gratt. 180, was decided; and therefore the last named case did not govern the former, and does not govern this case.

The only ground on which the counsel for the plaintiff in error relies to distinguish this case from that of *Yarborough & wife v. Deshazo* is, that there was an appearance in the appellate court in this case by counsel of the defendant in error, within the time for giving the bond, without making any objection on account of the failure to give the bond, which, it is contended, lulled the plaintiff in error into a sense of security, and was a waiver, in effect, of the bond.

The appearance of counsel referred to was merely to have his name marked on the office docket of the court, as counsel for the defendant in error; and was not intended to be, and had not the effect of being, a waiver of anything, except, perhaps, the necessity of service of process on his client, when such process could lawfully issue. Certainly it could not have been intended, nor could have the effect, in itself, to release the plaintiff in error from his obligation to give the supersedeas bond required by law.

Therefore the appeal is dismissed.

Appeal dismissed.

943

Page v. Commonwealth.

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the other indictments for felony which appear to have been found against him, in the same court and at the same time with the indictment which has been tried as aforesaid, or any other which may have been or may be found against him for felony in the same court.

The judgment was as follows:

951 *It seems to the court, for reasons stated in writing and filed with the record, that the said judgment is erroneous: Therefore it is considered that the same be reversed and annulled. And this court proceeding to enter such judgment as the said Circuit court ought to have entered, it is further considered, that the plaintiff in error be acquitted of the charges contained in the first and second counts of the indictment. And it is ordered that the verdict of the jury against him on the third count be set aside, and the cause remanded to the said circuit court for a new trial to be had therein on the said third count, for the offence of feloniously and maliciously burning a barn and stable as therein charged, and as described in the fifth section of chapter one hundred and eighty-eight of the Code. But it will be competent for the court below, if deemed best to do so, to have a nolle prosequi entered as to the said third count; and to proceed to the trial of the plaintiff in error in one or more of the other indictments for felony which appear to have been found against him in the same court and at the same time with the indictment on which he has been tried in this cause, or any other indictment which may have been or may be found against him for felony in the same court.

Which is ordered to be certified to the said circuit court for Chesterfield county.

Judgment reversed.

AUTREPOIS, ACQUIT AND CONVICT. (JEOPARDY.)

I. In General.

II. Essentials.

1. The Record.
2. Jurisdiction.
3. Identity of Offence.
4. Identity of Person.

III. When Conviction of a Lower Offence Bars Trial for Higher.

IV. Variances Material and Immaterial.

V. Discharge of Jury.

VI. Conditional Pardon.

VII. Errors Caused by Fault of the Accused.

I. IN GENERAL.

The provision in the Constitution of the United States that no person "shall be subject, for the same offence, to be twice put in jeopardy of life or limb" applies as such only to the courts of the United States, and not to the state courts. The common-law maxim, however, on which the provision is founded, does exist in Virginia and goes even further than that provision. For while that is confined, in terms to cases involving "life or limb" the maxim extends to all criminal cases. *Jones v. Com.*, 20 Gratt. 648.

A plea of *autrefois acquit* showing on its face a distinct offence from that for which prisoner is

indicted, is demurrable. *State v. Evans*, 23 W. Va. 417, 10 S. E. Rep. 792.

On a plea of *autrefois acquit*, when the general issue is also put in, the question whether there shall be one jury or two, is in the sound discretion of the court. If the trial is by only one jury, the verdict must respond to both issues.

Parol evidence may be introduced to show the person is the same, and the offence the same, but not to vary the record, which is conclusive. *State v. Hudkins*, 26 W. Va. 247, 13 S. E. Rep. 367.

II. ESSENTIALS.

1. *The Record.*—Entry by clerk in the minute book of the making of a presentment is a sufficient record of such presentment though not spread at large in the minutes. *Myers v. Com.*, 2 Va. Cas. 160.

Persons indicted for burning the house of R. plead *autrefois acquit* of same offence on same evidence, making the record part of the plea. *Held*, a reply "no such record" is sufficient, as it denies an essential part of the plea. *Page v. Com.*, 27 Gratt. 954.

A plea which does not set forth the court in which, nor the time when, nor any other circumstance of the prosecution, trial or acquittal, and which does not vouch the record of the same court, nor show the record of acquittal if of another court, should be rejected on motion. Neither a demurrer nor plea is necessary in such case. *Wortham v. Com.*, 5 Rand. 669-677.

There is no doubt, but that the transcript of the record pleaded, or the records themselves ought to be produced to the circuit court when the plea of *autrefois acquit* is pleaded. *Com. v. Myers*, 1 Va. Cas. 222.

Plea of *autrefois acquit* though informal will be sustained on demurrer if good in substance. *Day v. Com.*, 23 Gratt. 915, Va. Code 1887, § 2272.

On an indictment for murder the defendant filed a plea in abatement that he had no proper examining trial and the commonwealth's attorney replied but failed to vouch the record. Because of that material defect the indictment was quashed. *Held*, that such acquittal could not be set up in bar of a second indictment for murder. *Souther v. Com.*, 7 Gratt. 671.

2. *Jurisdiction.*—The court deciding the first case must have jurisdiction or its judgment cannot be set up in bar to further proceeding for same cause. *Day v. Com.*, 23 Gratt. 915.

An examining court, without authority to do so acquits defendant of murder and remands him to be tried for manslaughter. This does not bar the superior court from indicting him for murder. *Bailey's Case*, 1 Va. Cas. 258; *Com. v. Myers*, 1 Va. Cas. 188; *Sorrell's Case*, 1 Va. Cas. 253.

On indictment for felony, the indictment was removed from county to corporation court. *Held*, to invalidate that indictment but no bar to new indictment. *Marshall v. Com.*, 20 Gratt. 845.

Where a justice has power to try and punish or send to county court for trial and he does only the latter, his action cannot be set up in bar of trial in county court. *Wolverton v. Com.*, 75 Va. 909.

On indictment for a felony, an entry on the record of the examining court that it is "ordered that this case be dismissed" does not bar a subsequent prosecution. Such words do not convey the idea of trial and acquittal. *McCann's Case*, 14 Gratt. 581.

The order of a court which has no jurisdiction, dismissing an indictment is a mere nullity and no bar to further prosecution. *Dulin v. Lillard*, 91 Va. 718, 20 S. E. Rep. 821.

The conviction of assault and battery before a justice, who has no jurisdiction of felonies, is no bar to an indictment for a felony in the perpetration of which the assault and battery was committed; and this would be true though conviction was in a county court which generally has jurisdiction of both misdemeanors and felonies. The offences are essentially distinct. *Murphy v. Com.*, 23 Gratt 900.

3. Identity of Offence.—Defendant was prosecuted for fraudulently obtaining goods by means of a false privy token. He pleaded acquittal of the felony of forging an order and uttering as true a forged order. The forged order and privy token were the same. *Held*, the acquittal was no bar, the offences being different. *Com. v. Quann*, 2 Va. Cas. 89.

A conviction for advising one slave to abscond is not a bar to a conviction for advising another to abscond though the advice was given to both at the same time. *Smith v. Com.*, 7 Gratt. 593.

Both act and crime must be the same. On indictment for shooting J. W. a plea of *autrefois acquit* is not sustained by record showing acquittal of shooting S. W., though the act of shooting be the same. *Vaughan v. Com.*, 2 Va. Cas. 273.

Plea of acquittal of burning barn of Josiah Thompson cannot be pleaded in bar of an indictment for burning barn of Josias Thompson. *Com. v. Mortimer*, 2 Va. Cas. 325.

On indictment for burning the house of R. a plea of *autrefois acquit* is not sustained by record showing acquittal for burning the house of R. if the jury believe that a different house is intended in the second indictment. *Page v. Com.*, 27 Gratt. 954.

The plea of *autrefois convict* to operate as a bar must show by record the identical offence with which the prisoner is charged. *Com. v. Somerville*, 1 Va. Cas. 164.

An indictment for stealing bank notes "the numbers and denomination of which are unknown to the jurors" does not bar a second indictment which fails to charge that the denomination of notes were unknown, the first having failed because it was proved that jury did know the numbers and denomination of the notes. *Robinson v. Com.*, 32 Gratt. 866.

So an indictment for forging an order for \$47.25 is not barred by a previous acquittal of charge of forging an order for \$47.25 the latter charge having failed because of a material variance. *Burress v. Com.*, 27 Gratt. 934.

But if the same offence is charged in substance the plea of *autrefois acquit* is good though the plea be informal. *Day v. Com.*, 23 Gratt. 915.

A conviction of K. for assault and battery on H. M. may be pleaded in bar to second indictment for riotously assaulting and battering H. M. when the riot was shown in first case to enhance the damages. *Com. v. Kinney*, 2 Va. Cas. 139.

4. Identity of Person.—The plea of *autrefois acquit* must aver not only that the second prosecution is for the same offence but that defendant is the identical person who was proceeded against in the first prosecution. *Justice v. Com.*, 81 Va. 209-218.

The plea of *autrefois acquit* must show the identity of accused with person formerly acquitted. *State v. Cross*, 44 W. Va. 315, 29 S. E. Rep. 527; *State v. Evans*, 33 W. Va. 417, 10 S. E. Rep. 792.

III. WHEN CONVICTION OF A LOWER OFFENCE BARS TRIAL FOR HIGHER.

When an indictment contains three counts and a verdict is rendered on only one this is an acquittal as to the other two, though the crime charged be a felony. *Com. v. Bennet*, 2 Va. Cas. 235.

On indictment on several counts when jury finds defendant guilty on one and not guilty as to others, when a new trial is granted defendant can only be tried as to the count on which he was found guilty at the previous trial. *Lithgow v. Com.*, 2 Va. Cas. 297.

An indictment contains two counts, one for forgery and another for feloniously using as true a counterfeit note. *Held*, a verdict finding the persons guilty of forgery, is an acquittal of the charge in the second count. *Page v. Com.*, 9 Leigh 683; *Kirk v. Com.*, 9 Leigh 627.

The first count in an indictment charges malicious stabbing, the second unlawful stabbing. The verdict finds defendant guilty on second count. *Held*, though new trial granted because verdict was uncertain yet the second trial must be confined to the second count. *Marshall v. Com.*, 5 Gratt. 663.

In *Livingston's Case*, 14 Gratt. 592-606, the court by way of *obiter dicta*, considers that by the weight of authority, though there be only one count, a verdict of murder in the second degree on a charge of murder is an acquittal of murder in the first degree. In *Gwatkin v. Com.*, 9 Leigh 678, and *Ball v. Com.*, 8 Leigh 726, the question was not raised.

On an indictment for malicious assault the verdict of "not guilty of malicious assault as charged in the indictment but guilty of assault and battery as charged in the indictment" is an acquittal of the felony and conviction of a misdemeanor. *Canada v. Com.*, 22 Gratt. 899.

Defendant Stuart was indicted for malicious assault. He was convicted of unlawful assault. This verdict was set aside, and a new trial granted. *Held*, the second trial could only be for unlawful assault, the previous verdict being equal to an acquittal of malicious assault. By way of *obiter* the court says that this rule applies when there is only one count: and that when there is one count for murder and verdict of manslaughter this is an acquittal of murder. But up to time of this decision the question was still open in Virginia. *Stuart v. Com.*, 28 Gratt. 960.

The punishment on the second trial may be longer than fixed before but the offence cannot be higher. *Stuart v. Com.*, 28 Gratt. 968.

On indictment for arson containing two counts, one is adjudged bad. The verdict is set aside because the punishment does not correspond to the other count. *Held*, on new trial granted, defendant could not be indicted for offence charged in the bad count, the previous trial being an acquittal as to that. *Richards v. Com.*, 81 Va. 110.

In *W. Va.* there is a *dictum* to the effect that, in the absence of statute, a conviction of murder in the second degree would, when the verdict was set aside, be a bar to conviction of murder in the first degree. *State v. Cross*, 44 W. Va. 315, 29 S. E. Rep. 527.

House breaking and larceny may be charged in one count as they may constitute a continued act; and where defendant is judged guilty on such count and the verdict is set aside, he may be convicted of either offence provided the maximum penalty for that offence is no greater than that provided for the offence of which he was formerly convicted. *Benton v. Com.*, 91 Va. 722, 21 S. E. Rep. 496.

§ 25, ch. 17 of Acts 1877-78, declaring that "if a verdict be set aside on the motion of the accused, and a new trial awarded, on such new trial the accused shall be tried, and such verdict may be found and sentence pronounced as if the former verdict had not been found" is valid and constitutional.

Under this statute it was decided that though tried for murder and convicted of murder in the second degree, when such verdict was set aside the prisoner could be tried and convicted of murder in the first degree. *Briggs v. Com.*, 82 Va. 554. This changes the rule laid down in *Stuart v. Com.*, 28 Gratt. 950.

The maximum punishment determines the grade of the offence, and so a conviction for unlawful shooting which is punishable as a felony or misdemeanor in the discretion of the jury, is no bar, when the verdict is set aside, to trial for a felony. Va. Code (1887), § 4040 has no application to such case. *Forbes v. Com.*, 90 Va. 550, 19 S. E. Rep. 164.

IV. VARIANCES MATERIAL AND IMATERIAL.

Nolle Prosequi No Bar.

A *nolle prosequi*, entered by commonwealth's attorney in a justice's court on examining trial, is not a bar to further prosecution for felony. *Lindsay v. Com.*, 2 Va. Cas. 346.

The dismissal of a presentment is equivalent to an informal *nolle prosequi* and is not a bar to subsequent prosecution for misdemeanor. *Wortham v. Com.*, 5 Rand. 609.

Indictment—Essential Omitted.

An indictment for felony which omits to charge the act was done feloniously is fatally defective and is no bar to a subsequent prosecution for the same offence. *Randall v. Com.*, 24 Gratt. 644.

Indictment Nullified.

The defendant was indicted for malicious assault and convicted of unlawful assault. A new trial was granted. The indictment was quashed on motion of attorney for the commonwealth because of mutilation. *Held*, the first trial did not bar a second indictment but no conviction could be had of any offence greater than unlawful assault. *Stuart v. Com.*, 28 Gratt. 950.

Verdict—Essential Omitted.

A verdict, set aside for lack of an ingredient essential to constitute the offence charged, is no bar to a subsequent indictment for the same offence. *Com. v. Percavill*, 4 Leigh 686.

Verdict Improperly Signed.

Where the verdict is set aside because improperly signed by one who does not appear to be a juror, the judgment will be set aside, but this does not bar a new trial for the same offence. *Younger v. State*, 2 W. Va. 579.

A judgment, reversed because the verdict was incorrectly signed, is no bar to subsequent prosecution for the same offence. A judgment reversed because one of the jurors was not indifferent, is no bar to new trial. *Armistead v. Com.*, 11 Leigh 657; *Washington v. Com.*, 86 Va. 408, 10 S. E. Rep. 419; *DeJarnette v. Com.*, 75 Va. 897.

Verdict a Nullity for Lack of Assent.

Discharge of jury by the court, without knowing that one of the jury did not assent to the verdict which error rendered the verdict a nullity is no bar to a prosecution on a new indictment. *Gibson v. Com.*, 2 Va. Cas. 111-120.

Verdict Uncertain.

On indictment for felony the verdict was too uncertain and was accordingly set aside. The clerk, however, entered up judgment in the usual form. *Held*, such judgment based on such uncertain verdict and ordered set aside by the court was no bar to a subsequent indictment. *Com. v. Hatton*, 3 Gratt. 623.

On an indictment for malicious and unlawful stabbing, the accused was judged guilty of unlawful stabbing. The verdict was set aside for uncertainty.

Held, such verdict was no bar to new trial on same or new indictment for unlawful stabbing. *Marshall v. Com.*, 5 Gratt. 693.

On indictment for malicious assault with intent to maim, etc., a verdict that defendant is guilty of malicious assault is defective, and judgment on such verdict should be reversed. But this is no bar to a new trial for the same offence. *Jones v. Com.*, 37 Va. 63, 12 S. E. Rep. 226.

Evidence Erroneously Admitted.

If a judgment is reversed because of evidence erroneously admitted the case will be remanded for a new trial, such former trial being no bar. *Crookham v. State*, 5 W. Va. 510.

Unauthorized Punishment.

Conviction and sentence for a less term than the minimum fixed by law is no bar to a subsequent conviction. *Jones v. Com.*, 30 Gratt. 848; *Nemo v. Com.*, 2 Gratt. 558; *Com. v. Smith*, 2 Va. Cas. 327.

A sentence to punishment not authorized by the statute is a ground for reversal, but such trial and sentence is no bar to new trial. *Ex parte Marx*, 3 Va. 40-47, 9 S. E. Rep. 475.

On indictment for arson, when one count is fatally defective a verdict rendered on the other count must fix punishment according to such count. Failure to so correspond is error for which judgment will be reversed. On reversal a new trial may be had, the former trial being no bar to subsequent conviction on the good count. *Richards v. Com.*, 11 Va. 110.

Misdirection as to Punishment.

Where the jury is misdirected as to the minimum punishment, the judgment should be set aside and a new trial awarded. Nor can the commonwealth's attorney remit the punishment and so correct the error. *Allen v. Com.*, 2 Leigh 727.

No Punishment Fixed.

A verdict, set aside because it fixes no punishment, is not a bar to a subsequent indictment. *Mills v. Com.*, 7 Leigh 751.

Variance between Allegata and Probata.

An acquittal on account of a variance between allegations in the indictment and proof at the trial is not a bar to another prosecution for the same offence. *Com. v. Adcock*, 8 Gratt. 661.

A verdict, set aside because of insufficiency of evidence to sustain it, is no bar to an indictment for the same offence. *Ball v. Com.*, 8 Leigh 726.

On an indictment for murder when there is no evidence to sustain the charge, judgment will be reversed. But this does not bar a new trial for the same offence. *Grayson v. Com.*, 6 Gratt. 713.

When Variance Immaterial.

Consent cannot confer jurisdiction of the subject-matter, but may confer jurisdiction of the person, and may operate as a waiver of irregularities in the warrant of arrest; and when the trial is on the merits, the mere omission of the word "feloniously" in a warrant for larceny will not prevent an acquittal from being a complete bar to further prosecution, provided no objection was taken to such omission. *Jones v. Morris*, 97 Va. 43.

V. DISCHARGE OF JURY.

Discharge of Jury—When No Bar.

In case of misdemeanor the court may discharge the jury against the consent of defendant, and such discharge is no bar to subsequent prosecution for same misdemeanor. *Dye v. Com.*, 7 Gratt. 662.

Even in case of felony the court may discharge the jury for good cause and try prisoner again for same

offence before new jury. *Com. v. Fells*, 9 Leigh 618.

In case of necessity the judge may discharge the jury, and try the prisoner again before new jury, though the offence be a felony. But in case of felony, mere inability of the jury to agree presents no such case of necessity, and a discharge of the jury for that cause alone will bar a subsequent prosecution for the same offence. *Logan v. Com.*, 2 Gratt. 571. Changed by Va. Code 1887, § 4026.

Under § 12, ch. 202, Va. Code 1873, in any criminal case the court may discharge the jury when it appears they cannot agree in a verdict, or that there is manifest necessity for such discharge, and such discharge is no bar to a subsequent prosecution for the same offence. But if such discharge is objected to, and exception taken, the action of the court may be reviewed in the appellate court. *Wright v. Com.*, 75 Va. 914. This section is re-enacted in Va. Code 1887, § 4026, and was applied in case of *Jones v. Com.*, 86 Va. 740, 10 S. E. Rep. 1004.

VI. CONDITIONAL PARDON.

Conditional Pardon.

A conditional or commutative pardon, save in the case of capital punishment, is void and therefore no bar to executing the sentence of the court. *Lee v. Murphy*, 22 Gratt. 789.

VII. ERRORS CAUSED BY FAULT OF THE ACCUSED.

A judgment obtained by the fraud of defendant is no bar to a subsequent conviction; and a replication showing such fraud is a good answer to a plea of *autrefois acquit* and should be so adjudged on demurrer. *Com. v. Jackson*, 2 Va. Cas. 501.

Acquittal of defendant's associate, when defendant is himself a fugitive from justice, is no bar to conviction of defendant. *Williams v. Com.*, 86 Va. 697, 8 S. E. Rep. 470.

A judgment, reversed because defendant did not appear in person but by attorney, is no bar to a subsequent prosecution for the same offence. *State v. Conkle*, 16 W. Va. 786.

A discharge by operation of the statute of limitation is a bar to further prosecution for the same offence. *Com. v. Adcock*, 8 Gratt. 661.

See Va. Code 1887, §§ 3893-3894, 4026-4040, as to *autrefois acquit* in general.

952 *Wren v. Commonwealth.

March Term, 1875, Richmond.

1. **Criminal Law—Accessories after the Fact.**—An accessory after the fact to a felony, is a person who knowing a felony to have been committed by another, receives, relieves, comforts or assists the felon.

2. **Same—Same—Requisites.**—To constitute an accessory after the fact, three things are requisite: 1. The felony must be completed. 2. He must know that the felon is guilty. 3. He must receive, relieve, comfort or assist him.

3. **Same—Same—Notice of Principal's Crime.**—It is necessary that the accessory have notice, express or implied, at the time he assists or comforts the felon, that he had committed a felony. And the mere fact that one receives a felon in the same county in which he has been attainted is not sufficient to raise the presumption of knowledge. And the question of knowledge is a question for the jury.

4. **Same—Same—Same—What Constitutes.**—Any assistance given to one known to be a felon, in

order to hinder his apprehension, trial or punishment, is sufficient to make a man accessory after the fact; as that he concealed him in the house, or shut the door against his pursuers until he should have an opportunity to escape; or took money from him to allow him to escape, or supplied him with money, a horse, or other necessities, in order to enable him to escape; or that the principal was in prison, and the jailer was bribed to let him escape, or conveyed to him instruments to enable him to break prison and escape.

5. **Same—Same—Same—Compounding a Felony.**—Merely suffering the principal to escape will not make the party accessory after the fact; for it amounts at most to a mere omission. Or if he agree for money not to prosecute the felon; or if knowing of a felony, fails to make it known to the proper authorities; none of these acts are sufficient to make the party an accessory after the fact. If the thing done amounts to no more than the compounding a felony or the misprision of it, the doer of it will not be an accessory.

6. **Same—Same—Same—True Test.**—The true test whether one is accessory after the fact, is to consider whether *what he did was done by way of personal help to his principal, with the view of enabling his principal to elude punishment; the kind of help rendered appearing unimportant.

This is a sequel to the case of *Wren v. Commonwealth*, reported in 25 Grattan 989. On the second trial, after all the evidence had been introduced, the attorney for the commonwealth asked the court to give to the jury three instructions, which the court gave; and the prisoner excepted. But as they were not considered by this court, it is not necessary to state them.

The jury found the prisoner guilty and assessed his fine at two hundred dollars; and the prisoner moved the court to set aside the verdict and grant him a new trial. But the court overruled the motion and sentenced him to ten months' imprisonment in the city jail, and to pay the fine assessed by the jury. The prisoner excepted to the opinion of the court overruling his motion for a new trial; and the evidence being conflicting, the court spread all of it on the record. It is sufficiently stated in the opinion of Judge Christian. Upon the application of the prisoner, a writ of error was allowed.

Crump, for the prisoner.

The Attorney-General, for the commonwealth.

Christian J. delivered the opinion of the court.

This is a writ of error to a judgment of the Hustings court of the city of Richmond.

The case is before this court for the second time.

The accused was indicted in the said Hustings court, as accessory after the fact to a felony, of which one John Dull was convicted in said court. The indictment after setting out, in proper form, the felony committed *by the said John Dull, charged "that John Wren" (the

plaintiff in error), "well knowing the said John Dull to have committed the said felony in form aforesaid; to-wit, since the said felony was committed in the year aforesaid, in the city aforesaid, him the said John Dull did then and there unlawfully receive, harbor and maintain, against the peace and dignity of the commonwealth of Virginia."

Under this indictment the accused was found guilty at the November term of the said Hustings court; and his fine assessed by the jury at one cent; and was sentenced by the court to twelve months' imprisonment in the city jail; and to labor upon the public streets, or other public works, for seven hours a day during said term of imprisonment. To that judgment a writ of error was awarded by this court; and upon the hearing of said writ of error at the last term, the judgment was reversed, and the accused was remanded to the said Hustings court for a new trial.

It is proper to remark, that the judgment and opinion of this court upon the former hearing was confined to a single point; and that was that the instructions given by the court were calculated to mislead the jury, and were therefore erroneous. The opinion was confined to the single point, and the judgment was reversed upon that ground only.

At the February term of the said Hustings court, the accused was again tried upon the same indictment; was again found guilty, and his fine assessed by the jury at \$200; and was sentenced by the court to imprisonment for the period of ten months and until payment of said fine.

To this judgment a writ of error was awarded by this court.

The counsel for the prisoner, in his 955 petition for a writ of error, assigns two grounds of error: 1st. The granting, by the court, of the instructions asked for by the commonwealth's attorney; and 2d. The overruling of his motion for a new trial.

The second assignment of errors will be disposed of first.

The court below refused to certify the facts proved because the evidence was conflicting; but certified all the evidence offered, both by the Commonwealth and the accused. According to the rules established by this court, in considering such a bill of exceptions, the court will reject all the evidence offered by the prisoner in conflict with that offered by the Commonwealth, and determine, upon the testimony of the Commonwealth alone and all fair and legal inferences to be drawn therefrom, whether the offence charged in the indictment is made out and established by the proof: in other words, whether admitting all the facts proved by the Commonwealth, without reference to those proved by the accused, these facts constitute the offence charged in the indictment.

The accused is charged with accessorial guilt. He is charged in the indictment with unlawfully receiving, harboring and maintaining John Dull, knowing him to have

committed a felony. This charge constitutes what the law denominates "an accessory after the fact." The common law definitely and distinctly defines who is such an offender. He is a person who knowing a felony to have been committed by another, receives, relieves, comforts or assists the felon. 1 Hale P. C. 618; 1 Arch. Crim. Pract. 78, and cases there cited.

The reason on which the common law makes a party in such a case criminal, 956 is that the course of public justice is hindered, and justice itself is evaded by facilitating the escape of the felon.

To constitute one an accessory after the fact, three things are requisite: 1. The felony must be completed; 2. He must know that the felon is guilty; 3. He must receive, relieve, comfort or assist him. It is necessary that the accessory have notice, direct or implied, at the time he assists or comforts the felon, that he has committed a felony. 2 Hawk. ch. 29, § 32. And although it seemed at one time to be doubted, whether an implied notice of the felony will not in some cases suffice, as where a man receive a felon in the same county in which he has been attainted, which is supposed to have been a matter of notoriety, it seems to be the better opinion, that some more particular evidence is requisite to raise the presumption of knowledge. 1 Hale 323, 622; 3 P. Wms. R. 496; 4 Black. Com. 37.

But knowledge of the commission of the felony must be brought home to the accused, and whether he had such knowledge is always a question for the jury.

As to the receiving, relieving and assisting, one known to be a felon, it may be said in general terms, that any assistance given to one known to be a felon in order to hinder his apprehension, trial or punishment, is sufficient to make a man accessory after the fact; as that he concealed him in the house, or shut the door against his pursuers, until he should have an opportunity to escape; or took money from him to allow him to escape; or supplied him with money, a horse or other necessities, in order to enable him to escape; or that the principal was in prison, and the jailer was bribed to let him escape; or conveyed instruments to him to enable him to break prison and escape. This and 957 such like assistance to one known to be a felon, would constitute a man accessory after the fact. 1 Hale 619, 621; 2 Hawk. c. 29, § 26. But merely suffering the principal to escape, will not make the party accessory after the fact; for it amounts at most but to a mere omission. 1 Hale 619; 9 H. iv., 1. Or if he agree for money not to prosecute the felon; or if knowing of a felony, fails to make it known to the proper authorities; none of these acts would be sufficient to make the party an accessory after the fact. If the thing done amounts to no more than the compounding a felony, or the misprision of it, the doer will not be an accessory. 1 Bishop, § 633; 1 Hale 371, 618. "The true test (says Bishop, § 634) whether one is accessory after the fact, is

to consider whether what he did was done by way of personal help to his principal, with the view of enabling his principal to elude punishment; the kind of help rendered appearing to be unimportant.

In *Regina v. Chapple & others*, 9 Car. & Payne R. 355, it was held that "to substantiate the charge of harboring a felon, it must be shown that the party charged did some act to assist the felon personally." This decision is in strict accordance with the established principles of the common law. See Arch. Crim. Plead. and Pract. 78-9, note.

Now applying these well recognized principles to the case before us, we are of opinion that the Commonwealth has failed to show that the plaintiff in error is an accessory after the fact to the felony committed by John Dull. Upon the Commonwealth's evidence, giving to it full force and effect, with all the fair and legal inferences to be drawn from it, and discarding the evidence offered by the accused, the case made out does not contain the constituent elements required to make the accused an accessory after the fact.

958 *The evidence shows that the accused is a detective officer, belonging to the police force of the city of Richmond. One Jos. M. Fowlkes, a gentleman from the country, who seems to have been an easy victim of certain swindlers and sharpers, was inveigled into the house of one John Dull, and induced by an accomplice of Dull to try his chances in the drawing of a bogus lottery. The whole thing was a cheat and swindle; and Mr. Fowlkes, after being induced to believe that he was drawing large sums of money, soon found himself the loser of five hundred and seventy dollars. When he left Dull's house he went to see a friend (his commission merchant), who called a policeman near by, and he returned with the policeman to the scene of the swindle, but found the house closed and the inmates gone. The policeman introduced him to Wren (the plaintiff in error), whom they met on the street, as a detective, and Fowlkes told him that he had been robbed of five hundred and seventy dollars, and said he wanted him to try to get his money back. Wren took Fowlkes in a carriage and carried him to the house of Knox, whom he called the chief detective of the city, and who it seems was a partner of Wren in the detective business. After some consultation with Knox, whom they found at dinner, it was agreed that they would meet at the St. Charles hotel that evening. Fowlkes says he did not ask Wren to arrest the parties, but told him he wanted to get his money back; that his object in employing Wren was to get his money. Wren and Fowlkes, after seeing Knox, separated to meet at the St. Charles hotel. In the meantime, after parting with Wren, Mr. Fowlkes met with an old friend, a lawyer, Mr. Sam'l. Page, and consulted with him, giving him an account of what had happened at Dull's house. When near the St. Charles

959 *hotel, and about to go into an office

of a justice of the peace for the purpose of getting a warrant of arrest, Wren approached them, and said he had "brought the old man down" (meaning Dull), and Page, Fowlkes and Wren went together into the St. Charles hotel, where they found Dull. Fowlkes demanded his money of Dull, saying he had been robbed of it at his house. This Dull denied, saying Fowlkes had lost it at gambling, while Fowlkes declared it had been stolen from him. Dull then said he had nothing to do with it; that he was not in the room when the money was lost, and told Fowlkes with an oath to go after those who had won the money. Wren was present and heard what passed, but was not asked to arrest Dull. Fowlkes asked Page to have him arrested; but Page said no, the time had not come yet.

Page's testimony as to the interview between himself, Fowlkes, Dull and Wren, is the same as that above detailed by Fowlkes. He says that Wren was not requested to arrest Dull; that he (Page) had no doubt Wren would have arrested Dull if he had been requested, and that he (Page) did not want Dull arrested then, because his arrest would have frustrated his plan in getting all the money he could out of Dull for his friend Fowlkes. The next time Wren appears on the scene is on the next day, when he informed Mr. George D. Wise, a practising attorney, that Knox wanted to see him at the Dispatch corner on Main street, and went with him to the corner, where they parted, and Knox took him (Wise) to the American hotel, where he was shown into a room occupied by Dull, Lewis and Purdy; and that Purdy gave him a sum of money to be paid over to Mr. Fowlkes. The parties then met at the Circuit court room, Page being present as the counsel of Fowlkes, and Wise

960 as the *counsel of Dull. A certain sum of money was paid to Fowlkes, and the following receipt signed by him:
Richmond Va. Octo. 8th 1874. "Rec'd of John C. Dull two hundred and eighty-five dollars, in full settlement of all demands and claims against the house of Mr. Dull; hereby binding myself to make no more demands upon him, his house or any one else for any occurrence there: this is to be a settlement in full.

Signed Jos. M. Fowlkes."

Wren was present at this interview, but took no part in it, sitting some distance off in the judge's chair, but near enough to hear all that occurred. After the money was paid over Wren requested Page to see Fowlkes, and get him to pay him for his services. This Fowlkes refused to do.

Shortly after the money was paid Dull was arrested; Page having in his pocket, both the evening before at St. Charles Hotel and at the interview at the Circuit court room, a warrant for the arrest of Dull. But Wren was never requested either by Page or Fowlkes to serve the writ. After the arrest of Dull, Page met with Wren, who said to him with an oath, "Don't you think that old fool has gone and had Dull arrested. If Dull is to be shown up then all shall be shown up."

The only other testimony connecting Wren with Dull, is that of Captain Disney, a police officer; who testified as follows: "That soon after Dull's arrest Wren came to the station house, and was carrying Dull into witness' private office, when witness stopped him; and Wren said he wanted a private interview with him; but witness refused to allow such interview; that immediately afterwards when witness 961 was *searching another prisoner, he saw Dull attempting to slip something in Wren's hand; which he also stopped; thought it was money but could not say. Wren said to Dull, when Disney was afterwards searching him, anything you give Captain Disney will be safe. When witness refused the private interview with Dull, Wren said "never mind the Chief will be up here presently; and said with an oath, he would have Dull bailed out if it cost ten thousand dollars."

This is all the testimony connecting Wren in any way with Dull; and we are constrained to say, that whatever evidence there may be, tending to show that he was guilty of either compounding a felony, or of misprision of felony, there is no evidence sufficient in law to show that he gave any assistance to Dull, or any personal aid of any kind, to hinder his apprehension, trial or punishment. On the contrary he brought Dull into the presence of his prosecutor and his counsel; and though informed by Page that he intended to get a warrant for Dull's arrest, he did not inform Dull of it. He advised Page, it is true, not to take out a warrant at once; and Page concurred with him in that view, thinking it would frustrate his design in getting the money back. His object, as was that of Page, was to get the money of which Fowlkes had been swindled. But there is no evidence to show that his design was to enable Dull to elude or escape punishment. His failure to make the arrest himself, nor his effort, or expressed purpose to get him bailed after his arrest, nor his threat that as Dull is to be shown up others should be shown up also, none of these acts constitute Wren an accessory after the fact to the felony committed by Dull. If, knowing that a felony had been committed, he concealed it, then he is guilty of misprision of felony. If, knowing a felony 962. only to be committed *he concealed it, or forebore to arrest and prosecute the felon, for fee or reward, then he is guilty of compounding a felony. Both of these are grave offences; but they do not (if proved) constitute a party an accessory after the fact. This view of the case makes it unnecessary to pass upon the 1st assignment of error:

The court is therefore of opinion, that the Hastings court erred in not setting aside the verdict of the jury as contrary to the law and the evidence. The judgment must therefore be reversed, and the case be remanded to the said Hastings court for a new trial to be had therein in conformity with the foregoing opinion.

Judgment reversed.

963 *Swisher v. The Commonwealth.

[21 Am. Rep. 330.]

September Term, 1875, Staunton.

1. Evidence—Dying Declarations.—J receives wounds in a fight with S on the 8th of January, and on that night he expects to die very soon, and makes certain statements in relation to the fight. He lives until the 18th, encouraged to entertain some hope of recovery by his physician, and probably having some hope. On the trial of S for the murder of J, the statements of J on the 8th of January are competent evidence as his dying declarations.

At the May term 1875 of the Circuit court of Rockbridge county, Daniel T. Swisher was indicted for the murder of James Jarvia, by cutting him with a knife. The prisoner was tried at the same term of the court. On the trial evidence was introduced by the commonwealth, tending to prove that after an altercation on the 8th of January, 1875 between the deceased and the prisoner, a fight took place between them on the same day about 7 p. m.; and at its termination, the deceased was found to be cut or stabbed in two places in his body; of which wounds he afterwards died on the 18th of the same month. And then the Commonwealth proposed to prove certain statements made by the deceased during the night of the 8th of January; to which the prisoner by his counsel objected, until a proper foundation for their introduction was laid. And thereupon a number of witnesses were examined by the judge in the absence of the jury. This testimony is set out in the opinion of Judge Christian.

964 *The court was of opinion that the testimony was sufficient to authorize the admission of the evidence, as the dying declarations of the deceased; and the same was submitted to the jury; and the prisoner excepted.

The jury found the prisoner guilty, and fixed the term of his imprisonment in the penitentiary at three years; and he was sentenced by the court in accordance with

*Evidence—Dying Declarations.—"The principle upon which, in cases of homicide, the dying declarations of the deceased are admitted in evidence, is that they are declarations made in extremity, under a sense of impending death, and, therefore, when every motive to falsehood is silenced. It is not necessary, however, that they should be stated, at the time, to be so made. It is enough if it appears that they were made under that sanction; and, when this is shown, the length of time between the declarations and the death of the declarant is an immaterial matter." *Hall v. Com.*, 30 Va. 177, citing principal case; *Bull v. Com.*, 14 Gratt. 613; *Vann v. Com.*, 3 Leigh 786. The principal case is cited with approval by CHIEF JUSTICE FULLER in *Mattox v. U. S.*, 146 U. S. 145, 18 Sup. Ct. Rep. 54, also by the same eminent jurist in *Carver v. U. S.*, 160 U. S. 554, 16 Sup. Ct. Rep. 388. See further, *King v. Com.*, 2 Va. Cas. 32; *Hill v. Com.*, 2 Gratt. 594; *Purvey v. Com.*, 23 Va. 51; *Jackson v. Com.*, 19 Gratt. 556. The principal case is reported in 21 Am. Dec. 330. In West Virginia, see *State v. Burnett*, 47 W. Va. —, 35 S. E. Rep. 683; *State v. Cain*, 20 W. Va. 679.

the verdict. The prisoner thereupon applied to a judge of this court for a writ of error; which was awarded.

J. R. Tucker, W. A. Anderson and T. N. Williams, for the prisoner.

The Attorney-General for the commonwealth.

Christian, J. This is a writ of error to a judgment of the Circuit court of Rockbridge.

The prisoner in his petition, and his counsel at the bar here, assign but one ground of error, and that is, that the Circuit court erred in overruling the objection of the prisoner to the introduction of the dying declarations of the deceased.

The alleged ground of the objection is, that no sufficient foundation for their introduction had been laid.

The rule of law on this subject is well settled, that to render dying declarations admissible evidence, they must be shown to have been made when the declarant is under a sense of impending death, and without any expectation or hope of recovery. When this is made to appear by proof, or by the circumstances of the case, dying declarations to identify the prisoner, or to establish the circumstances of the *res gestæ*, or to show transactions from which death results, are always admissible, 965 *to have the same weight as if made under the sanctions of an oath. For it is considered that when an individual is in expectation of impending death, all temptation to falsehood, either of interest, hope or fear, will be removed, and the awful nature of his situation will be presumed to impress him as strongly with the necessity of a strict adherence to truth as the most solemn obligation of an oath administered in a court of justice. As was said in *Dunn v. The State*, 2 Pike's R. 229, cited in 1 Wharton 671: "When every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful consideration to speak the truth—a situation so solemn and awful, is considered by the law as creating the most impressive of sanctions." Whether the dying declarations sought to be introduced were made under a sense of impending death, without any expectation or hope of recovery, is always a question to be determined by the court on all the circumstances of the case. 1 East P. C. 357; 1 Stark. Ev. 523; Bull's case, 14 Gratt. 613.

Let us now apply these well established rules of law to the case at bar. In a fight between the prisoner and the deceased, which occurred about seven o'clock P. M. on the 8th of January 1875, the deceased was stabbed in two places in the body, of which wounds he died on the night of the 18th January 1875.

The declarations of the deceased, offered as evidence, were made on the night of the 8th, about two hours after he received his wounds: and the question was, whether at that time he had a consciousness of impending

death, and then had no hope of recovery. It becomes necessary therefore to examine the testimony of the witnesses who saw him on the night of the 8th, before and at 966 the time the declarations offered *in evidence were made. George Smith, who seemed to have been present just as the fight closed, proved that deceased seemed badly hurt; said he was cut to pieces; called out to his brother to kill the prisoner if he could; that he then walked from the place where he was wounded to the shop of the witness, which was 112 feet, and thence 55 feet further, into the house of witness, who sent for two physicians. Deceased said he could not live until the doctors came unless there was haste made. Said again he could not live, believed he would die before the doctor came; lost a good deal of blood; his pulse was weak.

Another witness, father of the deceased, proved he saw deceased about 25 minutes after he was wounded; was then at Smith's house. Deceased said he was badly cut. Witness told him he was excited. He replied he was not excited, and that if any of the family wished to see him they must be got there as soon as possible. He said he would not get over it. This was before the doctors came: frequently said during the same night he could not get over it.

Another witness proved that she saw deceased at Smith's house about 15 minutes after he was wounded. He looked as if he would die; she feared he would from his appearance. He repeated several times he would die: said, "I think I am going to die;" and afterwards, "I will die: I will never recover." All this was about an hour before Dr. Alexander came. When his father spoke of sending for Dr. Morrison, deceased said he would die. When he said he was going to die, witness told him not to think so; that if it was ordered he should die, the doctors would so tell him; that he must not be unnecessarily frightened. He made no reply then; but afterwards witness heard him say he would die. Witness 967 thought that deceased *thought he would die; and it was not a mere exclamation of pain, but the expression of an opinion.

Dr. Alexander proved that he reached the deceased about 10 o'clock on the night of the 8th January 1875; dressed his wounds; found him excited; that he was wounded in two places, one between the 6th and 7th rib on the left side, and the other in the abdomen; found him pale, but not from loss of blood: said nothing to deceased of his condition, and heard him say nothing; gave him morphine, and he went to sleep sitting in a chair. While attending on deceased, witness was sent for to see prisoner, who was cut in his hand, and on returning to deceased found Dr. Morrison with him.

Dr. Morrison proved, that he reached deceased about 11 o'clock of the night of the 8th January. He had lost some blood; was under prostration due to shock from his wounds. * * * * When witness first saw deceased he was pale, had clammy sweat

and was much prostrated; but reaction had already begun to set in. He thought when witness first saw him, he was going to die. Witness told him he might get well or might die. Witness (who was a surgeon in the Confederate army), told deceased he had seen many men no worse hurt than he was get well. Deceased was obviously encouraged by this, as witness thought. Afterwards, later in the night, about 1 o'clock, witness was called from another room whither he had gone, to see deceased, where some attendants had undertaken to lay him down on a pallet. The effect was to pass the discharge from his wound into his lungs, suffocating him, and making respiration very distressing. Witness replaced him in his chair, where he was more comfortable; found him no worse, and he revived again,

talked, and witness thought he was better. He said "however, he would die, and his wounds reasonably justified that opinion. Witness then left him for the night, being satisfied he was not then in immediate danger. The next morning he was much revived; no doubt he felt better, and obviously was satisfied he was better. For five or six days witness had good hope deceased would recover; would say to him when he visited him—"Jim, I hope you will get well;" and he would answer—"I hope so too." He said the morning after he was wounded, he felt better, and repeated the same thing on my several visits. Witness did not remember that deceased ever said in so many words, he thought he would recover; but he was certainly hopeful in opinion of witness. Witness was much encouraged about him, when about four days after he was wounded his bowels were favorably operated on. When on witness's first visit, deceased said "he thought he was going to die," witness encouraged him, felt his pulse, told him he was not dying, and he certainly was not then in a dying condition, and that as badly hurt men as he, witness had seen get well. On the night of the affray deceased frequently said he would die, and that this was not an exclamation of pain, but the expression of an opinion.

Witness thought that during the whole of the first night, up to the time he last saw him that night, that deceased was of opinion then that death was impending, and that declarations made by deceased that night were made in view of an impending death.

Witness never heard him say he would get well, but would say he was better and felt better and no doubt had hope. He never said in presence of witness, after first night, he thought he was going to die. Witness had hope up to within two days of deceased's death; up to that time witness thought deceased was hopeful.

969 *Witness told some of the family of deceased, that witness thought he was going to die. Perhaps his mother told him after that, she thought he would die, and to make preparations. Witness thought he had no hope after that.

Another witness, the brother of the deceased, proved, that he went for Dr. Morrison, and went in with Dr. M. to see deceased. That then deceased said he would not get well; never heard him say otherwise. The evening before his death deceased reached out his hand and said to witness "my time is short, call all in to see me." A minister of the gospel then prayed in the house.

This was all the material evidence certified by the Circuit court, as the foundation upon which the dying declarations were admitted.

It is urged on behalf of the prisoner, that a proper foundation was not laid for the introduction of the dying declarations, because the evidence failed to show that the deceased was under a sense of impending death without hope of recovery; but that on the contrary, it was shown that he had hope of recovery; and that therefore the evidence of his dying declarations were not admissible. To sustain this view, the evidence of Dr. Morrison is relied on; for the four other witnesses examined on this point, all agree that they heard the deceased give no indication that he had any hope of recovery. But the testimony of Dr. Morrison, which has reference to the night on which the declarations of the deceased were made, is not, when properly understood, at all in conflict with that of the other witnesses. The testimony of Dr. M., as to the expressions which fell from the prisoner, that "he felt better," that "he hoped he would get well,"

and that in the opinion of the doctor 970 he was hopeful and encouraged, *manifestly refer to occasions when he saw him after the night of the 8th January; for the doctor emphatically says, that on that night "he said that he would die, and that his wounds reasonably justified that opinion."

Again he says, after referring to the fact that he sometimes seemed encouraged and said he felt better, and in reply to the remark of the doctor, "Jim, I hope you are better," said "I hope so too," adds, "On the night of the affray deceased frequently said he would die; and this was not merely an exclamation of pain, but the expression of an opinion. Witness thought that during the whole of the first night, up to the time he last saw him that night, deceased was of opinion that death was impending; and that declarations made by deceased on that night were made in view of impending death."

Now it is evident, that the casual expressions of hopefulness made by the deceased, were not made on the night of the 8th of January, but at various times afterwards, when encouraged by his physician that he was better, and when he may have in fact felt better. It is thus clear, that on the night of the 8th of January when the declarations offered were made, the deceased was fully impressed with the conviction that he must die of his wounds, and had not the remotest hope of recovery. The fact that he did not die immediately, or

during that night, but lingered for ten days, and during that time gave expression to gleams of hope when encouraged by his physician, does not alter the case. The question is, always, did the deceased, at the time the declarations were made, have the consciousness that death was impending, and had no expectation or hope of recovery?

If the declarations were made under the sense of impending dissolution, and a
971 consciousness *of the awful occasion, the principle is not affected by the fact that death did not ensue until a considerable time after the declarations were made—1 Whar. 671; 2 Russ. Crim. 757;—nor by the fact that on other days, when encouraged by others, he may have expressed some slight hope of recovery, unless such expressions, taken together with all the circumstances of the case, shew that he had hope of recovery when the declarations offered were made.

The fact of the declarations not being made immediately previous to death, will not exclude them, provided the deceased was conscious at the time he made them, that he was in a dying condition. 1 Greenl. Ev. 158; McDaniel v. State, 1 Smeedes & Mar. 401; State v. Poll, 1 Hawks R. 442; Commonwealth v. Cooper, 5 Allen's R. 495; Rex v. Mosley & Morrill, Moody's C. C. R. 97; referred to in 3 Rob. Pract. old ed. 208.

The last named case is strikingly analogous to the one under consideration. In that case the injury that caused the death of the deceased, was inflicted on the evening of the 30th September; in consequence of which he was brought home and put to bed, and a surgeon was sent for on that evening to attend him. The declarations in question were made the same evening. The surgeon continued to attend him until his death; which took place on the 10th October. In his evidence the surgeon stated that previously to the 10th of October, he did not regard the case of the deceased hopeless, nor did he so represent to him; that he told him there was danger, but held out to him hopes of recovery; though he did not know whether deceased entertained hopes or not, as he never expressed to the surgeon any opinion either of hope or apprehension; but that when he saw de-
972 ceased on the 10th of October *he felt certain he would die that forenoon, and communicated to him the hopelessness of his state.

In consequence of this evidence of the surgeon it became material to enquire further, as to the prior hopeless state of the deceased, and his consciousness of it, from the commencement of, or during his illness, in order to ascertain, whether the declarations aforesaid were admissible in evidence or not. To this point a witness stated, "that she was sent for to the deceased, on the evening of the 30th September; that he was in a very ill state indeed; that he said he was robbed and killed; that he should never get better of it; that she assisted in putting him to bed, and continued to attend him till his death; that during that time

he spoke of dying, and said he could not continue long—a few days would finish him; that he all along said he never would get better; that he never missed saying so one day before the latter end." Witness also stated, that she was a nurse accustomed to attend such people, and very often found them low spirited, and have known many persons say they should never get better, who have got better; that deceased talked in that way; that about Tuesday before his death, he said he should not continue many days; that it was before that he told her all about it; that the first night he said he should not get better and continued to say so till the last day.

On this evidence it was objected for the prisoners, that a sufficient foundation was not laid for receiving evidence of the declarations of deceased made on Thursday evening the 30th of September. But Holroyd J. who tried the case, admitted the declarations; and upon that and other proof the prisoners were convicted of murder. Upon a case reserved, the court consisting of ten

judges, was unanimously of opinion,
973 *that the declarations were properly received. These two cases are singularly alike. In both cases the deceased lingered ten days after the fatal wounds were received. In both cases the surgeon attending did not think the wounds necessarily mortal; and encouraged the deceased that the case was not hopeless. In both cases the declarations offered were made on the night when the injury producing death was inflicted. In both cases, it is shown that the deceased on that night said he would never get over it,—that he must die, and similar expressions,—which were also used at various times during the lingering suffering of both for ten days.

In the case before us three witnesses, being those most constantly in attendance, prove that from the first night to the last (as was proved by one witness in the case cited), the deceased always said he must die.

The only difference is, that in the case before us, on one occasion several days after the declarations were made, in reply to the remark of the physician, "Jim, I hope you will get well," deceased replied, "I hope so too." This remark was the only one made, during the whole ten days, indicating that at any time there was on the mind of the deceased the slightest hope of his recovery; but this remark when taken in connection with the other evidence in the case and the circumstances under which it was made, does not show, or tend to show, that on the night of the 8th of January, when the declarations were made, the deceased had the slightest hope of recovery; especially when the intelligent physician who testified to this remark, says emphatically, that during the whole night of the 8th of January, up to the time he saw him last that night,
974 deceased was of opinion that *death was impending, and that declarations made by deceased on that night were made in view of impending death."

Certainly we cannot say, upon such evidence as this, that the opinion of the Circuit court in declaring, that a proper foundation had been laid for the introduction of dying declarations, was erroneous. Much weight ought always to be given to the opinion of the court below in determining this question. The duty by law is devolved on him to determine, not only from the proofs, but from all the circumstances of the case, whether the declarations are admissible. Bull's case, 14 Gratt. 613; Vass's case, 3 Leigh 786. That court has all the witnesses in its presence, hears them speak, can judge of their credibility, is cognizant of all the circumstances of the case, and to its judgment the law refers the determination of the question whether the declarations were admissible.

If that judgment is clearly erroneous, it may be reviewed like any other judgment. But in such a case, the same weight ought to be given to the judgment of the court below, as the appellate court gives to a judgment of the court of trial, when the motion for a new trial is overruled and the evidence certified. The judgment must be clearly erroneous before it will be interfered with by the appellate court.

In this case we have the evidence of four witnesses, among them the physician in attendance, all concurring, that on the night of the 8th January 1875, when the declarations were made, the deceased had no hope of recovery; and the physician in so many words declaring that the declarations made that night, "were made by the deceased under a sense of impending death." All this evidence comes before us with the sanction of the judge who heard the 975 witnesses speak, "who knew their character and credibility, and was cognizant of all the circumstances of the case.

Can we say that because, days afterwards, not on the night when the declarations were made, the deceased expressed some vague hope that he was better, that, for that reason, all the witnesses and the judge who heard them were mistaken in their conclusion, that the deceased was without hope of recovery when the declarations were made?

This would, it seems to me, be going farther than this court or any other, has ever gone, in declaring such a judgment erroneous. Upon the whole case, I am of opinion, that there is no error in said judgment; that it is fully sustained by the evidence, and the legal principles which govern the case; and the same should be affirmed.

Moncure P. and Staples J. concurred in the opinion of Christian J.

Anderson J. dissented.

Judgment affirmed.

976 *Mesmer v. Commonwealth.

September Term, 1875, Staunton.

I. Orders of Judge in Vacation — Summoning Grand Jurors.—On the 18th of September 1874, S. Judge of the Corporation court of W, issued his order in

vacation to the clerk of the court, directing that a grand jury of ten citizens, &c. be summoned to attend the court on the 21st of September. Upon this order the clerk issued his warrant to the sergeant to summon certain grand jurors, naming them. Of the list furnished the sergeant nine attended the court. At the September term of the court an order was entered as follows: This day came a grand jury, to wit: naming six of those who had been summoned by the sergeant; who being elected, &c. **Held:**

1. **Same—Same—Objections.**—It is not a valid objection to this grand jury, that the list of the jurors was not made out and delivered to the sergeant five days before the term.

2. **Same—Same—Statutory Requirements—Recordation.**—The statute does not require the order of the judge to be entered of record. And when it appears by the record that six were elected, &c. it must be presumed that all this was done by the direction of the court.

3. **Same—Same—Acts of Clerk.**—The acts of the clerk done in the presence of the court and under its supervision, must be taken to be done by direction of court; and is the act of the court.

4. **Same—Same—Statutory Requirements—Recordation.**—All the statute requires is, that the number of grand jurors may be limited to six by the direction of the court. It does not require that the direction shall be matter of record.

5. **Same—Same—Objections.**—Nor is it a valid objection to the grand jury, that it was composed of six of the nine summoned by order of the court in vacation.

II. Police Officers—Using Force in Making Arrests.—A policeman who does not use more force than is necessary to arrest a person who is engaged in riotous and disorderly conduct, and who resists the officer, is not guilty of an assault and battery.

977 *This was an indictment in the Corporation court of the city of Winchester, against John R. Mesmer, for assaulting and beating Amos Jackson. There was a verdict of the jury for one cent damages, to which the court by its judgment added ten days' imprisonment in the jail of the corporation. And thereupon Mesmer applied to a judge of this court for a writ of error; which was allowed. The case is fully stated by Judge Christian in his opinion.

Williams & Williams, for the appellant.

The Attorney-General, for the commonwealth.

Christian J. delivered the opinion of the court.

The court is of opinion, that the Corporation court of Winchester did not err in overruling the motion of the plaintiff in error to quash the indictment, because it was found by a grand jury of six, selected from nine who had been summoned to attend the term at which the indictment was found.

The 4th section of the act of the general assembly approved March 27th 1874 provides as follows:

§ 4. For every grand jury in the Circuit

courts, and for two terms in each year of the Corporation courts, such terms to be specially designated by such Corporation courts by order entered of record, which order may be changed from time to time, at the discretion of such courts, there shall be summoned twenty-four citizens of this state, of the county or corporation in which such court is held, and in other respects qualified jurors &c. * * * The number of persons to serve on such grand juries

may, by direction of the court to its clerk, be limited to sixteen. For *the grand juries to all other terms (i. e., except the two terms designated by order entered of record), there shall be summoned ten citizens of the state, with like qualifications, and subject to the exceptions hereinbefore stated: And the court may by direction to its clerk, limit the number of persons to serve thereon, to not less than six."

By an act approved April 23d, 1874, the first and third sections of the act of March 27th 1874, were amended; but the 4th section remains without amendment as above quoted.

Section 1st provides for a grand jury at each regular term of a Circuit court, and at any special term thereof; and at any term of a Corporation court, upon the order of such court, or the judge thereof, in vacation. And authority is given both Circuit and Corporation courts during any term, to order the empanelling of grand juries for such term.

The 3d section makes it the duty of the clerks, both of the Circuit and Corporation courts, five days before the regular terms of the Circuit court, and before the terms of the Corporation court, designated under 1st section, or on order of a judge in vacation at any time before a special term, or at any time upon order of the Circuit or Corporation court, to place in the hands of the officers of such court, lists of the grand jurors selected by lot as provided in previous section (sec. 2), duly qualified, &c. * * * And it is made the duty of such officers to summon the persons mentioned in said list to attend on the first day of such regular or special terms of such courts, or on the day designated in the order of the court.

It thus appears, that at each regular term of the Circuit Court, and at the two terms designated of record, by the Corporation courts, the clerks of said courts respectively, shall furnish the lists of qualified grand jurors, twenty-four in number, unless by direction of the court the number be limited to sixteen, to the officers of the court five days before the terms respectively.

At all other terms of the Corporation courts except the two designated of record, ten qualified grand jurors may be summoned; and at such term the number may, by direction of the court, be limited to six.

In the case before us, the indictment against the plaintiff in error was found on the 21st September 1874. On the 18th September Judge Sherrerd, of said Corporation court of Winchester, issued his order in va-

cation, directing "that a grand jury consisting of ten citizens of this state, of the city of Winchester, and in other respects qualified jurors, * * * be summoned to attend the Hustings court of the city aforesaid, on Monday the 21st September 1874, to serve as grand jurors therein." Upon this order the clerk issued his warrant to the sergeant of the corporation, directing him to summon certain grand jurors, naming them, and their residence in different wards of the city of Winchester. Of this list furnished to the sergeant, nine attended the court. At the September term, on what day of the term does not appear, the following order was entered: "This day came a grand jury, to wit, (naming six of those who had been summoned by the sergeant), who being elected, tried and sworn, and having received their charge, retired to their room, and after some time returned into court, having found as follows: Commonwealth of Virginia v. John Mesmer, Indictment for assault and battery. A true bill. Lloyd D. Logan, Foreman."

There was a motion to quash this indictment, upon *the ground that the grand jury was not made up according to law.

The 1st objection urged by the learned counsel for the plaintiff in error, to the constitution of this grand jury, is, that the list of grand jurors was not made out and delivered to the city sergeant five days before the term—the order in vacation having been entered on the 18th September, and the term commencing on the 21st of the month. This objection cannot be maintained upon a proper construction of the whole act. The 4th section of the act approved March 27th, is not repealed by the act approved April 23rd 1874.

That section provides: "For the grand jury for all other terms" (i. e. for terms other than the two designated of record), "there shall be summoned ten citizens of the state, with the qualifications, and subject to the exceptions heretofore stated. And the court may, by direction to its clerk, limit the number of persons to serve thereon to not less than six."

Now the 3d section requires the clerk of the Circuit court, five days before the regular term thereof, and of the Corporation courts five days before the terms designated in the 1st section, to place in the hands of the proper officer a list of grand jurors &c.; but it also provides that such list may at any time, before a special term of the Circuit court, by order of a judge thereof, and at any time upon order of such Circuit or Corporation court, be placed in the hands of the officer of the court, such list of grand jurors.

Power is thus conferred upon both the Circuit and Corporation courts to direct a grand jury to be summoned at any time, by order of such courts in term; and upon the Corporation courts is conferred the power to limit the number by direction to its clerk to six grand jurors.

*The 2nd objection urged is, that

there is no order of record, giving direction to the clerk to summon six grand jurors; and that the judge in vacation having directed that ten jurors should be summoned, they should have constituted a grand jury; and that they should have been summoned five days before the court.

To the 1st branch of the objection it is sufficient to remark, that the act does not require the direction to the clerk to be entered of record. It simply provides that the court may by direction to the clerk, limit the number of grand jurors to six.

Now when it appears by the record that six grand jurors were elected, tried and sworn and received the charge and retired to consider of their duties, it must be presumed that all this was done by the direction of the court. The acts of the clerk done in the presence of the court and under the supervision of the court, must be taken to be done by direction of the court. When the clerk calls and administers the oath prescribed by law for grand jurors to six men in the presence of the court as a grand jury, we are bound to presume that all this was done by direction of the court. What the clerk did in the premises was the act of the court. Done in the presence of the court, it must be presumed to have had the sanction and authority of the court. The act of the clerk became the act of the court, and the fact that it was done in the presence of the court is conclusive that it was done by its sanction and direction. And all the law requires is that the number of grand jurors may be limited to six by direction of the court. It does not require that this "direction" shall be made a matter of record. The act of the clerk in swearing a grand jury of six would have been without authority, and nothing, except that

982 *it was done in the presence and with the sanction of the court. And when that act is done in the presence of the court it must be presumed to have been done by its direction, and was in fact the act of the court. See *Allen v. Commonwealth*, 2 Leigh 727; *Thornton v. Commonwealth*, 24 Gratt. 657.

Nor is there any valid objection in the fact that this grand jury was composed of six of the nine summoned by order of the court in vacation. On the contrary the presumption is, that those summoned by the vacation order were selected because of their peculiar fitness for their duties as grand jurors. The fact that six of their number were selected instead of six others—the court having authority to summon six—certainly does not invalidate an indictment made by a grand jury composed of six, because that six was selected from men already summoned as a proper grand jury.

The court is therefore of opinion that there was no error in the judgment of the Corporation court of Winchester, in overruling the motion of the plaintiff in error to quash the indictment, because it was found by a grand jury not constituted according to law: this court being of opinion, that the grand jury composed of six members, was lawfully

constituted, by direction of the court having authority to order such grand jury. And that the indictment made by such grand jury, was made by authority of law.

But the court is further of opinion, that the said Corporation court erred in overruling the motion of the plaintiff in error for a new trial; and in entering judgment for the amount of the verdict and costs of the prosecution; and in entering as the judgment of court, that the plaintiff in error be imprisoned for ten days in the city jail.

983 *The facts certified by the court are:

That in September, 1874, Amos Jackson, a man of color, came to Winchester from Clarke county, where he was living with his employer, and with this latter's wagon and team, which he stopped on Main street, and went to a store on the opposite side of the street, returning thence with another man of color; and hearing a noise of some disturbance in Woolfort's saloon, attempted, together with several other men of color, to enter the same to see what was going on; but they were met in the vestibule by the proprietor, Henry Woolfort, who told them not to come in, and to go away from his door and not block it up; whereupon they all did as asked, save said Jackson, whom Woolfort again told to keep out, and go away, and shoved him just outside the door. Standing there, he said to Woolfort: "I'll knock you down in a minute, if you fool around me." That the accused was and had long been chief of police of the city of Winchester, and charged with the preservation of its peace—had been called for by some one present by cries of "police!" but whether for the disturbance in the house was not proven, and run up to the place in time to hear Jackson's remark to Woolfort; whereupon he said to Jackson: "What's that you say? Get away from here;" and took him by the coat collar; but Jackson resisted, and, being a stouter man, broke Mesmer's hold by turning around suddenly, and, by the act of turning, threw Mesmer away from him; saying, when Mesmer first seized him, "Go away, boss, you've got nothing to do with me, I ain't adoin'g nothing;" that upon being thrown off as above stated, Mesmer advanced upon and seized Jackson again, and the latter again breaking away, Mesmer struck him on the head with a whalebone stick

984 about an inch thick and two *feet long, tipped with white metal ferrules at each end, which the witness described as a billy; and Jackson still resisting arrest, and backing toward the curbstone, Mesmer struck him again, whereupon Jackson struck at Mesmer once or twice, and, in doing this, knocked the stick from his hands; upon which Mesmer reaching behind as if for his pistol, Jackson ran diagonally and very fast across the street and up an alley leading to Market street. Mesmer followed him rapidly, and after Jackson entered the alley, Mesmer fired three or four shots from his pistol; and after a considerable chase overtook and arrested Jackson and, with another officer, took him to jail. That when he fired

the first shot he was very near to Jackson and could, in the opinion of witnesses, have hit him, had he intended to do so; but it was not proved whether or not Jackson was struck by any of the shots fired, and that he had no wounds about him, except a small one on the side of his head, although he was at his own request examined by two physicians. That Jackson was tried by a justice of the peace for resisting an officer and being asked if he had any witnesses, said he had none—said he knew he had done wrong, and hoped the justice would be easy on him; and it was further proved that Mesmer interceded with the justice for him, and the justice thereupon abandoning the idea of sending him on to the grand jury, fined him one dollar and costs; and Jackson afterwards procured Mesmer's indictment, and employed counsel to assist in prosecuting him.

This court is of opinion, that the evidence certified, conclusively shows, that the alleged assault by the plaintiff in error, was made in the discharge of his official duty; as chief of police of the city of Winchester; and that no more force was employed

985 by *plaintiff in error than was necessary to secure the arrest of the party he was charged in the said indictment with having assaulted. Indeed the evidence conclusively shows, that no force was used until the plaintiff in error was resisted and assaulted, while making an arrest, in a case, which his duty as chief of police required him to make. The party whom he attempted to arrest was at the time so conducting himself as that his conduct was riotous and unlawful, and he continued his riotous and unlawful conduct by resisting and violently assaulting the officer. The blow, or blows struck by the officer, were only struck to accomplish his arrest, and cannot in law be considered an assault and battery for which the officer can be punished. The fact that the officer fired a pistol at the party when he had escaped by violent resistance, after assaulting the officer, does not alter the case. It is evident that the officer simply fired the pistol to intimidate the party, who, after assaulting him, had effected his escape, and compel his surrender. It is proved that the party was not shot, though the officer could easily have shot him; and the evidence shows that the pistol shots were fired only to intimidate and cause to surrender, a party who being caught by a policeman, (who is attracted to the spot by cry of Police), was engaged in riotous conduct—resists the officer, violently assaults him, and makes his escape.

It would never do, to hold policemen liable under such circumstances, for a prosecution for assault and battery.

The peace and good order of society, in every well ordered government, requires that policemen in the discharge of their duty, and in their efforts to protect society against violence and riotous conduct of evil doers, should be protected, and not be

986 subjected to *harrassing prosecutions for the faithful discharge of their duties as conservators of the peace.

The court is therefore of opinion, that the Corporation court of Winchester erred in overruling the motion of the plaintiff for a new trial, and in ordering the imprisonment of the plaintiff in error in the county jail.

For this error the judgment must be reversed, and the cause remanded for a new trial to be had therein.

Staples J. dissented.

The judgment was as follows:

This day came again as well the plaintiff in error as the attorney-general on behalf of the commonwealth, and the court having maturely considered the transcript of the record of the judgment aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the judgment of the Corporation court of Winchester in overruling the motion to quash the indictment, upon the alleged ground that it was found by a grand jury illegally constituted: this court being of opinion that a grand jury of six, which found said indictment, was under the statute law of this state legally and properly constituted.

But the court is further of opinion, that the said Corporation court erred in overruling the motion of the plaintiff in error for a new trial: this court being of opinion that the evidence certified, conclusively shows that the plaintiff in error was not guilty of such an assault and battery as is punishable under the laws of this state; but that as the chief of police of the city of

987 Winchester, he did not use more force than *was necessary to make an arrest, and did not use any force until he was violently resisted, and himself assaulted by the party he was attempting to arrest.

The court is therefore of opinion, that the said court erred in refusing to set aside the verdict of the jury aforesaid, and in adjudging that the plaintiff in error be imprisoned ten days in the city jail; for which error the judgment must be reversed, and the case remanded to said Corporation court, with directions to set aside said verdict and grant to the plaintiff in error a new trial; which is ordered to be certified to the said Corporation court of Winchester.

Judgment reversed.

988 *Myerdock v. Commonwealth.

November Term, 1876, Richmond.

Absent, MONCURE, P.

Licenses—Agent Selling under Principal's License.—

The act approved April 30th, 1874, in relation to sample merchants, licenses, authorized a party who has obtained a license, to employ an agent to sell for the principal under the license.

The case is stated in the opinion of the court.

E. Y. Cannon, for the appellant.

The Attorney-General, for the commonwealth.

The principal case is cited, but distinguished in *Webber v. Com.*, 83 Gratt. 906-7.

Christian J. delivered the opinion of the court.

The only question we have to determine in this case is, what is the true construction of that clause of 110th section of the act approved April 30th 1874, relating to sample merchants' license, which contains the following provision: "Such license thus obtained, shall be a personal privilege, and shall not be transferable, nor any abatement in the tax thereon allowed." Seas. Acts 1874, p. 18.

The plaintiff in error was indicted in the Hustings court of the city of Richmond, and the indictment charged that he "did unlawfully sell and offer to sell, goods, wares and merchandise by sample, card, description and other representation, without having a license according to law so to do." The jury found a special

989 *verdict—That the defendant John H. Myerdock sold, or offered to sell, certain goods, wares and merchandise, in the city of Richmond, by sample, to one Henry Wenzel, in the month of November 1874; and at that time the said defendant had a license taken out by him in the name of Wm. H. Horseman & Sons, of Philadelphia; for which license, he had paid on behalf of said firm, the sum of \$100, as required by law; and that said license was regularly issued by the commissioner of the revenue for the city of Norfolk, and was duly attested according to law, and issued on the 31st day of August 1874; and was in full force until the 30th day of April 1875. And that said defendant at the time when he offered said goods for sale by sample, was the duly accredited agent of said Wm. H. Horseman & Sons, who had given him a power of attorney, in the words and figures following to wit: And then follows the power of attorney in due form and duly acknowledged and certified, which after reciting the license issued to them by the commissioner of the revenue for the city of Norfolk, to sell merchandise by sample, in the state of Virginia, constitutes and appoints the plaintiff in error their agent to sell for them under said license, goods, wares and merchandise by sample in the state of Virginia.

Upon this special verdict finding these facts, the Hustings court adjudged the plaintiff in error guilty, and assessed his fine at the sum of two hundred dollars; and directed that he be confined in jail until said fine and the costs of prosecution be paid; such confinement not to exceed six months.

To this judgment a writ of error was awarded by one of the judges of this court.

The court is of opinion, that the judgment of said Hustings court is erroneous. According to the true *construction of the act of assembly above quoted, and under which the plaintiff in error was indicted, it is clear that he was not guilty of any violation of law. The act declares (sec. 110) that any person who shall sell or offer to sell any description of goods, wares or merchandise, by sample, card,

description or other representation, shall be deemed to be a sample merchant; and requires, under the penalty of a fine of \$100, that he shall obtain a license therefor; for which license he is to pay the specific tax of \$100. Horseman & Sons, as found by the special verdict, did obtain a license as sample merchants, and paid the specific tax. The plaintiff in error was their agent, and was selling by sample for their benefit, and not for his own. When the statute declares that such license "shall be a personal privilege," it does not mean, that the person obtaining such license shall be required to sell in person and not by another: it only means to declare, that such license shall be used for the benefit of the party to whom it is issued. He cannot transfer it to another; nor can any other person sell under it: but certainly there is no inhibition in the statute against sample merchants operating through agents. A sale by an agent is a sale by himself. If he has a license as a sample merchant, he may sell either by himself or by his agent, like any other merchant. This construction is made plain by the words which follow the clause—"shall be a personal privilege." "Such license thus obtained, shall be a personal privilege, and shall not be transferable, nor any abatement in the tax allowed:" that is to say, such license shall be used for the benefit of the person to whom it is issued, and shall not be transferred to another.

Myerdock, the plaintiff in error, was the duly authorized agent of Horseman & Sons. The latter were *duly licensed as sample merchants. They had a right to sell either by themselves or their agent; and Myerdock selling for the persons to whom the license was issued, and not for his own benefit, was guilty of no violation of the statute; and upon the facts found by the special verdict, ought to have been discharged. The judgment of the said Hustings court must therefore be reversed.

The judgment was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the judgment of the said Hustings court is erroneous. And this court being of opinion, that upon the special verdict found by the jury, the plaintiff in error was guilty of no violation of law; and proceeding to enter upon said verdict such judgment as the said Hustings court ought to have entered, it is therefore adjudged and ordered that the said plaintiff in error be forever discharged from said prosecution; which is ordered to be certified to said Hustings Court of the city of Richmond.

Judgment reversed.

992 *Morgan v. Commonwealth.

November Term, 1875, Richmond.

An indictment which charges a party with taking oysters with ordinary oyster tongs, without paying the tax prescribed by law, charges no offense against the law, and is fatally defective.

Uriah L. Morgan was indicted in the

County court of Matthews county, for that being a citizen of Virginia, and the owner of a canoe and oyster craft, he used the said canoe and oyster craft in taking oysters with ordinary oyster tongs, without paying the tax prescribed by law. Morgan appeared and demurred to the indictment; but the demurrer was overruled by the court. He then pleaded "not guilty;" and upon his trial was found guilty, and his fine was assessed at ten dollars; and there was judgment against him according to the verdict. He then took the cause to the Circuit court; where the judgment was affirmed. And he thereupon applied to this court for a writ of error; which was awarded.

J. N. Stubbs, for the appellant.

The Attorney-General, for the commonwealth.

Anderson J. delivered the opinion of the court.

This is an indictment against the plaintiff in error in the County court of Matthews for taking oysters with ordinary oyster tongs without paying the tax *thereon.

There are three counts in the indictment; but they do not materially differ in the charge made against the defendant. There was a demurrer to the indictment, and to each count thereof, in which the Commonwealth joined, which was overruled by the court; and the defendant plead not guilty. Upon the issue the jury found the defendant guilty, and assessed his fine at ten dollars, for which there was judgment against him. And upon a writ of error and supersedeas to that judgment the Circuit court of Matthews affirmed it; and the cause is brought here upon a writ of error and supersedeas to the judgment of the Circuit court.

The court is of opinion that all the counts in the indictment are fatally defective, because they charge no offence against the law. The constitution of Virginia, art. 10, section 2, expressly provides that "no tax shall be imposed on any of the citizens of this state for the privilege of taking or catching oysters from their natural beds with tongs." But a tax on the amount of sales of oysters so taken is authorized. If he had been taxed on the amount of sales of oysters, which might lawfully be done, and which was the design of the statute, he might be indicted for taking the oysters for sale without paying the tax. But the indictment does not so charge in either of the counts. He might have done everything which the indictment charges, and not be guilty of an offence. Commonwealth v. Young, 15 Gratt. 664. He might lawfully have taken the oysters without paying the tax. He might have taken them for family use, and not for sale, with tongs, which would have been no offence. The indictment must clearly allege the offence described in the statute. Old's case, 18 Gratt.

915. If the statute under which this indictment is made describes *any

offence at all, it is the refusal to pay, or non-payment of a tax on oysters which he has taken for sale. It is evidently designed to impose a tax on the amount of sales of the oysters taken; and the non-payment of a tax so imposed is the offence. The taking of oysters ad libitum, if not for sale, or planting for sale, without paying the tax, is no offence. It is unnecessary to consider the instructions.

The court is of opinion therefore that the County court erred in overruling the demurrer, and the Circuit court erred in affirming the judgment of the County court. It is therefore considered that the judgment of the Circuit court be reversed and annulled; and the court proceeding to enter such judgment as the Circuit court ought to have entered, it is considered that the judgment of the County court be reversed and annulled, and that the plaintiff in error be discharged from further prosecution under this indictment, and go thereof without day.

Judgment reversed.

995 *Howell v. Commonwealth.

November Term, 1875, Richmond.

1. **Criminal Law—Murder in First Degree—Sufficiency of Evidence.***—Upon the evidence the prisoner held to be guilty of murder in the first degree.
2. **Same—Same—Same—Appellate Practice.**—The jury having found the prisoner guilty of murder in the first degree, and the court of trial having refused to set aside the verdict and grant a new trial, the appellate court even if they had some doubt about the sufficiency of the evidence to convict the prisoner of murder in the first degree, would not reverse the judgment.
3. **Same—Same—Statutory—Intent to Kill.**—Murder committed by any of the specific means enumerated in the statute, Code of 1873, ch. 187, § 1, is murder in the first degree, whether there was any actual intent to kill or not.

At the November term 1873 of the County court of Patrick county, Isaac C. Howell was indicted for the murder of Lee Martin. He was tried at the July term 1874, of the court, and found guilty by the jury of murder in the first degree; and the court sentenced him to be hung. The only question in the case arises upon the motion of the prisoner for a new trial, on the ground that the verdict was contrary to the law and the evidence; which was overruled by the court; and exception taken by the prisoner. And upon his application this court allowed him a writ of error to the judgment. The case is fully stated by Judge Moncure in his opinion.

Martin and Barksdale for the prisoner.

996 *The Attorney-General, for the commonwealth.

Moncure P. This is a writ of error to a

***Criminal Law—Murder.**—See citation of principal case in Mitchell v. Com., 38 Gratt. 872, and *note*, collecting all decisions in point in both Virginia and West Virginia.

judgment of the Circuit court of the county of Patrick, convicting Isaac C. Howell of murder in the first degree, and sentencing him to the punishment of death therefor. The prisoner moved the court to set aside the verdict and grant him a new trial because the verdict was contrary to the law and the evidence; but the court overruled the motion, and the prisoner excepted to the opinion of the court. The bill of exceptions contains a certificate of what is stated to be "all the facts proved in the case." The only assignment of error in the judgment is, the refusal of the court to award a new trial.

Beyond all question the prisoner killed the deceased; and in so doing was guilty of murder. These facts were not, and upon the evidence or facts certified, could not be denied. The only question argued or raised in the case was, whether the offence, as shown by the records, was murder in the first or second degree. The learned counsel for the prisoner argued that murder is presumed to be only murder in the second degree, unless and until it be proved to be murder in the first degree; and that the murder in this case was not proved to be murder in the first degree.

The legal proposition thus contended for is certainly true. But is it true that the murder in this case was not proved to be murder in the first degree?

The law defining the degrees of murder may be found in the Code, chapter 187, section 1, page 1188; and is in these words: "Murder by poison, lying in wait, imprisonment, starving, or any wilful, deliberate and premeditated killing, or in the commission of, or attempt to commit arson, 997 rape, robbery or burglary, *is murder in the first degree. All other murder is murder in the second degree."

The offence in this case was certainly not committed by any of the specific means enumerated in the statute, that is "by poison, lying in wait, imprisonment or starving"; nor in the commission of, or attempt to commit, any of the specific offences therein named, to wit: "arson, rape, robbery or burglary." Had it been so committed, it would have been murder in the first degree, whether there was any actual intent to kill or not. In other words, although the presence of an actual intention to kill would often exist in such a case, it would not necessarily constitute an ingredient of the offence, as it would be no part of its definition.

If, therefore, the offence in this case be murder in the first degree, it must be because it is embraced by the general words: "any wilful, deliberate and premeditated killing," used in the statute. And to constitute murder in the first degree under that branch of the statute, the offence must be committed with an actual intention to kill. And to authorize a conviction of such an offence, it must appear from the evidence that such an intention existed.

Does it appear from the facts or evidence

certified in this case, that such an intention existed?

The certificate is in these words: That on the 21st day of November 1873, about 9 o'clock, the prisoner came to the house of Peter Via, who lived about half a mile from the prisoner's mill, and said he "was afraid he had stretched Lee Martin," the deceased, and he wished the witness to go with him to the mill where the deceased was. On the way to the mill, the prisoner stated to the witness, that on the same morning he, the prisoner, was in his mill, on the upper floor, stooping down upon his knees, 998 trimming a wedge on *a block with a hatchet or small chop axe; that the deceased came into the mill, on the same floor on which the prisoner was, having a small sack of corn and a tin bucket on his arm; that the deceased placed his sack of corn near the mill hopper (having passed by the prisoner) and turning immediately advanced upon the prisoner, while he was yet upon his knees, with an open knife in his hand, his arm drawn back in a threatening attitude—the knife being a pocket knife about six inches long, blade and handle—the blade having a sharp point; that the prisoner thereupon, in order to defend himself, struck the deceased two blows with the blade of said axe; that the deceased gave back upon receiving the first blow; advanced again with his drawn knife, and that the prisoner tapped him the second time; when the deceased, who was near the brink of the upper floor, fell to the lower floor; that the prisoner then further stated, that as soon as the boy fell, and he saw he was badly hurt, he went below to see what he had done; that he turned the boy over on his side in an easy position, and then went immediately to give information to the nearest neighbor, who was the witness; that the witness went on immediately to the mill with prisoner at his request; that when they got to the mill, he found the deceased on the floor, as stated by the prisoner, and yet alive and in a very bad condition.

The prisoner went in the mill with witness to see the condition of deceased. Seeing how he was, prisoner asked him (witness) what he thought had better be done, and said he thought he would give himself up to a magistrate, if one could be found in the neighborhood. Witness told him he knew of none near by, and that prisoner might see E. B. Turner, who was a police officer. Prisoner then requested wit- 999 ness to go *after James Wright, a school teacher near by. Witness went after Wright, saw him, delivered the message, went on to Tazewell Turner's, and before getting to Turner's prisoner overtook him, and said he believed he would go with him. The four parties mentioned then returned to the mill.

It was further proved that the mill house was about 22 feet square; that it was about 8 feet 8 inches from the lower to the upper floor; that there were no plank on the lower floor, and the deceased was no more than 18 inches from the brink of the upper floor

when he received the blows from prisoner, and fell or struggled below; that there were two logs or sills on lower floor and that the upper floor extended over about half the upper story.

It was further proved, that the block upon which the prisoner was chopping when the deceased entered the mill, was on the right of the front door as they entered, and about four feet from the door. The distance from the door to the mill hopper is about 15 feet; from block to right hand wall about 18 inches or 2 feet; from block to mill hopper about 8 or 10 feet; that the prisoner showed one of the witnesses the place where he said the deceased stood when he was struck, and that this point was 4 or 5 feet from the block, on a line to the hopper; that the knife, the hat and the tin bucket were found below, and the hatchet above on the bag of corn with the handle next to the steps leading below, as if placed there by some one coming from below. There was blood on the blade of the axe; the hat was on the sill below, with no appearance of having been cut with the axe, with a few sprinkles of blood on it, and looking as if it was placed there—it was a felt hat and seemed to have been taken up and put there. There were some

1000 "sprinkles of blood on side of bucket; there was no blood on the upper floor.

It was a cold morning and there was a little fire in the mill on lower floor. There was some blood on the side of steps in two or three places, as if made by the left hand in going up. The deceased was 15 years old, weighed about 85 pounds, was rather delicate in appearance, and was on his way to school, having come by the mill to bring his corn. The prisoner is about 45 years old, and is a strong and able-bodied man. In going from the mill to Via's house, the prisoner had to cross two branches. On his return from Via's house to the mill, Via saw some blood on the prisoner's hand. It was proved, that the prisoner went to the house of Wright the school teacher, and made complaint to him about the conduct of the deceased who was then attending his school, along with the prisoner's children: this was about three days before the killing. He complained that the deceased had treated his children very badly. This was on Sunday morning. The next morning prisoner went to the school house and carried four of his children. He told the schoolmaster that the deceased had acted very badly; that he did not care about his saying anything to the deceased about it, but that he wanted him (schoolmaster) to protect his children; that he could not and would not stand such behaviour.

It was further proved by one Daniel Martin, an uncle of the deceased, that he was at the prisoner's mill the day before the killing, and told the prisoner he had seen his wife that day, and she, prisoner's wife, told him, that a short time before the deceased had been at her house in the absence of her husband, and after whipping some of her children, the deceased abused and

insulted her very much. Witness said 1001 he "advised prisoner to tell deceased's mother about the matter, and probably she would have him corrected. Prisoner said to witness: 'I'll get him yet.'"

It was proved by various witnesses, that the prisoner had, from his boyhood, sustained a high character, as a man of truth and honesty; as a peaceable, quiet and well behaved citizen; that he had every opportunity after the killing, to make his escape, and refused to do so—surrendering himself voluntarily to the officers of the law; that after he was put in jail he could have made his escape, but refused to do so. This was proved by the jailer. There were three wounds on the head of the deceased—one, the skin was separated from the skull, from near the top of the head to near the neck; the other two wounds were cut with a sharp instrument, about three inches long and about two inches deep, and extending from near the upper part of the left ear toward the crown of the head. The deceased lived about twenty-four hours. There was a scratch on the left cheek of the deceased, which appeared to have been made with the finger nail.

There was some controversy in the argument, whether the certificate was intended to be of facts or of evidence only; or in part of facts, and in part of evidence only. In other words: whether the statements certified as having been made by the prisoner are to be regarded as statements of fact which actually occurred in the case. If they are to be so regarded, then it may well be contended, not only that it is not a case of murder in the first degree, but that it is not a case of murder at all; but only a case of manslaughter, if indeed it be not a case of homicide in self-defence. For according

to those statements, while the prisoner 1002 was in his mill, "stooping down upon his knees trimming a wedge on a block with a hatchet or small chop axe, the deceased came into the mill and advanced upon the prisoner "with an open knife in his hand, his arm drawn back in a threatening attitude—the knife being a pocket knife about six inches long, blade and handle—the blade having a sharp point." And "the prisoner thereupon, in order to defend himself, struck the deceased two blows with the blade of said axe," &c. A man may, intentionally kill his adversary in necessary self-defence. And even though it be not an act of necessary self-defence, yet the assault upon him may be in such a manner, and with such a weapon, as that, under all the circumstances of the case, his offence in killing his adversary would be only manslaughter, even though the killing was actually intended.

But these statements of the prisoner are not to be regarded as statements of fact which actually occurred in the case. They are not certified as such; but merely as statements made by the prisoner. And they are inconsistent with, and disproved by, the facts of the case, and cannot therefore be of facts also; for all the facts actually oc-

curring in a case must, necessarily, be consistent.

Looking then to the facts of this case as they appear in the certificate, is it a case of murder in the first degree? Was the killing wilful, deliberate, and premeditated?

In solving this question we must look at all the circumstances of the case. Murder in the first degree is often committed secretly, and not openly. The homicide in this case was so committed. But the nature and grade of the offence may in such a case be often proved as plainly by the circumstances, as if it had been committed in the presence of many witnesses: and we think such is the case here.

In the first place, a circumstance which strikes us as very important in this case is, the great disparity between the age and strength of the parties—the prisoner and the deceased. The prisoner was in the prime of life, about forty-five years old, and a strong and able-bodied man. The deceased was but fifteen years old, weighed about eighty-five pounds, was rather delicate in appearance, and was on his way to school, having come by the mill to bring his corn. The prisoner might, if he had chosen, have stamped the deceased to death with his feet, or beaten him to death with fists or with hands; though his offence in that case would doubtless have been none the less. But he chose to use a more certain and speedy means of death. He used a deadly weapon—one of the most deadly of all weapons, a hatchet or small chop axe. And he used it in such a way as to ensure the death of the boy. He struck him, apparently with all his strength, three blows on the head with the blade of that axe; thus inflicting three wounds on that most vital portion of the body, two of which were about three inches long and about two inches deep, and extending from near the upper part of the left ear toward the crown of the head. Could he have expected, or intended, to inflict such blows upon that boy without killing him? Was it strange that the boy lived but twenty-four hours after receiving them? Is it not more strange that he did not immediately die under the infliction? The law presumes that a sane man intends the natural consequence of his act. What consequence of this act of the prisoner could have been more natural than the death of the boy. It may be asked—

indeed it was asked in the progress of the argument. If the prisoner intended to kill the deceased, why the act of killing was not completed at the time; and why was the deceased left alive by the prisoner? The answer is, that the prisoner knew he had given the deceased a mortal wound, which must very soon cause his death, if it had not already done so, and there was no cause for doing anything more to effect the purpose in view. It does not appear that the deceased was sensible at all after he received the wounds. He may have languished insensibly until he died, but twenty-four hours thereafter. The prisoner may have believed

that the deceased was actually dead when he left him. If we can suppose that the prisoner, after inflicting the wounds with a wilful, deliberate and premeditated intention to kill, changed his intention and determined not to kill, his act would have been just as criminal, in the eye of the law, as if there had been no such change. His offence was completed when he did, with criminal intent, the act which caused the death; however much he may, possibly, have regretted it, after it was done and before the death occurred.

The record does not show that there was anything in the conduct of the deceased at the time of the commission of the offence by the prisoner, which could have afforded the slightest excuse for the act of the latter, or reduced it from the grade of murder in the first degree. The deceased went to the mill of the prisoner on business, on his way to school, to carry a small sack of corn to be ground. The idea that he went there to make an assault upon the prisoner is wholly groundless. He would not have attempted so rash and mad an act, looking to the great inequality in age and strength between the two. He had no conceivable motive for such an assault, and he was wholly unprepared for it. He went without a weapon, except an ordinary pocket knife, which he no doubt accidentally had about his person. It would be absurd to suppose that he went in such a way to assault such a man in his own house, when there was no one near to prevent his being killed by his adversary, which might so easily have been done.

But while the deceased had no motive for such an assault, and would have been so rash and mad in making it, such was not the case in regard to the prisoner. He had a motive, real or imaginary. The deceased went to school with the prisoner's children, and had as the prisoner said, and as his wife said, treated them badly. It does not appear what was the nature and extent of this bad treatment, except that the wife said to an uncle of the deceased that the latter had, a short time before, been at her house in the absence of her husband, and after whipping some of her children abused and insulted her very much. The deceased may have acted very badly in regard to the children of the prisoner, and may have deserved reasonable chastisement for his conduct in that respect. Whether he did or not, and to what extent, we cannot know from the record in this case. Nor is it material that we should know. Had the prisoner been content, as he should have been, to have had the deceased reasonably chastised for his conduct, nothing would have been easier than to have had it done. He might have had it done no doubt both through the teacher and through the mother of the boy. But it appears that the prisoner had in his mind a different kind and degree of punishment of the deceased from that chastisement which is inflicted on children with a view to their correction.

tion—a punishment no less than that of death—the highest punishment known to the law for the highest crime. That the purpose of the prisoner was revenge, and not reasonable chastisement, is shown by what he said both to the teacher and to the uncle of the deceased. He told the teacher, about three days before the killing, that the deceased had treated his children very badly; “that he did not care about his saying any thing to the deceased about it, but that he wanted him (the schoolmaster) to protect his children; that he could not and would not stand such behaviour.” And when advised by the uncle of the deceased to tell his mother about the matter, who would probably have him corrected, prisoner said to the uncle: “I’ll get him yet.” He got him the day after.

Now the close connection between these threats and the act which they foreshadowed, and the circumstances attending its commission, show that “it was an act of wilful, deliberate and premeditated killing, and of course murder in the first degree.” The deceased could not have expected an attack from the prisoner, or he would not have placed himself so completely in his power. It does not appear from the facts certified in the record that the deceased made any resistance. He had not time, even if he had had strength, and the means at hand to make it. The first blow of the axe no doubt staggered and stunned him, and wholly disabled him from making any resistance. There was not a mark or scratch on the person of the prisoner after the affair was over; nor a drop of blood, except some on his left hand, which was the blood of the deceased.

In regard to the good character of 1007 the prisoner, and *his conduct after the killing in not making his escape, but giving himself up to be tried for the offence, these are not sufficient to repel the effect of the strong, if not conclusive proof of his guilt afforded by the facts certified in the record. His conduct afterwards may have been, and doubtless was, induced by a desire to make out thereby a case of self-defence; or, at all events, to extenuate the degree of the crime of which he might be convicted, and to mitigate his punishment.

But even if we had any doubt as to the degree of the offence in this case, it is certainly not sufficient to warrant us in reversing the judgment of the court for any supposed error in that respect. It was the province of the jury in finding the prisoner guilty, to find whether he was guilty of murder in the first or second degree. The jury which found the prisoner guilty in this case found him guilty of murder in the first degree. The court in which he was tried, which heard and saw the witnesses testify, was moved to set aside the verdict and grant a new trial, because the verdict was contrary to law and the evidence; but overruled the motion, and pronounced the judgment. According to well settled law and practice, this court would not be warranted in re-

versing the judgment. It is therefore affirmed.

We have referred to no authorities in the foregoing opinion considering the principles of law therein stated to be well settled. Reference may be had, however, if desired, to the following, besides other cases on the subject. King’s case, note thereto 2 Va. Ca. 84; Wick’s case, Id. 387; Burgess’s case, Id. 483; Whiteford’s case, 6 Rand. 721; Jones’s case, 1 Leigh 598; Bennett’s case, 8 Id. 745; McCune’s case, 2 Rob. 772; Hunter Hill’s case, 2 Gratt. 595; Read’s case, 22 Id. 924.

1008 *Christian, Anderson and Bouldin, J’s. concurred in the opinion of Moncure, P.

Staples, J. without dissenting from any part of the opinion of Moncure, P. concurred in affirming the judgment, on the ground that it is not a case in which this court can reverse the judgment of the court below.

Judgment affirmed.

1009 *Kent, Paine & Co. v. Dickinson, Judge.

January Term, 1876, Richmond.

Continuation of Same Case.—In the case of Kent, Paine & Co. v. Dickinson, Judge, reported in 26 Gratt. 817, JUDGES ANDERSON and BOULDIN dissented from the decision of the court. The opinion of JUDGE ANDERSON expressing his dissent was not received by the reporter in time to insert it in the report of the case, and it is given below.

Anderson, J.

This is a rule against the honorable judge of the Circuit court of Charlotte county, to show cause why a peremptory mandamus should not be awarded against him, to proceed to hear and finally dispose of the case of Kent, Paine & Co. v. A. D. Ford & Co. I think his answer to this rule is all sufficient, that he has heard and finally disposed of said cause.

The cause was upon the docket of the district Court of Appeals, when the present constitution took effect, and by operation of the 2nd section of ch. 178 (Code of 1873, p. 1143), was transferred to the Supreme Court of Appeals. But this was a case which this court, under the constitution, had no jurisdiction to try; the matter in controversy, exclusive of costs, not being of the value of \$500; and it not being “a controversy concerning the title or boundaries of land, the probate of a will, the appointment or qualification of a personal representative, guardian, committee or curator; or concerning a mill, road way, ferry or landing; or the right of a corporation, or a county 1010 to levy *tolls or taxes; and it not being a case of habeas corpus, mandamus, or prohibition, or involving the constitutionality of a law.” This court by

express inhibition of the constitution, could not assume jurisdiction to try it. (Constitution of Virginia, art. 6, sec. 2; Code of 1873, p. 84.) And by the mandate of the 33d section of the Act of Assembly, supra it was properly transferred to the Circuit court where the appeal was taken, there to be docketed, heard and finally disposed of as by an appellate court. The cause was so transferred and docketed; and it is insisted by the defendant, was heard and finally disposed of.

But it was not heard on its merits. It was heard upon a motion to dismiss the appeal, upon the ground that the person by whom it was awarded was not a judge, and had no lawful authority to award the writ. If that were so, it was not competent for the Circuit court, as an appellate court, to hear and determine the case upon its merits. The writ of supersedeas was a nullity, and the original judgment of the Circuit court was in force. It was a question which met the appellate judge at the threshold of the case, and which he was obliged to decide. And it was, unquestionably, within his appellate jurisdiction. He did entertain the motion, and after argument and due consideration, being of opinion, that the writ of error and supersedeas, had not been awarded by one who had judicial authority, and that the original judgment had not been lawfully superseded, and was still in force, he dismissed the appeal. Being of that opinion what else could he do? He was bound to dismiss it. If he erred, and upon that point I give no opinion, because I do not think it is involved in this inquiry, it was an error of judgment, in the decision of a question which was clearly within his jurisdiction to determine; and *the only

mode by which it could be reviewed and corrected was by a writ of error. If the same decision had been made by the District court, and the amount in controversy was sufficient to give this court jurisdiction, I am clearly of opinion, that it might have been reviewed by this court, upon a writ of error. If so, it could not be reviewed and reversed, upon a rule for a mandamus. If a writ of error would not lie, because the value of the matter in controversy was not sufficient to give this court jurisdiction, the case must share the fate of all other cases, where the inferior court has erred, or is believed to have erred, and the appellate tribunal has no jurisdiction to review the decision and correct the error. I do not mean to say that a writ of error would not lie in this case from this court to review the decision. It may be claimed upon the ground that it involved the constitutionality of a law. I do not know that such is the case. That point is not involved in this case, and I do not express any opinion upon it. But however that may be, whether this tribunal would have jurisdiction or not to review the decision upon a writ of error, I am clear, that it has no jurisdiction to reverse it by mandamus.

But it is contended that the court below disobeyed the order of this court, in refus-

ing to hear the case on its merits. I do not understand the order of this court as requiring the Circuit court to try the cause on its merits. And I do not think that it was competent for this court to make such an order. This court acted ministerially in executing the act of assembly. It was manifest upon the face of the judgment of the Circuit court which was sought to be reversed, that this court had no jurisdiction whatever in the case: and that there was a constitutional inhibition to its taking jurisdiction. If it were not so, the cause 1012 was *improperly transferred to the Circuit court, and that court had no jurisdiction to try it.

But the District court having been abolished, all the causes pending and undetermined in that court, with the papers and records of said court, were transferred by the operation of the 30th section of the act aforesaid, to the custody of the Court of Appeals. The act then provides how they shall be disposed of by said court. Section 31 authorizes it to try such of them as are within its jurisdiction; and such of them as are not, section 33 provides, "shall be transferred to, and docketed in the Circuit court of the counties or corporations, whence the appeals were originally taken, there to be heard and disposed of as an appellate court." It was not the design of the act to give the Supreme Court of Appeals an appellate jurisdiction which was expressly prohibited by the constitution. It was only intended that the court should look into the record of the causes so committed to its custody, which it might do by its clerk, and try such as it had jurisdiction to try, and those which it had not jurisdiction to try, as where the amount in controversy was not of the value of \$500, it is provided, "shall be transferred," &c., to the Circuit court; and the act (not the court) further requires, that it shall be there heard and finally disposed of, as by an appellate court. And the cause coming on before the Circuit court of Charlotte, as an appellate court, it was obliged to consider and decide the question which had been raised, whether the writ of error and supersedeas had been awarded by a judge who had warrant of law to award it; just as the district Court of Appeals would have been if the cause had been before it. The act of the court in making the transfer was only ministerial, and was done through its clerk. There was no de-

cision of the question here, *upon which the case turned in the court to which it was transferred, and upon which it was finally disposed of. No such question was raised here, and could not have been, because this court had no jurisdiction of the case. If the amount in controversy had been not less than \$500, exclusive of costs, that question might have been raised in this court, and it would have been within its appellate jurisdiction to decide it, and it would have been its duty to do so. In like manner the case being before the Circuit court as an appellate court, the question was properly before it, and it was its duty

to decide it. Just as it would have devolved upon this court to have decided it, if it had had jurisdiction of the case, did it devolve on the Circuit court to decide it. And in deciding it that court did not exceed its authority, but kept strictly within the limits of its jurisdiction. And I am of opinion, that this court cannot, without encroaching upon the jurisdiction of the Circuit court, command it to reverse its decision of that question, and to try the cause on its merits. I am of opinion therefore that a peremptory mandamus should not be awarded, and that the rule should be discharged.

INDEX.

ACCESSORIES.

1. An accessory after the fact of a felony, is a person who knowing a felony to have been committed by another, receives, relieves, comforts or assists the felon.

Wren's case, 952

2. To constitute an accessory after the fact, three things are requisite: 1. The felony must have been completed. 2. He must know that the felon is guilty. 3. He must receive, relieve, comfort or assist the felon.

Idem, 952

3. It is necessary that the accessory have notice, express or implied, at the time he assists or comforts the felon, that he had committed a felony. And the mere fact that one receives a felon in the same county in which he has been attained is not sufficient to raise the presumption of knowledge. And the question of knowledge is a question for the jury.

Idem, 952

4. Any assistance given to one known to be a felon, in order to hinder his apprehension, trial or punishment, is sufficient to make a man accessory after the fact; as that he concealed him in the house, or shut the door against his pursuers until he should have an opportunity to escape; or took money from him to allow him to escape; or supplied him with money, a horse or other necessities, in order to enable him to escape; or that the principal was in prison, and the jailer was bribed to let him escape, or conveyed to him instruments to enable him to break prison and escape.

Idem, 952

5. Merely suffering the principal to escape will not make the party accessory after the fact; for it amounts at most to a mere omission. Or if he agree for money not to prosecute the felon; or if knowing of a felony he fails to make it known to the proper authorities; none of these acts are sufficient to make the party an accessory after the fact. If the thing done amounts to no more than the compounding a felony or the misprison of it, the doer of it will not be an accessory.

Idem, 952

6. The true test whether one is accessory after the fact, is to consider whether what he did was done by way of personal help to his principal, with a view of enabling his principal to elude punishment; the kind of help rendered appearing unimportant.

Idem, 952

ACCOUNTS.

1. The accounts of an executor settled and returned by a commissioner, and confirmed by the court, is to be looked to as showing in what character the executor held the assets of the estate.

Smith & als. v. Gregory, 248

ACTIONS.

1. In cases of warranty of soundness or quality, see *Warranty*, No. 1, 2, 3, and

Huff & al. v. Broyles & al., 283

2. An administrator of an accommodation endorser of a negotiable note protested for non-payment, taking up the note after the death of his intestate, may maintain either assumpsit or debt in his own name against the maker of the note, for the amount in value he has paid for the note.

Burton v. Slaughter, 914

AGENTS.

1. For a thorough and exhaustive investigation of the power of a state, and its limitations, to tax the agencies of the United States Government, see the opinion of *Staples J.* in

1016 **Western Telegraph Co. v. City of Richmond*, 1

2. See *Corporations*, No. 1, 2, and *Idem*, 1

3. M was president of the O. D. bank, located in the city of Alexandria, and he was a member of the firm of B & Co. of that city. In May 1861 M went to Richmond, where he remained during the war; and B & Co. removed to the same city. In January 1863, M collected of the treasurer of the state the interest on state bonds held by the bank; of course in Confederate money. After the war the O. D. bank may maintain an action of assumpsit against M for the money so collected by him.

McVeigh v. The Bank of the Old Dominion, 188

4. M invests the money so collected by him in a call certificate of the Confederate States, to have it ready to be applied to the uses of the bank, and he holds the certificates until such certificates are called in by the government. He then receives the money for it, and tries to lend it out, but fails; and he then deposits it in bank to the credit of B & Co., who are to pay interest upon it, and return it on call. In 1864 B & Co. invest this money, with their own, in tobacco, M intending it to be at his own risk; he holding himself bound to pay the bank as on an investment at six per cent. The tobacco is burned during the war. This was an appropriation of the money by M to himself, and he is responsible to the bank for the value of the Confederate notes at the time they were appropriated by him.

Idem, 188

5. M is to be charged with interest only from the end of the war.

Idem, 188

6. What statements of agents of railroad companies are not evidence against the company. See *Railroad Companies*, No. 4, and *Va. & Tenn. R. R. Co. v. Sayers*, 328

AMENDMENTS.

1. For amendments of pleadings in equity, see *Practice in Chancery*, No. 4, 5, 6, 7, 8, and *Belton v. Apperson & als.*, 207

APPEALS.

1. The § 3, of the act of March 15, 1857, which amended § 3, of ch. 182, of the Code of 1860, changing the limitation of time for presenting a petition of appeal from or a writ of error or supersedeas to, any final decree or judgment, from five to two years after it was made or rendered, did not amend section 26, of that chapter, which allows five years for perfecting the appeal, by giving bond, &c. And therefore, when a petition for an appeal was presented within two years from the date of the decree, it might be perfected in any time within five years from that date. But see now Code of 1873, ch. 178, § 17.

Bolling v. Lersner, 36

2. If an appeal has been allowed, and the case decided by the appellate court, without objection by the appellee that the appeal was not presented in time, the objection cannot be made afterwards in the court below, or in the appellate court when the cause is brought up a second time, *Idem*, 36

3. E files his bill against the administratrix of C, to obtain possession and sale of property conveyed by C in trust to secure a debt to E of \$1000. E charges that there is still due to him \$640. The answer denies that there is any debt due from C to E. The property was not worth \$500. As the existence of the debt is involved in the decision of the case, the Court of Appeals has jurisdiction of the case upon appeal by E.

Eacho v. Cosby, 112

4. In this case the enquiry before the commissioner being as to the execution and delivery of the note spoken of in the deed, and the commissioner reporting that there was no satisfactory evidence of the delivery, and the court having dismissed the bill; the decree will be reversed and the cause sent back for an enquiry whether C was indebted to E in a debt intended to be secured by the deed. *Idem*, 112

5. When the appellate court will amend and affirm a decree with costs to the appellee, see *Practice in Chancery*, No. 3, and

Mott v. Carter's adm'r, 127

6. When an objection for failure to bring one of the parties before the court in an action of debt, will be held in the appellate court to have been waived. See *Practice at Common Law*, No. 4, and

Bush v. Campbell, 403

1017 *7. In 1866 F files bill against H, to subject lands to a mechanics lien, and obtains a decree. Before the decree is made H sells and conveys the land to S. S may prosecute an appeal from the decree in the name of H.

Hendricks, by Stuart, v. Fields, 447

8. A petition for an appeal from an inter-

locutory decree is not barred by the limitation prescribed by the Code, ch. 178, § 3, p. 1136. *Idem*, 447

9. A judgment is rendered on the 13th of May 1872, and one of the parties obtains an award of a supersedeas to the judgment on the 9th of November 1872, but the supersedeas bond is not given until the 15th of April 1875; though counsel had marked his name on the docket as counsel for the appellee. The bond not having been given within the time prescribed by the statute, the appeal must be dismissed; and the counsel marking his name on the docket, though it may be a waiver of the process, is not a waiver of the bond. Code of 1873, ch. 178, § 17, p. 1140.

Otterback v. Alex. & Fred. Railway Co., 940

APPEALS—SPECIAL COURT OF.

1. The act of February 28, 1872, to provide a special court of appeals, acts of 1871-72, ch. 124, p. 98, which creates a Special Court of Appeals to consist of three judges of the Circuit courts, is constitutional, and the decisions of the court are valid and binding on the parties in the causes decided.

Bolling v. Lersner, 36

2. All cases pending on the docket of the Supreme Court of Appeals, not involving a constitutional question, and not decided in the court below by one of the judges of the Special Court of Appeals, are proper cases to be sent to the Special Court of Appeals for decision; and it is for the judges of the Supreme Court of Appeals, under the constitution and the statute, to select the cases to be sent to the said special court. *Idem*, 36

3. The Special Court of Appeals having decided a case regularly sent to that court, and having reversed the decree of the court below, and sent the cause back for further proceedings, there can afterwards be no complaint of error in the decree of the special court or in the proceedings before that decree. *Idem*, 36

APPELLATE COURT.

1. Where an exception is not taken to a commissioner's report, on a question which might be affected by extrinsic evidence, and the question is not made in the court below, the appellate court will not consider it.

Peters v. Neville's trustee & als., 549

2. After an appeal has been allowed in a cause, by consent of parties a decree is made modifying, in one respect, the decree appealed from. The appellate court may amend the decree appealed from in that respect, and affirm it. *Idem*, 549

3. A decree directing a receiver to pay certain sums to parties, which should bear interest from a certain day, will be amended, and so amended will be affirmed. *Idem*, 549

4. An instruction which in part is not based upon any evidence before the jury is erroneous, and is ground for reversing the judgment.

Rea's adm'r v. Trotter & Bro., 585

5. When an appellate court is of opinion that an instruction given to the jury by the court below is erroneous, the appellate court cannot undertake to determine, that the verdict, notwithstanding the erroneous instruction, is right upon the evidence, and therefore to affirm it. But the judgment must be reversed, and the cause remanded for a new trial. *Idem*, 585

6. When the appellate court will not reverse a personal decree against an executrix, upon an objection first made in that court. See *Executors and Administrators*, No. 5, and *Shands' ex'x v. Grove & als.*, 652

7. When upon reversing a decree the cause will be sent back, though the plaintiff had failed to make out his case in the court below. See *Separate Estate*, No. 7, and

Darnall & wife v. Smith's adm'r & als., 878

8. The jury having found a prisoner guilty of murder in the first degree, and the court of trial having refused to set aside the verdict and grant a new trial, the appellate court, even if they had some doubt about the sufficiency of the evidence to convict the prisoner of murder in the first degree, would not reverse the judgment.

Howell's case, 995

ARSON.

1. The 3d section of ch. 188, of the Code of 1873, creates no offence. It declares nothing necessary to be noticed in pleading, either in the indictment or elsewhere. It is a mere incident to § 1 and 2 of the said chapter, and a mere limitation of the word "dwelling house" therein mentioned.

Page's case, 943

2. A count in an indictment, which charges that the prisoner at night did burn "a certain other house called a barn and stable of one R, there situate, the same being an outhouse not adjoining the dwelling house, nor under the same roof, but some persons usually lodging therein at night, to wit," &c., does not set out an offence for which the punishment is death.

Idem, 943

3. On such a count the prisoner having been found guilty, and sentenced to be hung, the appellate court will reverse the judgment. But as the count does charge the burning of a barn and stable, which is punishable by imprisonment in the penitentiary under § 5 of said chapter, the additional description of the barn in the count may be rejected as surplusage, and he will be remanded to be tried for the offence under the 5th section.

Idem, 943

4. To make an outhouse a dwelling house, not under the same roof, parcel thereof within the meaning of § 1, of ch. 188, of the Code of 1873, two things must appear: 1st, that such outhouse is within the curtilage of the dwelling house, and occupied therewith; and 2d, that some person usually lodges therein at night.

Idem, 943

5. "A dwelling house," in the meaning of § 1, of ch. 188, of the Code of 1873, embraces

all its parcels, including such an outhouse as parcel thereof. The burning of such an outhouse is the burning of a dwelling house, in the meaning of this law, and may be so described in the indictment; and proof of the burning of the outhouse will as much sustain the indictment, as would proof of the burning of the principal part of the dwelling house, or the whole of it including all the parcels.

Idem, 943

ASSIGNOR AND ASSIGNEE.

1. See *Liens* No. 3, and *Russell v. Randolph & als.*, 705

2. See *Separate Estate*, No. 7, and *Darnall & wife v. Smith's adm'r & als.*, 878

ATTACHMENTS.

1. In an attachment suit by F against M, there is no service of process on M, or order of publication; but there is a declaration in assumpsit with a special and general count; and counsel appears for him and pleads, and the cause is tried by a jury and a judgment for F. The record affords at least *prima facie* evidence, that the counsel was authorized to appear for M, and defend the action.

Fisher & Bro. v. March, 765

2. In a foreign attachment in chancery, the affidavit required by the statute may be made by the agent of the plaintiff, and it may be made after the suit is brought.

Idem, 765

3. If in such affidavit the affiant swears that the matters and things set forth in the bill are true, he adopts the bill as a part of the affidavit.

Idem, 765

CARRIERS.

1. How far they may restrict their liabilities by contract. See *Railroad Companies*, No. 2, 3, and

Va. & Tenn. R. R. Co. v. Sayers, 328

CONFEDERATE CONTRACTS.

1. A Confederate contract for the sale and purchase of land in May 1863, upon a credit of one, two and three years, in which it was held, that the value of the land at the time of the contract was the most just measure of recovery; and one-third of the purchase money having been paid, the vendor must pay two thirds of the value of the land at the time of the sale, with interest.

Mott v. Carter's adm'r, 127

2. When and how a person acting as agent of a foreign party during the war, is to be charged with money of the principal collected by him. See *Agents*, No. 3, 4, 5, and

McVeigh v. The Bank of the Old Dominion, 188

3. In April 1862 P, at the request of A, paid to the bank, a note for an ante-war debt of A, which had been protested for non-payment, paying the bank the nominal amount with Confederate money, and A gave P his note for the amount with interest, payable in one year. The debt of A to P is a Confederate debt, and is to be scaled as of

the date of the note, and not as of the date of its maturity.

Ashby's adm'r & als. v. Porter & als., 455

4. A sale of land by executors in October 1862, held, upon the time of sale, the surrounding circumstances and the evidence, to have been made with reference to Confederate treasury notes as the standard of value, and therefore that the purchase money was to be scaled as of the date of the sale.

Moore & als. v. Harnsberger's ex'ors., 667

5. An offer by a purchaser to one of the executors, a short time after it fell due, to pay the first bond due for the purchase money, he not showing any money, was not a good tender. *Idem*, 667

6. In April 1862 F lends to D \$7,000, and takes his bond payable in six years in current money of Virginia payable semi-annually. For the loan D receives the checks of F on a bank which is then paying Confederate money. Nothing is said, either before or at the time of the loan, as to the kind of money in which the bond is to be paid, except what is stated in the bond. D pays the interest in Confederate money up to 1864. In September of that year he offers to pay the interest, but F refuses to receive the money. In December 1865, 1866, 1868 and February 1869, D made payments on the bond. **Held:**

1. This is a Confederate contract, and is to be scaled as of the date of the contract. *Fultz v. Davis*, 903

2. In ascertaining the amount still due F on the bond, the value of the bond in gold at its date is first to be ascertained, then interest is to be charged upon the amount so ascertained, up to the time of the first payment, and the premium on the gold is then to be added to it, and the payments deducted at their nominal amount, from the amount so ascertained. *Idem*, 903

CONFIDENTIAL RELATIONS.

1. A bequest in favor of an attorney who writes the will is not necessarily invalid.

Riddell & als. v. Johnson's ex'r & als., 152

2. A case in which a large bequest to the attorney who wrote the will was held to be valid. *Idem*, 162

CONSTITUTIONALITY OF LAW.

1. The ordinance of the city of Richmond laying a license tax on telegraph companies doing business in the city, is constitutional. See *Richmond No. 1*, and

Western Union Telegraph Co. v. City of Richmond, 1

2. The act of February 28, 1872, Acts of 1871-'72, ch. 124, § 9, which creates a Special Court of Appeals to consist of three judges of the circuit courts, is constitutional.

Bolling v. Lersner, 36

3. The ordinance of the Virginia convention passed June 24th, 1861, which provides

that in cases specified the parties to negotiable notes, bills and checks, payable in such cities and towns (as before specified) shall remain bound after the maturity of such notes, &c., without demand, protest or notice, as if the requirements of the law in that behalf had been complied with, is, as to notes made and discounted before its passage, in violation of that provision of the constitution of the United States, which declares that no state shall pass any "law impairing the obligation of contracts."

Farmers Bank of Va. v. Gunnell's adm'x, 131

4. The City council of Norfolk has authority, under the charter of the city and the constitution of Virginia, to assess the expense, or a part of the expense, of paving a street upon the owners of the property on the street, in the ratio of the front foot of their lots facing the street.

Norfolk City v. Ellis, 224

CONTRACTS.

1. During the year 1861 slavery was recognized as existing, both by the United States and Missouri, and slaves owed no allegiance to either; and there could be no demand for their services by the United States or 1020 the state, which would *occasion a failure in part of the consideration of the notes given for their hire.

Booker v. Kirkpatrick, 145

2. T stores goods with R, and nothing is said as to the compensation which R is to receive for their storage. The law implies a contract that R shall be paid a reasonable compensation therefor, unless there be something in the relation of the parties, or the circumstances of the case which precludes the idea of such compensation; in which case there would be an implied agreement or understanding that no compensation was to be paid.

Rea's adm'x v. Trotter & Bro., 585

3. In assumpsit by T, a resident of Staunton, against R to recover the value of certain manufactured tobacco which T had stored with R in Winchester in July 1864, and which R had sold for Confederate money. If the tobacco was deposited by T with R, who received the same into his warehouse on storage, for a compensation to be paid to him by T, and agreed in consideration thereof to keep the same in store on account of T, and subject to his order, until T should demand the same, and then deliver it to T's order; and if R failed to keep the tobacco and deliver it up, he thereby became liable to pay to T the damages sustained by such breach of the contract; though R, before demand by T, sold the tobacco of T as well as his own, because of his apprehension that the Union forces were about to occupy said town, and would search his house and seize said tobacco; and said forces did after their occupation search R's house for tobacco.

Idem, 585

4. See *Usury No. 1*, and *Coffman & Bruffy v. Miller & Co.*, 698

CONVEYANCES—FRAUDULENT.

1. A deed of trust to secure *bona fide* creditors, which conveys land, horses, cattle, &c., farming implements, household and kitchen furniture, growing grain and vegetables, the grantor to retain possession three years, by paying interest on the debts secured, is not fraudulent *per se*, though made without the knowledge of the creditors secured.

Sipe v. Earman & als., 563

2. Nor does the execution of the deed pending a suit against the grantor, by a creditor not secured by it, and a short time before the term at which it was probable judgment would be rendered against him, render the deed fraudulent. *Idem*, 563

3. Nor does a provision in the deed authorizing a sale of the property within three years at the instance of the grantor, render the deed fraudulent. *Idem*, 563

4. If there was a fraudulent intent in the grantor in making the deed, (of which there is no evidence in this case), as the deed is not fraudulent on its face, and the trustee and the creditors secured by it had no knowledge of its execution until it was done, they cannot be affected by such fraudulent intent; and the deed is valid. *Idem*, 563

5. D recovered a judgment against R in July 1868. In March 1871 R executed a deed of homestead, which embraced all his personal property; and on the 10th of August 1871 he conveyed the property to P, in trust for his wife and children. **HOLD:**

1. The declaration of homestead by R, having been made after D recovered his judgment, was null and void as to D's judgment.

Russell v. Randolph & als., 705

2. The deed of R to P, being not upon a consideration deemed valuable in law, and having been made after the judgment, was null and void as to D's judgment.

Idem, 705

3. Under § 2, ch. 179, of the Code of 1860. D, without having sued out execution at law, might impeach by a suit in equity the deed of homestead and the deed of trust.

Idem, 705

6. M and H, with others, were the sureties of J as sheriff, who, in 1865, was dead and insolvent. In January 1866 B recovered a judgment against H as surety for J, and in April 1866 B recovered a like judgment against M. M was an old man, not able to provide for himself, and there were several judgments against him. In March 1866 he conveyed to his nephew T, all his real estate, worth about \$2,100, in consideration of \$50 he owed T, and that T would provide for him during his life; T not knowing of the judgment against H, or that M was a surety of J. T paid off the judgments against M to the amount of \$687.60, and paid for the support of M, after the deed and before March 1869, about \$1,300. In March 1869 H files his bill against M and T, to set aside the deed 1021 on the *ground of fraud; and T answers and denies fraud in himself, or any

knowledge of a fraudulent intent on the part of M. **HOLD:**

1. Equity would vacate the deed and hold the land liable to the creditors of M if they interposed in due time in asserting their claims.

Henderson v. Hunton, 926

2. But the creditors of M having failed to assert their demands against the property until T had made considerable advances for the support of M, in performance of his contract, the deed is a valid security to the extent of these advances. *Idem*, 926

3. A conveyance on such a consideration is not to be regarded in law as merely voluntary; and the courts will not pronounce the consideration inadequate, unless it is manifest that the services to be rendered and the expense to be incurred are grossly disproportioned to the value of the property. *Idem*, 926

4. Such agreements are treated as founded on a valuable consideration; and consequently they are only fraudulent, so far as the grantee is concerned, when *mala fides* is justly attributable to him: he must be cognizant of the fraudulent intent of the grantor, if there was such intent.

Idem, 926

5. When there is actual fraud, both parties participating, a deed is utterly void *ab initio*, and is not permitted to stand as security for any purpose. The fraud infects the whole transaction. *Idem*, 926

6. When the deed is merely constructively fraudulent, or when it appears that the grantee has acted *bona fide*, and did not participate in the fraud, the deed is permitted to stand as a security for what is justly due to the grantee, or for advances made by him subsequent to its execution.

Idem, 926

7. A *bona fide* deed, in consideration of future support, though voidable at the suit of creditors, is not void. The legal title vests in the grantee by operation of the deed, good against all the world, except creditors; subject to be divested by them if they impeach it in due time. But the title remains in the grantee until the deed is vacated; and when vacated, it is not void *ab initio*, but only from the time of the decree. *Idem*, 926

8. The amount paid by T is so nearly the value of the property that the bill of H should be dismissed. *Idem*, 926

CORPORATIONS.

1. Corporations are to be deemed and taken as persons, when the circumstances in which they are placed are identical with those of natural persons expressly included in the statute.

Western Union Telegraph Co. v. City of Richmond, 1

2. Corporations which derive their existence, and exercise their franchises, under authority of State laws, but are employed by the national government for certain duties

and services, whilst congress may exempt them from any state taxation which will really prevent or impede such services, yet in the absence of legislation by congress to indicate that exemption is deemed essential to the performance of governmental services, it cannot be claimed on the mere ground that the corporation is employed as an agency of the government. And the tax may be either upon the property or business of the corporation. *Idem*, 1

3. The cases recognize a distinction between taxation of the property belonging to a private corporation employed by the government, and taxation of the instrumentalities or means of the government in the possession of such corporations. The state may tax a banking institution; but it cannot tax the currency or the government bonds belonging to such bank. It may tax the railroad, but not the mail, or munitions or other property of the government. It may tax the contractor with the government though not the contracts. *Idem*, 1

4. A corporation, except when it is otherwise provided in its charter, expressly or by clear implication, in the use of its property, the exercise of its powers and the transaction of its business, stands upon the same footing as individuals, and is subject to the same control under the police powers of the state or a municipal corporation.

Richmond, Fred'g & Pot. R. R. Co.
v. City of Richmond, 83

1022

*COURTS.

1. The former County courts being courts of general jurisdiction had authority to remove and appoint a trustee for a married woman and her children. And the court having made such an order on the request of the married woman, with the assent of the trustee given in court, the order is valid, though made without either bill or petition.

Shelton v. Jones' adm'x & als., 891

2. If the children, not having been parties to the proceeding, might have had it set aside, they having acquiesced in it for a long period, the parties to the bond given by the appointed trustee cannot avoid the order on that ground. *Idem*, 891

3. The County court being a court of general jurisdiction, the validity of its order in the removal and appointment of a trustee cannot be questioned in any collateral proceeding. *Idem*, 891

4. The acts of the clerk done in presence of the court, and under its supervision, must be taken to be done by the direction of the court; and is the act of the court.

Mesmer's case, 976

CRIMINAL JURISDICTION AND PROCEEDINGS.

1. An indictment for felony contains three counts, and on the trial of the prisoner he is found guilty on the third count. He is entitled to a judgment of acquittal on the first and second counts. *Page's case*, 943

2. On a count in an indictment for burning a barn and stable, being an outhouse not adjoining the dwelling house, nor under the same roof, but some persons usually lodging therein at night, viz., &c., the prisoner is found guilty and sentenced to be hung. The appellate court will reverse the judgment; but as the count does charge the burning of a barn and stable, which is punishable by imprisonment in the penitentiary, under § 5 of the ch. 188, of the Code of 1873, the additional description of the barn in the count may be rejected as surplusage, and he will be remanded to be tried for the offence under that 5th section. *Idem*, 943

3. How grand juries may be made up, and by what order of the court. See *Grand Jurors*, No. 1, and *Mesmer's case*, 976

4. When the appellate court will not reverse the judgment in a case of murder. See *Appellate Court*, No. 8, and *Howell's case*, 995

DECREES.

1. When ward and sureties of the guardian not bound by a decree. See *Executors & Administrators*, No. 2, and

Smith & als. v. Gregory, 246

2. When decree obligatory on all courts. See *Liens*, No. 3, and

Russell v. Randolph & als., 705

3. See *Judicial Sales*, No. 5, and

Myers v. Nelson & als., 723

4. What order of a County court cannot be questioned in any collateral proceeding. See *Courts*, No. 1, 2, 3, and

Shelton v. Jones' adm'x & als., 891

5. When decision of the Special Court of Appeals concludes all the previous proceedings. See *Appeals—Special court of—No. 1*, and *Bolling v. Lersner*, 36

6. When the appellate court may amend and affirm a decree. See *Appellate Court*, No. 2, 3, and

Peters v. Neville's trustee & als., 549

DEEDS.

1. As to priorities of deeds of trust and judgments. See *Trusts & Trustees*, No. 1, 2, 3, 5, and

Eacho v. Cosby, 112
Blackford & als., trustees, v. Hurst & als., 203

As to the place of recording deeds of trust. See *Trusts & Trustees*, No. 4, and *Idem*, 203

2. As to deeds fraudulent *per se* or otherwise—See *Conveyances—Fraudulent*, No. 1, 2, 3, 4, and *Sipe v. Earman & als.*, 563

3. What deeds by wife to or for her husband and children, invalid. See *Husband & Wife*, No. 4, 5, 6, 7, and

Switzer v. Switzer, 574

4. How deeds in consideration of future support, not fraudulent, will be treated at the suit of creditors of the grantor. See *Conveyances—Fraudulent*, No. 6, and

Henderson v. Hunton & als., 926

5. Deed from husband to wife not
1023 *fraudulent, though void at law is valid
in equity.

Sayers & als. v. Wall & als., 354

DYING DECLARATIONS.

1. J receives wounds in a fight with S on the 8th of January, and on that night he expects to die very soon, and makes certain statements in relation to the fight. He lives until the 18th, encouraged by his physician, to entertain some hope of recovery, and probably having some hope. On the trial of S for the murder of J, the statements of J on the 8th of January are competent evidence as his dying declarations. *Swisher's case,* 963

EQUITABLE DEFENCES.

A & J, partners, give two notes to R. They both die, A being the survivor. At the death of A both notes are barred by the statute of limitations. After the death of A, R knowing that the notes were barred by the statute, fraudulently, or under a mistake of the law, represents to B, his administratrix, that said notes are unpaid, and are valid and in full force in law against the estates of A & J, and proposes, that if B will give her bond to R for one-half the amount of the notes, R will settle the other half with J's representative, who is R's daughter; and thereupon B trusting to these representations, executes her bond to R for the amount of one-half of the notes. **Held:**

1. If this was a misrepresentation of the law, still it is a case in which equity will relieve B; and the defence may be made at law by plea under the statute setting out the facts.

Brown v. Rice's adm'r, 467

2. But it was in truth a misrepresentation of a fact; and the facts set out in a plea is a good defence to an action on the bond by R's adm'r against B.

Idem, 467

EQUITABLE JURISDICTION AND RELIEF.

1. W is sued by R, in debt on the note of B & Co. He employs counsel to defend the suit, and states to him that he never was the partner of B & Co., or in any way liable for the debt. He lives in the county, but pays no further attention to the case. At the next term of the court the counsel examines the docket, and though he sees a case of R against B & Co., he does not suspect that that is the case against W, and therefore does not examine the papers; and no plea being entered the office judgment is confirmed. Equity will not relieve W.

Wallace v. Richmond, assignee, 67

2. In the progress of a suit a part of the property involved is sold under a decree by consent, and the proceeds deposited in bank to the credit of the cause, and by like consent the rest of the property is decreed to the defendant upon her giving bond with security to pay \$300, upon a decision in favor of the plaintiff. If the case was not one of

which equity had jurisdiction originally, yet the court having taken jurisdiction, and taken possession of the property and disposed of it, must proceed to decide the case.

Eacho v. Cosby, 112

3. See *Equitable Defences*, No. 1, and
Brown v. Rice's adm'r, 467

4. A judgment creditor files a bill to set aside the deed of trust to secure certain creditors for fraud, and for general relief. Though the deed is held to be valid, the plaintiff is entitled to the surplus after paying the debts secured; and the bill should not be dismissed, but under the prayer for general relief he is entitled to an account of the debts secured by the deed, and to have a sale of the property.

Sipe v. Earman & als., 563

5. M and D as his surety, execute a bond to G, upon a settlement of an account for articles furnished by G to M. After the articles were furnished by G to M, but before the execution of the bond, M conveys his property in trust for his wife and children, subject to his then existing debts. The debt of M to G for the articles furnished, was a subsisting debt at the date of the deed; and in equity this debt was not merged in the bond, but the trust property is liable for it. And G having recovered a judgment on the bond, and execution being levied on D's property; and there being a suit in the same court by R's adm'r against M and others and G, to ascertain M's indebtedness at the date of the deed, and adjust the accounts between M's trust estate and G, who is largely indebted to said estate for rents; a bill by 1024 D stating the facts, and asking for *an injunction to a sale under the execution makes a good case for relief.

Meade v. Grigsby's adm'r, 612

6. A court of equity will correct a mistake, clearly proved by parol evidence, in an agreement for the sale and purchase of real estate; and this, whether the contest is between the vendor and purchaser, or the vendor and creditors of the purchaser.

Mauzy v. Sellars & als., 641

7. See *Liens*, No. 3, and
Russell v. Randolph & als., 705

8. See *Conveyances—Fraudulent*, No. 6, and
Henderson v. Hunton & als., 926

EQUITIES.

1. C contracts with M for the purchase of land, and pays a small part of the purchase money; but he does not have his contract recorded. The land is sold under a deed of trust given by M, and purchased by J, who is a creditor of M; and without notice of C's contract, J obtains from M an assignment of the balance of the purchase money after satisfying the debt secured by the deed of trust, in payment of M's debt to him. J's right to the surplus of the trust fund in the hands of the trustee, is superior to that of C, to be reimbursed for the purchase money he had paid M.

Marshall & al. v. Cross & al., 679

2. For equities between the vendor of land and judgment creditors of the purchaser, see *Vendor & Purchaser*, No. 11, and

Coffman v. Niswander & als., 737

EVIDENCE.

1. The statements of agents of a railroad company, as to the condition of the brakes on the cars, or as to the condition of the road at the place where an accident occurred, said statements having been made some time before, and some time after the accident, and at some miles from the place, are not a part of the *res gesta*, and are not competent evidence for the plaintiff in a suit against the company to prove negligence in the company.

Va. & Tenn. R. R. Co. v. Sayers, 328

2. In an action of assumpsit by T against R to recover the value of goods stored by T with R, the receipt of R for the goods is competent evidence for T, and an account of the sales of the goods copied from the books of R with his assent and in his presence, and acknowledged by him to be correct, is competent evidence for T, as original and not secondary evidence.

Rea's adm'r v. Trotter & Bro., 585

3. In an attachment suit by F against M, there is no service of process on M, or order of publication; but there is a declaration in assumpsit with a special and general count; and counsel appears for him and pleads; and the cause is tried by a jury and a judgment for F. The record affords at least *prima facie* evidence that the counsel was authorized to appear for M, and defend the action.

Fisher & Bro. v. March, 765

4. What is evidence of notice to insurer of loss. See *Insurance*, No. 3, and

West Rockingham Mutual Ins. Co. v. Sheets & Co., 854

5. See *Dying Declarations*, No. 1, and *Swisher's case*, 903

EXCEPTIONS—BILL OF.

1. If no notice is given of an intention to except to a ruling of the court made upon the trial of a cause, until the jury come into court with their verdict, it is too late to except.

Peery's adm'r v. Peery, 320

EXECUTORS AND ADMINISTRATORS.

1. J, executor of G, settles his accounts in 1860, and is found indebted to his testator's estate. He then qualifies as guardian of the legatee of the testator, and closes on his books his executorial account, and opens a guardian's account; and transfers the balance due from him as executor to his debit as guardian. At this time he has no property of his testator's estate in his hands. He afterwards in 1863, lays his account before a commissioner, and requests him to settle it as an account as guardian; but the commissioner settles it as an executorial account; and it is returned to the court as such. **Held:**

1. The executor could not transfer his indebtedness as executor to himself as guardian, so as to exonerate his sureties as

executor from liability to the legatee for the amount.

Smith & als. v. Gregory, 248

1025 *2. The account returned by the commissioner, is to be looked to as showing in what character J held the assets of the estate. *Idem*, 248

2. In 1866 J has a suit brought by his ward, by her next friend, against him, as executor and guardian, for the settlement of his accounts, and a commissioner reports the executorial account up to January 1863, and then opens a guardian's account from that day, and transfers the balance due from J as executor to him as guardian; and the report is confirmed by the court. The ward having had no agency in bringing or conducting the suit, and the sureties of the guardian not having been parties, neither the ward nor the sureties are bound by it. *Idem*, 248

3. M by his will gives his executor discretion to sell his whole real and personal estate. He lends it to his wife for the support of herself and his daughter L, until the daughter attains lawful age or marries; and then says: Should my wife not marry, I wish when L comes of age or marries, one-half of my estate to go to my wife for life and the other half to L absolutely; and at the death of my wife the other half. He appoints J his executor. The executor pays the debts, and sells the whole estate at public auction, nearly all of which is bought by the widow; and he takes her bond for the amount. He afterwards settles his accounts and is charged with the amount of the sales, and then settles with the widow and takes her receipt for the amount of her purchases. L marries, and she and her husband sue J and claim one-half the amount reported against him at once, and security for the other half to be paid on the death of the widow. **Held:**

1. The will does not create a trust of the estate in the executor. And when he had paid the debts he properly turned over the remainder of the property to the widow; and her receipt was a discharge to him. His taking her bond did not affect his responsibility. *Mason v. Jones & wife*, 271

2. Having properly turned over the property to the widow, who was the life tenant, his office was fully discharged, and he is not liable to L, who took in remainder. *Idem*, 271

4. H recovers a judgment against W and P. Afterwards W and H die, and K qualifies as the executor of W and administrator of H. As administrator of H, K sues out a *scire facias* to revive the judgment against P, the surviving obligor, and P appears and files a general plea of payment, without stating the nature of the payment. He proves that H, in his lifetime, assigned the judgment to D, who was a debtor of T, who was a debtor of W; and that under an agreement between D and T that T would take in payment of his debt, any debt on W which K would take in payment of T's debt to W, D obtained this judgment from H, and assigned it to K, who credited it on T's debt to W. There was a

verdict for the defendant, and on motion for a new trial, **HELD:**

1. The evidence should have been excluded from the jury, the defendant's plea not describing the payment so as to give plaintiff notice of its nature, as required by the statute, Code of 1860, ch. 172, § 4.

Peery's adm'r v. Peery, 320

2. K having taken the assignment to himself, and credited the amount upon the debt due from T to W, he made himself liable to his testator's estate for the amount; but having taken the assignment to himself, he was the owner of the judgment, and might as administrator of H maintain the *scire facias* to revive the judgment at law.

Idem, 320

3. The arrangement does not constitute a payment of the judgment at law, though it may constitute grounds of equities between W and P.

Idem, 320

5. G brings a creditor's suit against the executrix of S, to subject the estate of S to satisfy a judgment. The order of the court was destroyed, but some of the papers were preserved; and it was proved by a witness that G recovered a judgment against the R T. Co. and issued an execution upon it; and then, at the instance of S, sued out a suggestion against him as a debtor of the Co., and that S appeared in court and acknowledged his indebtedness to the Co., and judgment was rendered against him. The proceedings in both cases to the judgments are endorsed on the papers preserved. An account taken in the cause showed the executrix indebted to the estate for considerably more than the claim of the plaintiff, beside large assets in her hands; and an inquiry ordered as

1026 *to the debts of S was not acted on, no other creditor making claim. **HELD:**

1. G is entitled to recover his debt from the estate of S.

Shands' ex'x v. Grove & al., 652

2. The proceeding being against the estate of S as the debtor of G, the Co. was not a necessary party.

Idem, 652

3. No other creditor having presented a claim, and the executrix not having insisted upon an enquiry, a personal decree against her will not be reversed for the want of such enquiry, upon the objection first made in the appellate court.

Idem, 652

6. The personal representative of an accommodation endorser of a negotiable note protested for non-payment, can only acquire the note, whether by purchase or payment, in his fiduciary character.

Burton v. Slaughter, 914

7. The personal representative of the accommodation endorser of a negotiable note protested for non-payment, cannot in any event, either by purchase or payment, acquire larger rights than his testator or intestate would have had, had he paid the note in his lifetime and after protest.

Idem, 914

8. An administrator of an accommodation endorser of a negotiable note protested for

non-payment, taking up the note after the death of his intestate, may maintain either *assumpsit* or debt in his own name against the maker of the note, for the amount in value he has paid on the note.

Idem, 914

FAILURE OF CONSIDERATION.

1. During the year 1861 slavery was recognized as existing, both by the United States and Missouri, and slaves owed no allegiance to either; and there could be no demand for their services by the United States or the state, which would occasion a failure in part of the consideration of the notes given for the hire of slaves.

Booker v. Kirkpatrick, 145

FIXTURES.

1. The true rule in determining what are fixtures in a manufacturing establishment, where the land and building is owned by the manufacturer, is—That where the machinery is permanent in its character, and essential to the purposes for which the building is occupied, it must be regarded as realty, and passes with the building; and that whatever is essential to the purposes for which the building is used will be considered as a fixture, although the connection between them be such that it may be severed without physical or lasting injury to either.

Green v. Phillips & als., 752

FRAUD AND MISTAKE.

1. What misrepresentation whether of law or of fact, will be relieved in equity, and may be set up as an equitable defence in an action at law. See *Equitable Defences*, No. 1, and

Brown v. Price's adm'r, 467

2. A court of equity will correct a mistake, clearly proved by parol evidence, in an agreement for the sale and purchase of real estate; and this, whether the contest is between the vendor and purchaser, or the vendor and creditors of the purchaser.

Mauzy v. Sellars & als., 641

3. When court of equity will correct mutual mistakes. See *Vendor & Purchaser*, No. 4, and

Hoback v. Kilgore, 442

4. See *Conveyances—Fraudulent*, No. 6, and

Henderson v. Hunton & als., 926

GRAND JURIES.

1. On the 18th of September 1874, S, judge of the Corporation court of W, issued his order in vacation to the clerk of the court, directing that a grand jury of ten citizens, &c., be summoned to attend the court on the 21st of September. Upon this order the clerk issued his warrant to the sergeant to summon certain grand jurors, naming them. Of the list furnished the sergeant nine attended the court. At the September term of the court an order was entered as follows: This day came a grand jury, to wit: naming six of those who had been summoned by the sergeant; who being elected, &c. **HELD:**

1. It is not a valid objection to this grand jury that the list of the jurors was not

made out and delivered to the sergeant five days before the term.

Mesmer's case, 976

2. The statute does not require the order of the judge to be entered of record.

And when it appears by the record
1027 *that six were elected, &c., it must be presumed that all this was done by direction of the court. *Idem*, 976

3. The acts of the clerk done in the presence of the court and under its supervision, must be taken to be done by direction of the court; and is the act of the court.

Idem, 976

4. All the statute requires is, that the number of grand jurors may be limited to six by the direction of the court. It does not require that the direction shall be matter of record. *Idem*, 976

5. Nor is it a valid objection to the grand jury, that it was composed of six of the nine summoned by order of the court in vacation. *Idem*, 976

GUARDIAN AND WARD.

1. About 1849 M executed his bond to E for a debt he owed him, without security. E died in 1852, and A qualified as his administrator, and as guardian of his children. On the 1st of January 1853 M, and K as his surety, executed to A, guardian of the legatees of E, a paper intended to be a bond, payable on demand, for \$936.63, for the debt of M to E. A settled his accounts as guardian, charging himself with this bond. He died in 1867 or 1868, when the bond went into the hands of his administrators, one of whom offered it to the wards; but they declined to receive it; when he brought suit upon it against M and K, recovered judgment in December 1869, which was unproductive. From the date of the bond to the end of the war M and K were in independent circumstances. At the end of the war M was very much injured, but still owned valuable land. K was injured by the war, but he was able to pay his debts until 1869, when his land was greatly injured by a flood. HELD: The estate of A is liable to the wards for the debt.

Ergenbright & als. v. Ammon's adm'r & als., 490

2. A guardian of infants may maintain a suit for partition of real estate held jointly by the infants and other adult parties.

Zirkle v. McCue & als., 517

3. See *Partition, & Judicial Sales No. 3*, and *Idem*, 517

4. Land of infants is sold in 1859, upon credits extending to January 1862. Their guardian collected a part of the money in May 1862, and he invested it in March 1863, \$3,500 in seven per cent. Confederate bonds, which were found after his death enclosed in a paper endorsed Wolfe's heirs; but the bonds were taken in his own name. HELD:

1. There is no sufficient evidence that the investment when made, was intended for his wards.

Ammon's adm'r v. Wolfe & al., 621

2. The debt due to the wards being a good ante-war debt well secured, he was not authorized to collect in Confederate money, and he could not be authorized under the statute so to invest it. *Idem*, 621

HOMESTEADS.

1. D recovered a judgment against R in July 1868. In March 1871 R executed a deed of homestead, which embraced all his personal property; and on the 10th of August 1871 he conveyed the property to P, in trust for his wife and children. HELD:

1. The declaration of homestead by R, having been made after D recovered his judgment, was null and void as to D's debt.

Russell v. Randolph & als., 705

2. The deed of R to P, being upon a consideration not deemed valuable in law, and having been made after the judgment, was null and void as to D's debt.

Idem, 705

3. Under § 2, ch. 179, of the Code of 1860, D, without having sued out execution at law, might impeach by a suit in equity the deed of homestead and the deed of trust.

Idem, 705

HUSBAND AND WIFE.

1. In November 1855 S made a deed by which he conveyed in fee to his wife E, his entire real estate lying in the county of P, his then residence, of about 700 acres; and seven days afterwards acknowledged the deed in the clerk's office of the county. At that time he owed no debts, and had personal property, including slaves, amounting to ten or twelve thousand dollars. He afterwards in the course of business, contracted debts; and losing his slaves by the results of the war, his personal property was not
1028 sufficient *to pay his debts. His wife died in 1864, leaving children. HELD:

1. The conveyance, though void at law, is valid in equity; and vests in the wife both the legal and equitable title to the land, as of her separate estate, in which the husband, the wife being dead, is not entitled to curtesy.

Sayers & als. v. Wall & als., 354

2. Upon the death of the wife, her heirs were entitled to the immediate possession of the land. *Idem*, 354

3. There being no charge or proof of fraud by S in making the deed, the subsequent creditors of S have no equity against E and her children, to entitle them to subject the land to the payment of the debts of S subsequently contracted. *Idem*, 354

4. Though the conveyance is not founded on a valuable, but only on a meritorious consideration, in favor of a wife and children, a court of equity will give effect to it against subsequent creditors of S.

Idem, 354

2. A bill having been filed by the creditors of S to subject the land to the payment of their debts, without alluding to the deed from S to his wife, her children present their peti-

tion to the court setting out the deed, and ask that they may be made defendants in the suit, that they may defend their rights under it; and they are permitted, without objection by the plaintiffs, to file their answers. **Held:**

1. If they were not necessary parties, they were certainly proper parties; and having been permitted to appear and set up their claim, the plaintiffs cannot afterwards object that they were made parties.

Idem, 354

2. If it would have been more proper to assert their rights by a cross-bill, their petition may be treated as such.

Idem, 354

3. *Quare*. If a wife is competent to contract with her husband on an agreement for their separation.

Switzer v. Switzer, 574

4. A contract between a husband and wife, on an agreement for separation, if the wife is competent to make such a contract, cannot be sustained in any case in which it does not clearly appear, that in the negotiation which preceded the agreement, as well as at the time of executing it, the wife was in a position in which she could act and did act, not only with perfect freedom, but with a full knowledge and appreciation of the circumstances of her situation, and of her individual and marital rights; and the contract in itself must be fair and just, wholly free from exception, and such as a court of equity might have imposed upon the parties in a case in which their persons and their property had properly fallen under its jurisdiction and control.

Idem, 574

5. The statute prescribing the mode by which the interests of *femes covert* in real estate may be divested, applies to conveyances executed by the husband and wife to third persons, and not to deeds executed by the wife to the husband, or for his benefit. It is the union of the husband and wife as grantors that makes the instrument operative. A deed therefore by husband and wife of the wife's land to a trustee for the husband, can derive no validity from the privy examination of the wife.

Idem, 574

6. If a wife may contract with her husband on an agreement of separation, in this case the deed is invalid, on the ground of the disability of coverture, for the want of freedom of the will in the wife in executing it, as well as the inadequacy of the consideration.

Idem, 574

7. The deed being invalid as to the husband, is invalid as to the children. The disability, the constraint operating on the wife, and the inadequacy of the consideration, necessarily extend to them.

Idem, 574

8. As to wife's separate estate and her power over it. See *Separate Estate*, No. 2, 3, 4, 5, 6, 7, and

Darnall & wife v. Smith's adm'r & als., 878

9. How the court should guard the interests of a wife. See *Idem*, No. 7, and

Idem, 878

10. A wife though having a separate estate, is exempt from all personal liability, and from all personal decrees or judgments upon her contracts.

Idem, 878

INDICTMENTS.

1. "A dwelling-house," in the meaning of § 1 of ch. 188 of the Code of 1873, embraces all its parcels, including an outhouse within the curtilage of the dwelling-house, in which some persons lodge at night. The burning of such an outhouse is the burning of a dwelling-house, *in the meaning of the law, and may be so described in the indictment.

Page's case, 943

INFANTS.

1. For sales of infants' lands in suits for partition, see *Partition, passim*, and

Frazier v. Frazier & als., 500

Zirkle v. McCue & als., 517

2. A guardian of infants may maintain a suit for partition of real estate held jointly by the infants and other adult parties.

Idem, 517

3. It is well settled in Virginia that an infant, as a general rule, is as much bound by a decree against him as a person of full age. He is not permitted to impeach such decree, except upon the same grounds as a person of full age may impeach it—such as fraud, collusion or error.

Idem, 517

4. But in suits for partition, whenever the court sells and conveys an infant's inheritance, he is entitled to an opportunity of making a defence at any time within six months after he arrives at full age.

Idem, 517

5. See *Judicial Sales*, No. 3, and

Idem, 517

INSTRUCTIONS.

1. See *Appellate Court*, No. 4, 5, and *Rea's adm'x v. Trotter & Bro.*, 585

INJUNCTIONS.

1. See *Equitable Jurisdiction and Relief*, No. 5, and

Meade v. Grigsby's adm'rs, 612

INSURANCE.

1. In an action on a policy of insurance on buildings, if the declaration is framed as authorized by the statute, Code of 1873, ch. 36, § 44, it ought regularly perhaps to notice the fact, that the policy or a sworn copy of it, is filed with it.

West Rockingham Mutual Fire Ins. Co. v. Sheets & Co., 854

2. But when it does not so appear that the policy was filed with the declaration, yet if the parties proceed in the case without its being called for by the defendant, and it is obvious that the defendant knew what it was, without calling for it, the objection that it was not filed with the declaration cannot be taken for the first time, in the appellate court, though there was a demurrer to the declaration.

Idem, 854

3. S & Co. have a policy of insurance against fire on buildings in a company of which R is president. The buildings are burned; and two days after the fire S writes to R describing the fire, and stating the loss, and then referring to what it will be necessary to be done by the company, and expressing himself as wishing to comply with the rules and regulations of the company. Upon the receipt of this letter by R the company proceed to act upon it. The letter having been intended by S as the notice required by the policy, and the company having acted upon it as such, the fact that it was not signed by S & Co., or addressed to R as president of the company, or to the company, as required by the rules, will be considered as waived; and the letter is competent evidence of notice. *Idem*, 854

4. If the evidence shows that the preliminary proofs, required by a policy of insurance, have been waived by the company, the insured is entitled to recover, though no such proofs were in fact taken. *Idem*, 854

5. When an insurance company is informed of a fire by the insured, and the company not saying anything about the preliminary proofs proceed to enquire whether the insurance is valid upon a specific ground independent of these proofs, and decide that upon this specific ground the insurance is not valid; this is a waiver of all objection to the insufficiency of these proofs. *Idem*, 854

6. By the constitution of a Mutual Assurance Company, no person who has claimed a homestead exemption shall be a member of the company. One of the members of the firm of S & Co. has claimed his homestead; and S & Co. sign the constitution and take out a policy on their partnership property. The fact that one of the partners has claimed his homestead does not impair the validity of the policy issued to the partnership. *Idem*, 854

7. If a policy of insurance does not require that the insured shall give in the liens or incumbrances on the property insured, or state what is his title to it, and no questions are asked of the insured by the insurers, the policy is not avoided by the failure of the insured, without any fraudulent intent, to mention a lien upon it. *Idem*, 854

8. If there be a warranty, or a representation which amounts to warranty, that there are no incumbrances on the property insured, whether such warranty or representation be given in answer to a question or not, if it be untrue the policy is void, even though the insured was not guilty of actual fraud. *Idem*, 854

9. In a declaration on a policy of insurance framed under the statute, plaintiffs say they have performed on their part all the conditions of the policy, and have violated none of its prohibitions. Under this declaration they may prove a waiver of performance of the conditions of the policy by the insurer; and this will be equivalent to proof of the performance of such conditions. *Idem*, 854

INTEREST.

1. When proper to charge interest on estimated rents. See *Vendor and Purchaser*, No. 2, and

Bolling v. Lersner, 36

2. A person acting as agent for a foreign party during the war, is to be charged with interest upon money collected by him, only from the end of the war.

McVeigh v. The Bank of the Old Dominion, 188

3. When interest on a debt due by trustee disallowed by the court below, not reversed on appeal. See *Trusts and Trustees*, No. 8, and

Kirby v. Goodykoontz & als., 298

INTERNAL IMPROVEMENT COMPANIES.

1. See *Railroad Companies, passim*.

2. When commissioners are appointed by a County or Corporation court under § 6, ch. 56, of the Code of 1860, for the purpose of ascertaining what will be a just compensation to the tenant of the freehold for land taken for a work of internal improvement, it is the duty of such commissioners to hear all the legal and relevant testimony offered by either party, bearing upon the question of such compensation.

Wash. Cin. & St. Louis R. R. Co. v. Switzer, 661

3. The refusal of the commissioners to hear such testimony, when offered in due time, is of itself sufficient to vacate their report. *Idem*, 661

4. When such a report is returned to the court either party may show cause against its confirmation, upon the ground of excessive or inadequate compensation, improper conduct of the commissioners in refusing or failing to hear legal and proper evidence, or by proof of any other fact tending to show that said report ought not to be confirmed. *Idem*, 661

5. Under the statute all matters affecting the validity of the report and the action of the commissioners are open for investigation without notice. *Idem*, 661

6. On the motion of the company, a rule is made on the tenant of the freehold, to show cause why the report and assessment of the commissioners, made in such a case, should not be set aside, upon the ground that said assessment is excessive; and why other commissioners should not make said assessment. Upon the hearing the company will not be confined to the specific objection therein suggested to the confirmation of the report; but the company may impeach it by showing that the commissioners had improperly refused or failed to hear legal testimony offered by the company upon the question of compensation and damage. *Idem*, 661

7. If a tenant may be surprised by the offer of testimony on matters not referred to in the rule, it is competent for the court to continue the hearing to a future day or term. *Idem*, 661

JUDGMENTS.

1. When equity will not relieve against a judgment. See *Equitable Jurisdiction and Relief*, No. 1, and

Wallace v. Richmond, assignee, 67

2. The act of March 2, 1866, Sess. Acts 1865-'66, p. 191, ch. 77, § 1, "to preserve and extend the time for the exercise of certain civil rights and remedies," is retrospective in its operation, and applies in favor of a judgment creditor as to the docketing of his judgment.

Hill & als. v. Rixey & Starke and als., 72

3. The act of March 2, 1866, Sess. Acts 1865-'66, ch. 69, p. 180, called the stay law, does not apply to a judgment creditor *to relieve him from the necessity of docketing his judgment.

Idem, 72

4. R recovers a judgment against G in 1860, but it is not docketed until December 1868. W and others recover judgments against G in 1861 and 1865, which were docketed in November and December 1865 and in 1866. In November 1865 G conveys land in trust to secure other creditors; but it is not recorded until November 1867. HELD:

1. The deed having been recorded before the judgment of R was docketed, the lien of the deed has priority over the judgment of R. *Idem,* 72

2. The judgments of W and others having been docketed before the deed was recorded, they have priority over the deed. *Idem,* 72

5. When under the statute, Code of 1849, ch. 177, § 19, in suits on contracts judgment may be rendered for some and against others, and at different times. See *Practice at Common Law*, No. 5, 6, and

Bush v. Campbell, 403

6. Deed of homestead on personal property, and deed conveying this property in trust for wife and children, are void as to a judgment recovered before their execution; and under § 2, ch. 179 of the Code of 1860, the judgment creditor, without having sued out execution at law, may impeach them by a suit in equity.

Russell v. Randolph & als., 705

7. What is not a satisfaction of the judgment. See *Idem,* 705

8. For equities between the vendor of land and judgment creditors of the purchaser, see *Vendor and Purchaser*, No. 11, and

Coffman v. Niswander & als., 737

9. F recovers judgment against M, on which execution is issued, but is stayed by order of plaintiffs' attorney. It appears, however, that some shares of stock were sold by the officer to satisfy the judgment; but there is no return of such sale by the officer. It appearing further, that the stocks did not sell for enough to discharge the judgment, F may have another execution, or bring another action for the balance still due.

Fisher & Bro. v. March, 765

10. In a suit by attachment, if the plaintiff recovers judgment against the defendant, without his appearance, such judgment will have no effect in another State, as a personal judgment against the debtor. But if the defendant appears and defends himself in person or by attorney, then the judgment will have the same force and effect everywhere, as a judgment recovered in an ordinary suit. *Idem,* 765

11. In such a case the record may show upon its face that the debtor did or did not appear; and if it does, the judgment will have effect accordingly. If the record does not show whether he did or did not appear, the presumption is in favor of the validity of the judgment. *Idem,* 765

12. But in such a case, if the record does not state that the debtor did or did not appear, or even if it states that he did appear, in a suit upon this judgment in another state, the defendant may by his pleading and evidence aver and prove the contrary. *Idem,* 765

13. In a suit in equity to enforce a judgment, the questions whether it was an illegal contract on which the judgment was recovered, or whether the agent who made the contract was authorized to make it, are concluded by the judgment. *Idem,* 765

14. Where the bill sets out a judgment correctly, as stated in the record of the judgment, there is no variance because a *scire facias* issued against garnishees, recites it as of a different amount, or that the endorsement on the papers by the clerk, of the proceedings in the cause, of the date of the judgment, is different from that stated in the bill. *Idem,* 765

JUDICIAL SALES.

1. See *Partition*, No. 1, and *Frazier v. Frazier & als.,* 500

2. See *Partition*, No. 3, 4, 5, 6, and *Zirkle v. McCue & als.,* 517

3. The errors for which a judicial sale of an infant's land may be set aside must be substantial errors. A fair purchaser is not bound to go through all the proceedings, and to look into all the circumstances, and see that the decree is right in all its parts. He has the right to presume the court has taken the necessary steps to investigate the rights of the parties, and upon such investigation has properly decreed a sale. He will not be affected by any imperfection in the frame of the bill, if it contain sufficient matter 1032 to show the propriety of the decree.

The priority of the sale must be tested, and its validity determined by the circumstances then existing, and the surrounding circumstances. The only matter for enquiry is, Did the court have jurisdiction of the matter? Were the proper parties before it? Were the proceedings regular? Was the sale proper under all the circumstances then surrounding the parties? If so, the title of an innocent purchaser is not to be disturbed because, from subsequent events, the sale has proved unfortunate for the infants.

Idem, 517

4. Bonds well secured, are given by purchasers at a judicial sale made in 1860, and they fall due in 1861, 1862 and 1863. In 1860 P is appointed a receiver to collect the purchase money; and he collects that due in 1862 and 1863, in Confederate money, and makes no report to the court; but retains it in his own hands. He was not authorized or justified in receiving Confederate money, and it is not to be scaled.

Peters v. Neville's trustees & als., 549

5. M buys land at a judicial sale in 1859, and gives his bonds payable annually down to 1863. He pays all but the last bond, and pays on that \$2,000 in Confederate money; and a few days afterwards offers to pay the balance to the commissioner in Confederate money, who refuses to receive it. M then files his petition in the cause, stating that he owes this balance, and that the commissioner refused to receive it; that he is ready to pay it, and that he may be authorized to pay it, and that a commissioner may be directed to convey the land to him. The court decrees that M be authorized to pay to the general receiver the balance due, stating the amount, and upon its payment a commissioner named should convey the land to M. **Held**:

1. The decree being a proper decree upon its face, it could not have been altered on appeal.

Myers v. Nelson & als., 729

2. The decree did not authorize M to pay in Confederate money, and a payment to the receiver in that money was not a discharge of M's debt. *Idem*, 729

6. W is appointed a commissioner to sell land at public auction, but he is not to act under the decree until he gives bond, &c., faithfully to perform this and any future decrees made in the cause. He does not execute the bond, but he sells the land at private sale to H, which he reports to the court. The court confirms the sale, and directs W to collect the money and invest it, and H pays him the whole purchase money; only a part of which he invests; and dies insolvent. **Held**:

1. The sale having been made by a commissioner under a decree of the court, and that sale having been confirmed by the court, it is a judicial sale.

Hess & als. v. Rader & wife & als., 746

2. Whether made at public or private sale, it only becomes a sale at all, when confirmed by the court; that constitutes such sale a judicial sale. *Idem*, 746

3. W not having given the bond as required, had no authority to receive the purchase money; and H is responsible to the party who is entitled to the proceeds, for so much as has not been properly invested by W, and cannot be made out of W's estate. *Idem*, 746

4. The statute, Code of 1873, ch. 174, § 1, is imperative, that a bond shall be given, and it is the duty of a purchaser at a judicial sale to see that the bond has been given

before he pays his money to the commissioner, or he does it at his own risk.

Idem, 746

7. When a decree is made for the sale of real estate for the payment of a debt secured by a deed of trust upon said real estate, the decree must be for the sale of the property upon the terms of the deed: and it is error to decree a sale upon credits not authorized by the deed.

Fultz v. Davis, 903

LEGACIES AND LEGATEES.

1. A bequest in favor of an attorney who writes the will is not necessarily invalid.

Riddell & als. v. Johnson's ex'r & als., 152

2. A case in which a large bequest to the attorney who wrote the will was held to be valid. *Idem*, 152

3. In the absence of fraud on the part of a legatee, a court of equity will not enforce a parol charge upon his legacy.

Sprinkle & als. v. Hayworth & als., 384

1033

*LIENS.

1. For priorities of liens by judgments and deed of trust, see *Judgments*, No. 4, and *Hill & als. v. Rixey & Starke & als.*, 72

2. For priority of a deed of trust over judgments. See *Trusts & Trustees*, No. 5, and *Blackford & als., trustees, v. Hurst & als.*, 203

3. In April 1868 R conveys land with general warranty to C: this deed is not recorded, though the deed of trust to secure the purchase money is. R assigns three of C's bonds to W, B and J—J being the last assignee. In July 1868 D recovers a judgment against R. In 1871 R executes a deed of homestead on all his personal property, and afterwards conveys it in trust for his wife and children. In May 1873 C is declared a bankrupt, his land is sold under the order of the court, and the priorities of his creditors fixed, D being the first, and J the last; but the fund is retained; and in April 1874 it being suggested that there was personal property of R which might be subjected to pay D's judgment, sufficient for the purpose, it was decreed that no part of the proceeds of C's land should be applied to pay it. In January 1874 J having purchased D's judgment, he files a bill against R, the trustee, &c., to set aside the deeds of homestead and trust, and subject this property to satisfy this judgment. **Held**:

1. The deeds are null and void as to the judgment, and under the statute, Code of 1860, ch. 179, § 2, without suing out executions at law, D may impeach the deeds by suit in equity.

Russell v. Randolph & als., 705

2. The decree of the bankrupt court of April 1874 was a final decree, and obligatory on all other courts; and it was a proper decree, as the judgment of D was a debt of R, and not of C, and R's property should be first applied to its payment.

Idem, 705

3. C's land being only liable to satisfy D's judgment because of his failure to have his deed recorded, if he had paid that judgment, or if it had been paid out of the proceeds of his land, he would have been substituted to all the rights and remedies of D against R; and he would also have had a remedy against R upon the warranty in R's deed. *Idem*, 705

4. J being the assignee of R of one of the bonds given for the purchase money of the land, and thus a creditor of C, and having a lien on the land to secure the bond, he has all the equities of C against R, and also an equity against R as assignor of the bond. *Idem*, 705

5. As holder of the bond J had but one fund upon which he could rely for payment, whilst D has two funds for the satisfaction of his judgment, the land of C and the personal property embraced in the deeds of homestead and trust. And a court of equity will marshal the assets, and compel D to exhaust the fund upon which J has no claim, that J may have the only fund within his reach. *Idem*, 705

6. Dis the only person who can complain of being required to resort to R's personal estate in relief of the land fund; and that, only on showing that such a course would operate to his prejudice. And if D did show this, J might satisfy his judgment and stand in his place. In this case he has done better by taking an assignment of the judgment. *Idem*, 705

7. Clothed with the rights and remedies of D, J may properly proceed against the property of R, to satisfy R's debts, and against the land of C, to satisfy the debt chargeable upon it. *Idem*, 705

LIMITATIONS—STATUTES OF.

1. The § 3, of the act of March 15, 1867, which amended § 3, of ch. 182, of the Code of 1860, changing the limitation of time for presenting a petition for an appeal from or writ of error or supersedeas to any final decree or judgment, from five to two years after it was made or rendered, did not amend § 26, of that chapter, which allows five years for perfecting the appeal, by giving bond, &c. But see now Code of 1873, ch. 178, § 17.

Bolling v. Lersner, 36

2. And see.

Otterback v. Alex. & Fred. Railway Co., 940

MARSHALING ASSETS.

1. See *Liens*, No. 3, and

Russell v. Randolph & als., 705

1034

*MECHANIC'S LIEN.

1. On the 1st of March 1866 F contracts with H, to build H a house on land in the country. At this time the only mechanic's lien was that provided for in the Code of 1860, p. 567, ch. 119, § 2, which provided for such liens only where the land on which the building was erected or repaired, was situate in a city or town; and that not being the fact in this case, F is not entitled to a

mechanic's lien under that law, for the money due him for erecting the building.

Hendricks, by Stuart, v. Fields, 447

2. Though said § 2, of ch. 119, was amended by the act of April 13th, 1867, Sess. Acts 1866-'67, p. 805, ch. 36, and by that amendment gave a lien on land situate in a city or town or in the country, yet that act operates prospectively only, and not retrospectively also; and therefore does not give a mechanics' lien to F for the money due him on his contract made in March 1866. *Idem*, 447

3. Though F completed the work and took the bonds of H for the amount due him, dated July 4th 1867, and on the 10th of January 1868 had the contract recorded in the clerk's office of the county, even if the contract was duly recorded, the effect of said act was not to produce a novation of the contract, or to bring it down to the date of recordation, so as to subject the said contract to the operation of the said act of April 13, 1867, and to give F, under and by virtue of the same, the benefit of a mechanic's lien thereunder. *Idem*, 447

MERGER.

1. M and D, as his surety, execute a bond to G, upon a settlement of an account for articles furnished by G to M. Though at law the account is merged in the bond, in equity the debt on the account will be held as still subsisting if necessary to do justice between the parties.

Meade v. Grigsby's adm'rs, 612

MISTAKES.

1. See *Fraud and Mistake*.

MULTIFARIOUSNESS.

1. See *Pleadings in Equity*, No. 1, and

Dunn v. Dunn & als., 291

MURDER.

1. Upon the evidence the prisoner held to be guilty of murder in the first degree.

Howell's case, 995

2. The jury having found the prisoner guilty of murder in the first degree, and the court of trial having refused to set aside the verdict and grant a new trial, the appellate court, even if they had some doubt about the sufficiency of the evidence to convict the prisoner of murder in the first degree, would not reverse the judgment. *Idem*, 995

3. Murder committed by any of the specific means enumerated in the statute, Code of 1873, ch. 187, § 1, is murder in the first degree, whether there was any actual intent to kill or not. *Idem*, 995

NORFOLK CITY.

1. The city council of Norfolk has authority under the charter of the city and the constitution of Virginia, to assess the expense, or a part of the expense, of paving a street upon the owners of the property on the street in the ratio of the front foot of their lots facing the street.

Norfolk City v. Ellis, 224

OYSTERS.

1. An indictment which charges a party with taking oysters with ordinary oyster tongs without paying the tax prescribed by law, charges no offence against the law, and is fatally defective.

Morgan's case,

992

PARTIES.

1. On a bill by the administrator of a vendor of land, against the vendee, who has not received a deed, to subject the land to pay the purchase money, the heirs of the vendor should be made parties.

Mott v. Carter's adm'r,

127

2. An assignor of a bond secured by deed of trust upon land, the assignment being absolute, is not a necessary party in a suit by the assignee against the vendee of the obligor, to subject the land to satisfy the debt.

Omohundro v. Henson & als.,

511

3. H and B, as his surety, execute a bond to M, executor, for land purchased of him by H, and which H afterwards
1035 *conveys to O. M recovers judgment upon the bond against H and B, and B pays the debt, and M assigns it to him without recourse. On a bill by B against O and H, to subject the land to satisfy the debt. **HOLD:** Whether B claims as assignee, or as a security who has paid the debt, M is not a necessary party. *Idem,*

511

4. S conveys land to his wife E, reserving a large personal property, and he is not indebted at the time. Some years afterwards he contracts debts; and by the results of the war loses his property. His subsequent creditors file a bill against S, to subject the land conveyed to E, who is then dead, to the payment of their debts, without noticing the deed from S to E. The children of E present their petition setting out the deed, and asking that they may be made defendants in the suit, and this is done, and they file their answers without objection by the plaintiffs. **HOLD:**

1. If they were not necessary parties, they were certainly proper parties; and having been permitted to appear and set up their claim, the plaintiffs cannot afterwards object that they were made parties.

Sayers & als. v. Wall & als.,

354

2. If it would have been more proper to assert their rights by a cross-bill, their petition may be treated as such.

Idem,

354

5. G recovers a judgment against R, and upon a suggestion obtains a judgment against S. Upon a bill by G against S's ex'x to have payment out of his estate, R is not a necessary party.

Shands' ex'x v. Grove & als.,

652

PARTITION.

1. F and R owned one-half of two tracts of land, one in Bath county, called the Bath Alum, and the other in Rockbridge, called the Rockbridge Alum. The other half of

these tracts was owned by J, an infant aged 17 years, subject to his mother's dower; and she had married P, who became the guardian of J. F sold the Bath Alum tract, with some furniture, to B, for \$30,000 Confederate 8 per cent. bonds, subject to the ratification of the court. F & R then brought their suit in equity to have the sale ratified, alleging that the property could not be conveniently divided, and that it was for the interest of all parties, including the infant, that the property should be sold. P & wife and J answered, concurring in the statements of the bill, and in the prayer that the sale to B should be confirmed. Three witnesses concur in sustaining the statements of the bill, and that the price is a full price for the land. And the court confirms the sale. When J comes of age he files a bill to set aside the sale. **HOLD:**

1. The suit of F & R was a suit for partition; and the proceedings having been regular throughout, the fact that the sale was made for Confederate bonds, which have since become worthless, is no ground for setting aside the sale.

Frazier v. Frazier & als.,

500

2. The fact that the parties owned another tract of land in another county, and that it did not appear that partition in kind of the two tracts could not be made, is not ground for setting aside the sale: the parties not wishing to sell the other tract, which was productive.

Idem,

500

3. The fact that the witnesses spoke of the value of the land, not referring to the furniture, which was not worth more than \$2,000 or \$2,500 in Confederate money, but estimating the price to be given as a very full price for the land, is not grounds for setting aside the sale; especially as this objection was not made until the court had decreed to dismiss the bill, when it was set up by an amended bill.

Idem,

500

2. A guardian of infants may maintain a suit for partition of real estate held jointly by the infants and other adult parties.

Zirkle v. McCue & al.,

517

3. In a suit for partition, to authorize the sale under the statute, of lands in which infants have an interest, the case must be one in which partition cannot be conveniently made, and it must appear that the interests of the parties will be promoted by a sale of the property.

Idem,

517

4. It is not necessary that the facts necessary to warrant a decree for sale should appear from the report of commissioners or by the depositions of witnesses. It is sufficient if the facts appearing in the record reasonably warrant the decree of sale: and this especially when the proceeding is to defeat the title of an innocent purchaser.

Idem,

517

1036 *5. M died in 1862, leaving E his widow, and ten children, two infants, the children of E, and eight adults. He left a tract of 789 acres of land, slaves, &c. In

March 1863 E filed her bill, in which she asked to have her interests and those of her children (whose guardian she was), in the estate ascertained and laid off: To have her dower in kind or commuted in money; and that the interests of her children might also be ascertained and placed under her control as their guardian, and for a settlement of the rights of all the parties. The administrator and children of M were made defendants, and the case regularly proceeded in. **Held:**

1. It is a suit for partition, and E might properly bring it. *Idem*, 517

2. If in the progress of the cause, it appears to be a case under the statute for a sale of part of the land, and a sale was made, which all the adult parties and E, as guardian of her children, approved, and it was confirmed and perfected by payment of the purchase money and a conveyance, it cannot afterwards be questioned by the infants as unauthorized in that suit. *Idem*, 517

3. Even if it is doubtful whether E could maintain such a suit, yet it having been brought, and the sale having been so made and perfected, the purchaser will not be disturbed in his purchase at the suit of the infants. *Idem*, 517

6. In suits for partition, whenever the court sells and conveys an infant's inheritance, he is entitled to an opportunity of making a defence at any time within six months after he arrives at full age. *Idem*, 517

7. See *Judicial Sales*, No. 3, and *Idem*, 517

PARTNERS.

1. B and H were partners carrying on business in the state of Missouri; H living there, and attending to the business, and B living in Virginia. In March 1861 they hired of K, several slaves to work in their factory from that time to the end of the year, and they executed their three notes to K for the amount of the hires; and the slaves continued to work during the year in the factory. The war between the U. S. and the C. S. commenced the 17th of April 1861, and continued until 1865. **Held:**

1. B living in Virginia, a part of the Confederate States, and H living in Missouri, a part of the United States, their partnership was dissolved by the war.

Booker v. Kirkpatrick, 145

2. But both partners are liable to K on their notes for the hire of the slaves, notwithstanding the dissolution of the partnership. *Idem*, 145

2. A, a partner in the firm of A & Sons, dies, and is largely indebted individually, as well as a partner. His real estate is equally liable for his partnership debt as for his individual debts. See Code of 1849, ch. 144, § 13.

Ashby's adm'or & als. v. Porter & als., 455

PAYMENT AND SET-OFF.

1. As to priorities of payment between

deeds of trust and judgments. See *Judgments*, No. 4, and

Hill & als. v. Rixey & Starke & als., 72

2. W brings debt on a bond against H, and H pleads payment and set-off, on which issue is joined. H files with his plea a statement of the payment, which was the amount of a bond of W and J to L, and that W agreed with H, if H would pay the bond due to L, H should have credit for the amount as a payment on the bond sued on. **Held:** If the plea is sustained by the evidence, the payment of the bond of L by H is a good payment *pro tanto* upon his bond to W.

Huffmans v. Walker, 314

3. Payment of a debt is not necessarily a payment in money; but that is payment which the parties contract shall be accepted as payment. *Idem*, 314

4. What is not a good plea of payment, and what not a good payment. See *Executors & Administrators*, No. 4, and

Peery's adm'r v. Peery, 320

5. What not a good payment. See *Judicial Sales*, No. 5, and

Myers v. Nelson & als., 729

6. What not a good payment. See *Promissory Notes*, No. 13, and

McVeigh & al. v. Bank of the Old Dominion, 785

7. Where payments are made from time to time, on a debt bearing interest, 1037 *the interest is to be computed on the debt up to the time of the payment, and the payment is to be deducted from the amount, principal and interest. It is error to compute interest on payments to a future day when the debt is paid or settlement made, and then credit the payment and interest on the debt, principal and interest.

Fullz v. Davis, 903

PLEADINGS AT LAW.

1. See *Warranty*, No. 1, 2, 3, and

Huff & al. v. Broyles & al., 283

2. As to pleas of payment, see *Payment & Set-off*, No. 2, and

Huffmans v. Walker, 314

See *Executors & Administrators*, No. 4, and *Peery's adm'r v. Peery*, 320

3. As to pleading on a policy of insurance. See *Insurance*, No. 1, 2, and

West Rockingham Mutual Ins. Co. v. Sheets & Co., 854

PLEADING—IN EQUITY.

1. J was a partner in a mercantile business with W and A. That partnership was dissolved; and J and A formed a partnership to carry on the same business at the same place; and this partnership was dissolved. Afterwards J filed his bill against W and A, charging that both partnerships are indebted to him, and asking for a settlement of their accounts. W demurs and answers, the demurrer being contained in the answer, and

not stating the grounds of the demurrer.
HELD:

1. The bill is multifarious.
Dunn v. Dunn & als., 291
2. The demurrer is sufficient in form.
Idem, 291
2. As to amendments and changes in bill,
see *Practice in Chancery*, No. 4, 5, 6, 7, 8, and
Belton v. Apperson & al., 207

PRACTICE—AT COMMON LAW.

1. In an action of debt, defendant pleads a failure of warranty of the animal for which the note sued on was given, and claims damages to the amount of the note, as a set-off; and succeeds. He then sues upon the warranty to recover further damages, and defendant pleads non-assumpsit, and a special plea of the former judgment, vouching the record; to which plea the plaintiff demurs. The court sustains the demurrer, and the plaintiff not replying further to the special plea, the court may render judgment for the defendant without trying the issue on the plea of non-assumpsit.

Huff & al. v. Broyles & al., 283

2. Though a plaintiff moves the court, before the jury retires to consider of their verdict, to exclude certain evidence which had been given on the trial, which the court refuses to do, if notice of the purpose to except to the ruling of the court is not given until the jury come into the court with the verdict, the exception is too late.

Peery's adm'r v. Peery, 320

3. On a general plea of payment, without stating the nature of the payment, defendant cannot prove an agreement that plaintiff would take in payment a debt due from his intestate, if defendant obtained it.

Idem, 320

4. In an action of debt on a bond against five persons, the plaintiff endorses on the process, "Not to be served on G," who was one of the five; and he is not brought into court. There having been two continuances of the cause, and a verdict and judgment against B, one of the defendants, and he having moved for a new trial, and also in arrest of judgment, without at any time objecting to the failure of the plaintiff to make G a party; and it appearing further from the motion in arrest of judgment, that G had absconded and left the state before the suit was brought, B must be held in the appellate court, to have waived the objection; and it is too late to make it in that court.

Bush v. Campbell, 403

5. In an action of debt upon a bond against five persons, upon one of whom the process is not served by direction of the plaintiff, the four plead usury in the bond, and three of them plead severally *non est factum*. On the trial the jury find in favor of three of the defendants, on the pleas of *non est factum*; but they cannot agree on the plea of usury. There is a judgment in favor of the three, and the case is continued as to the fourth. Afterwards there is a verdict against the fourth; and he moves in arrest of judgment.

HELD: Under the statute, Code of 1849, 1038 ch. 177, § 19, there may be judgment in favor of the three at one time, and against the fourth at another time.

Idem, 403

6. The act, Code of 1849, ch. 177, § 19, applies to actions on contract against two or more defendants, where the defense of some of the defendants is personal to themselves, though that defense is, that they never were parties to the contract sued on, as *non est factum*.

Idem, 403

7. Though in such action the parties sued live in different counties, and the only parties who live in the county where the suit is brought, have a verdict and judgment in their favor on their plea of *non est factum*, the plaintiff may still proceed in that suit against the other parties who do not reside in the county.

Idem, 403

8. If a plaintiff, in order to give jurisdiction to the court, in a case where the defendants live in another county unites in the action a party who he knows is no party to the contract, the court will on motion dismiss the suit with costs.

Idem, 403

9. P, as assignee of L, brought debt upon two notes against E. At the September term 1873 of the court E appeared and filed pleas of payment and *nil debet*, and three special pleas; on which issues were made up. The case was continued until the next March term of the court; when the defendant tendered another special plea, stating an agreement with L before the assignment, which, if true, constituted a good defence to the action. But the court being satisfied that it was merely intended for delay, rejected it. And the appellate court, concurring with the court below, affirmed the judgment.

Evans v. Pettyjohn, 604

10. In an action on a policy of insurance, under a declaration averring performance by the plaintiffs of all the conditions of the policy, plaintiff may prove a waiver of performance of the conditions by the insurer, and this will be equivalent to proof of performance of such conditions.

West Rockingham Mutual Fire Ins.

Co. v. Sheets & Co., 854

PRACTICE—IN CHANCERY.

1. After a decree for the sale of real estate to satisfy creditors having liens thereon, and an appeal from that decree by the debtor, the court below in which the suit was pending, may appoint a receiver to take possession of the property, and rent it out, and collect the rents, until the further order of the court, &c.

Moran v. Johnston & als., 108

2. If the sergeant of the city in which the property is located, is appointed the receiver, it is not necessary to require him to give security for the faithful performance of his duty, as it is covered by his official bond. Code of 1873, p. 1124, ch. 174, § 5.

Idem, 108

3. Bill by the administrator of the vendor of land against the vendee, who had not

received a conveyance, to subject the land to pay balance of purchase money. Vendee answers, and insists that the heirs of the vendor should be made parties; but the court below, without requiring this to be done, makes a decree for the sale of the land. Upon appeal the appellate court amends the decree, and directs that the heirs shall be made parties before a sale of the land, and then affirms it with costs to the appellee.

Mott v. Carter's adm'r, 127

4. The rule in equity in regard to amendments is, that they may be made when the bill is defective in its prayer for relief, or in the omission or mistake of some fact or circumstance connected with the substance of the case, but not forming the substance itself. The plaintiff will not be permitted to abandon the entire case made by his bill, and make a new and different case by way of amendment. But this rule has been much trenchanted upon, especially in the states and in Virginia.

Bellon v. Apperson & al., 207

5. If a plaintiff is not permitted to make a new case, he may by his amendments, so alter the frame and structure of his bill, as to obtain an entirely different relief from that asked for originally. *Idem*, 207

6. If the lender of money is made a party to a bill filed under the 7th section of the act in relation to money and interest, and answers, he cannot be proceeded against under the 10th section of said act. See Code of 1849, ch. 141. *Idem*, 207

7. Courts of equity will allow an amendment of the bill by the introduction of new parties, plaintiffs and defendants, when necessary to the ends of justice, or to prevent further litigation. As a general
1039 *rule this is not a matter of course, but discretionary with the court. *Idem*, 207

8. B in 1868 files bill against C and A to enjoin sale of land under deed of trust to secure debt due by note, on the ground of usury. They answer that they have no interest in the note, but it belongs to S. The case stands till December 1871, when B and his wife and children offer to file an amended and supplemental bill, stating that B had conveyed the land to the wife for life, and to the children in remainder; and they make C, A and S defendants. They charge usury in the note, disclaim discovery, ask for an issue, &c. HELD:

1. Upon the coming in of the answers of C and A, B might have dismissed his bill; and immediately thereupon have filed a new bill against S, under the 10th section of the act, Code of 1849, ch. 141: And he might submit to a dismissal of his bill by the chancellor, and at once file a bill against S.

Idem, 207

2. C and A having no interest in the note, the case is virtually ended as to them; and S not having been a party to the original bill, the answers of C and A cannot be read for or against him, either under the original

or amended bill; and the amended bill under the 10th section of the act may be filed.

Idem, 207

3. As S was not a party to the original bill, and as the plaintiffs may at once file a new bill against him, the delay in tendering the amended bill cannot prejudice his interests. *Idem*, 207

4. *Quære*: Whether the original bill in this case was filed under the 7th or under the 10th section of the act. *Idem*, 207

9. When a petition by persons to be made parties in a suit, to defend their rights, may be treated as a cross-bill.

Sayers & als. v. Wall & als., 354

10. The equities between a vendee of land and his vendor, may be adjusted in a suit brought by the assignee of vendor to subject the land under a deed of trust given to secure the purchase money.

Omohundro v. Henson & als., 511

11. See *Appellate Court*, No. 2, 3, and

Peters v. Neville's trustee & als., 549

12. A judgment creditor files a bill to set aside a deed of trust to secure specified creditors for fraud, and for general relief. Though the deed is held to be valid, the plaintiff is entitled to the surplus after paying the debts secured; and the bill should not be dismissed, but under the prayer for general relief he is entitled to an account of the debts secured by the deed, and to have a sale of the property.

Sipe v. Earman & als., 563

13. Under § 2, ch. 179, of the Code of 1860, a judgment creditor, without having sued out execution at law, may sue in equity to impeach a deed of homestead of personal property, and deed conveying said property in trust for grantor's wife and children; said deeds having been since the judgment was recovered.

Russell v. Randolph & als., 705

14. How the court should guard the interests of a married woman having separate estate. See *Separate Estate*, No. 7, and

Darnall & wife v. Smith's adm'r & als., 878

15. When a decree is made for the sale of real estate for the payment of a debt secured by a deed of trust upon said real estate, the decree must be for the sale of the property upon the terms of the deed: and it is error to decree a sale upon credits not authorized by the deed. *Fultz v. Davis*, 903

16. In a foreign attachment when and by whom the affidavit may be made. See *Attachments*, No. 2, and

Fisher & Bro. v. March, 765

PRINCIPAL AND SURETY.

1. H and B, as his surety, execute their bond to M, for land purchased of him by H, and gives deed on the land to secure it, and H afterwards conveys the land to O. M recovers judgment on the bond against H and B; and B pays the debt, and M assigns it to him without recourse. On a bill by B

against O and H, to subject the land to satisfy the debt. **HOLD:**

1. B is entitled to have the land sold to pay his debt without proceeding first against H; especially as O did not ask for such a decree in the court below.

Omohundro v. Henson & als., 511

2. O may, if he chooses, make an issue in this case between himself and H, and have the equities between them settled.

Idem., 511

2. When discontinuance of an action 1040 *as to one of two makers of a note does not release the endorser. See *Promissory Notes*, No. 15, and

McVeigh & al. v. Bank of the Old Dominion, 785

3. When an order of a County court removing a trustee and appointing another, though without either bill or petition, is binding upon the trustee appointed and his sureties. See *Trusts and Trustees*, No. 13, and

Shelton v. Jones' adm'r & als., 891

4. See *Executors and Administrators*, No. 1, 2, and

Smith & als. v. Gregory, 248

PROMISSORY NOTES.

1. To fix liability upon the endorser of a negotiable note, the holder must use due diligence in giving notice of dishonor; and where the holder and endorser reside in different localities, and at the time of the dishonor, and for months before and afterwards, the usual and ordinary intercourse by mail between the two is intercepted by a state of war, the holder does not prove due diligence, by proving simply, that he deposited in his post office, on the day of the dishonor of the note, a notice of dishonor addressed to the endorser at his place of residence.

Farmers Bank of Va. v. Gunnell's adm'r, 131

2. A state of war which intercepts intercourse by the ordinary and usual course of mail between the holder and endorser of a note, excuses the holder from giving notice of dishonor so long as such interruption continues; but diligence on the part of the holder requires that he should forward notice to the endorser as soon as the interruption ceases.

Idem., 131

3. That the note was made, endorsed and discounted in the city of Alexandria, and that at that time that city was in the firm occupation of the troops of the United States, and the endorser after endorsing the note and before its maturity returned to his home within the lines held by the forces of the Confederate States, and remained there until May 1862, nine months after the note fell due, does not excuse the holder from giving the endorser notice of protest for non-payment of the note.

Idem., 131

4. That at the date of the protest of a note in August 1861, up to the 10th of April 1862, the city and a portion of the county of Alexandria where the note was discounted, was in possession of the forces of the United

States, and the endorser was within the lines of the forces of the Confederate States, and that the bank, the holder of the note at Alexandria, on the 10th of April ceased its banking operations by resolutions of its board of directors, and turned all its assets over into the hands, management and custody of three agents; and the bank never afterwards resumed its business, is no excuse for the failure to give notice of protest and non-payment.

Idem., 131

5. For other insufficient excuses, see the opinion of the court delivered by *Moncure P.* in

Idem., 131

6. The ordinance of the Virginia convention passed June 24th, 1861, which provides that in cases specified the parties to bills, notes, &c., shall remain bound after the maturity of the notes, etc., without demand, protest or notice, &c., is, as to notes made and discounted before its passage, in violation of the constitution of the United States.

Idem., 131

7. During the year 1861 slavery was recognized as existing both by the United States and Missouri, and slaves owed no allegiance to either; and there could be no demand for their services by the United States or the State, which could occasion a failure of consideration of notes given for the hire of slaves.

Booker v. Kirkpatrick, 145

8. A note discounted at the bank in B, was to fall due on the 18th of June 1864. On the 10th, from apprehension that the Union forces would come into B, the valuables of the bank, including this note, were sent away about two miles. The Union forces did enter B on the 12th, and left on the 14th of June. The note was not brought back to the bank until after the 18th, and was not presented and protested for non-payment, nor was notice of non-payment given to the endorser. **HOLD:**

1. The facts do not excuse the failure to have the note presented and protested, and to give notice to the endorser.

Tardy, trustee, v. Boyd's adm'r & als., 631

2. But if the bank was not guilty of laches in not having the note presented and protested for non-payment, and notice of dishonor on the day it fell due, to bind the endorser, all this should have been

1041 done within a reasonable *time after the hindering cause was removed.

Idem., 631

9. A promise to pay, by an endorser of a note, with a full knowledge of all the facts and of the laches of the holder in not protesting the note, may be held in point of law to amount to a waiver of the right to notice. But such a promise to be obligatory, must be deliberately made, in clear and explicit language, and must amount to an admission of the right of the holder, or of a duty and willingness of the endorser to pay. If, therefore, the conduct or acts of the endorser be equivocal, or the language used be of a qualified or uncertain nature, the endorser will not be held responsible.

Idem., 631

10. B was the endorser of a note made by his brother A, which fell due in June 1864, but there was no protest for or notice of non-payment. B afterwards, with the knowledge of these facts, proposed to the holder, to pay the notes in Confederate money; which was refused by the holder; the note being for good money. The proposition having been refused, it does not constitute a promise to pay, or a recognition of his liability, which will bind him to pay the debt.

Idem, 631

11. A note made in January 1863 is the last renewal of notes given for a debt due before 1861. It is not to be scaled.

Idem, 631

12. The act of March 3, 1866, for scaling debts, does not apply to a case where the money loaned was a sound currency, and the note sued upon was a renewal of notes accepted as an accommodation to the debtor, and only as evidence of a pre-existing debt due in good money.

Idem, 631

13. M owned a large real estate in Alexandria, and was president of the Bank of the Old Dominion located in that city. In 1861 M endorsed seven notes made in March and on to June by J, which were discounted at the bank. Before any of these notes fell due the Union forces took possession of Alexandria, and held it till the end of the war. A few days after they came M left the city, and joined his family, who had left some time before; he leaving at his dwelling a white servant and having had his place of business at the bank. He remained in Richmond, within the Confederate lines, until the end of the war. Two of the notes had been made and discounted for M's accommodation, and he received the proceeds. All the notes were protested for non-payment as they fell due, and notice of dishonor was left at his house, with the white servant left by M there, except one, which was left at his place of business at the bank; and no other notice was ever given him. HELD:

1. The notice was not sufficient to bind M as endorser of the notes.

McVeigh & al. v. The Bank of the Old Dominion, 785

2. On the notes made and discounted for his accommodation, M was liable without notice.

Idem, 785

3. Though the declaration is special upon the note, and avers demand and notice to the endorser, the plaintiff may prove on the trial that the note was made and discounted for the accommodation of the endorser, and recover in the action, though no notice, or an insufficient notice, was given to the endorser.

Idem, 785

4. The statute directing how notices may be given, does not apply to a notice of the dishonor of negotiable paper. Code of 1860, ch. 167, § 1, of 1873, ch. 163, § 1.

Idem, 785

5. The fact that the maker of these notes paid to the branch of the bank at P, in Confederate money, the full amount of the

notes, under the act of assembly authorizing it, the branch not having the notes at the time, does not constitute a payment; though after the war the bank took possession of all the assets of said branch, including the funds so paid in.

Idem, 785

14. A note made in June 1861, by a person resident within the Confederate lines, and discounted by a bank located within the Union lines, is illegal and void; unless it was given in renewal of a note made before the war, and by an agent acting under an authority conferred before the war.

Idem, 785

15. In an action against J & E, partners, as makers, and M as endorser of a negotiable note, the process is served on J and M, but is again and again returned as to E, "not found," or "no inhabitant," and the action is discontinued as to E.—E is not thereby released from liability on the note, and therefore M, the endorser, is not released; and the plaintiff may have judgment against J and M.

Idem, 785

1042 *16. J & E, partners, living in the city of Alexandria, made a note dated at Alexandria, and payable at the Bank of the Old Dominion, which is located in said city, which is endorsed by M, the president of the bank, and discounted by said bank. HELD: That it is not necessary to state on the face of the note that it is payable in the state of Virginia, to bring the note within the statute; Code of 1860, ch. 144, § 7, of 1873, ch. 141, § 7; but it may be shown by evidence that the place of payment is within the state.

Idem, 785

17. An accommodation endorser of a negotiable note paying after protest, has only the right of a surety, to be fully indemnified for his payment on account of his principal: and this indemnity is fully secured by the payment to him by the principal of the value paid by the surety.

Burton v. Slaughter, 914

18. See as to the personal representative of an accommodation endorser. *Executors & Administrators*, No. 6, 7, 8, and

Idem, 914

RAILROAD COMPANIES.

1. The charter of the Richmond, Fredericksburg and Potomac Railroad Company does not, in express terms, or by necessary implication, vest in the company the right to propel her engines by steam through the streets of a city, without the consent of the corporate authorities of the city; and the charter of the city of Richmond giving to the council of the city, the authority to prevent the propelling of the cars of a railroad by steam through the streets of the city, provided no contract is thereby violated, the council may prohibit said railroad company from the use of steam in propelling their cars in the streets of the city.

Richmond, Fred'g & Pot. R. R. Co. v. City of Richmond, 83

2. It seems a railroad company may, by express contract or notice brought home to

the employer, relieve itself from its liability as insurer of freight, or for money, or valuable articles liable to be stolen or damaged, unless apprised of their character or value, or for articles liable to rapid decay, or for live animals liable to get unruly from fright, and to injure themselves in that state, when such articles or animals become injured without the fault or negligence of the company or its agents.

Va. & Tenn. R. R. Co. v. Sayers, 328

3. But a railroad company cannot by express contract, though upon the consideration of a reduced charge upon the freight, relieve itself from its liability, as carrier of the freight, from injury to or loss of the freight, resulting in any degree from the want of care or faithfulness of themselves or their agents. For a case see,

Idem, 328

4. The statements of agents of a railroad company, as to the condition of the brakes on the cars, or as to the condition of the road at the place where the accident occurred, said statements having been made some time before and some time after the accident, and at some miles from the place, are not a part of the *res gestæ*, and are not competent evidence for the plaintiff, in a suit against the company, to prove negligence.

Idem, 328

5. For proceedings to assess the compensation to the tenant of the freehold, for the land taken, see *Internal Improvement Companies*, No. 2, 3, 4, 5, 6, 7, and

Wash. Cin. & St. Louis R. R. Co. v. Switzer, 661

RENTS.

1. How rents should be estimated against a vendor of land refusing to deliver possession. See *Vendor and Purchaser*, No. 1, and

Bolling v. Lersner, 36

2. In such a case, though the rents are estimated, it is proper to charge interest upon them. *Idem*, 36

RICHMOND.

1. The council of the city of Richmond has authority, under the charter of the city, to impose a license tax upon a foreign telegraph company having an agency in the city and doing business therein. And there is nothing in the constitutions and laws of the state or of the United States, which forbids such tax, if it is equal and just in its provisions.

Western Union Telegraph Co. v. City of Richmond, 1

2. Though the ordinance of the city imposing taxes, speaks only of persons or firms doing business in the city, yet it imposes a tax in terms, on telegraph companies, and obviously intends to include incorporated companies as well as individuals. *Idem*, 1

3. The council of the city of Richmond may prohibit the Richmond, Fredericksburg & Potomac Railroad Company from propel-

ling their cars by steam through the streets of the city. See *Railroad Companies*, No. 1, and

Richmond, Fred'g & Pot. R. R. Co. v. City of Richmond, 51

SAMPLE MERCHANTS.

1. The act approved April 30th, 1874, in relation to sample merchants' licenses, authorizes a party who has obtained a license, to employ an agent to sell for the principal under the license.

Myerdock's case, 908

SCALING CONFEDERATE DEBTS.

1. At what time the scale to be applied. See *Agents*, No. 4, and

McVeigh v. The Bank of the Old Dominion, 188
See *Confederate Contracts*, No. 3, and
Ashby's adm'r & als. v. Porter & als., 455

2. A note made in January 1863 is the last renewal of notes given for a debt due before 1861. It is not to be scaled.

Tardy, trustee, v. Boyd's adm'r & als., 621

3. The act of March 3, 1866, for scaling debts, does not apply to a case where the money loaned was a sound currency, and the note sued upon was a renewal of notes accepted as an accommodation to the debtor, and only as evidence of a pre-existing debt due in good money. *Idem*, 621

4. A sale of land by executors in October 1862, held, upon the time of sale, the surrounding circumstances and the evidence, to have been made with reference to Confederate treasury notes as the standard of value, and therefore that the purchase money was to be scaled as of the date of the sale.

Moore & als. v. Harnsburger's ex'ors, 667

5. A case in which the value of the land at the time of the sale was held to be the proper measure of recovery. *Idem*, 667

SEPARATE ESTATE.

1. A conveyance of land by a husband to his wife, vests in her a separate estate; and upon her death, leaving children, it descends to them; and the husband is not entitled to curtesy in it.

Sayers & als. v. Wall & als., 354

2. A married woman, possessed of a separate estate, may charge the same with her debts in like manner and to the same extent as a *feme sole*.

Darnall & wife v. Smith's adm'r & als., 878

3. The liability of the separate estate of a married woman can only arise out of the supposed intention of the wife. And no pecuniary engagement can be a charge upon the wife's estate which is not connected by agreement, either express or implied, with said estate. *Idem*, 878

4. If a married woman having separate property enters into a pecuniary engagement, whether by ordering goods or otherwise, which if she were a *feme sole* would constitute her a debtor, and in entering into such an engagement she purports to contract not for her husband, but for herself, and on the credit of her separate estate, and it was so intended by her, and so understood by the person with whom she is contracting; that constitutes an obligation for which the person with whom she contracts has the right to make her separate estate liable: and the question whether the obligation was contracted in this manner must depend upon the facts and circumstances of each particular case. *Idem*, 878

5. As the charge is a mere question of intention, the wife may extend it to the whole, or confine it to a part of her separate estate. If no specific part is appointed for the payment of the debt, the fair implication is, that the whole estate was intended to be made liable. If, on the other hand, only a part of the estate, expressly or by fair inference, is designed to be charged, no liability whatever can attach to the residue. *Idem*, 878

6. A wife is exempt from all personal liability, and from all personal decrees and judgments upon her contracts. Her undertaking, so far as it is recognized by the courts, is not that she will pay the debt, but that her 1044 separate estate shall be answerable *for it. And that is bound so far only as she has agreed it shall be bound. *Idem*, 878

7. W was insolvent, and E, his wife, owned a separate estate, part of it under her father's will, which was given in trust for her. In August 1860 W and E purchase a crop of tobacco from S, and they execute a paper by which they bind themselves to convey to S a sufficient interest in the Peatross estate to secure him for the tobacco. In October 1860, E directs her agent, J, to give to S an order from her on the Peatross estate for \$4,153.22, to be drawn on whoever the court may appoint to distribute the estate. In 1866 S's adm'r files her bill to sell E's separate estate for the payment of this debt, and claims that E's whole separate estate is liable. E and her present husband do not answer, but her trustee does, and denies her estate is liable. And without directing any enquiry as to the Peatross estate, or what had been done with E's interest in it, there is a decree for the sale of E's land for the payment of the debt. **Held:**

1. *Prima facie* E's interest in the Peatross estate is alone liable for the payment of the debt. *Idem*, 878

2. If plaintiff insists that the other separate estate of E is liable, and that her interest in the Peatross estate was only taken as collateral security, the burden is on the plaintiff to establish the fact. *Idem*, 878

3. Before the plaintiff can subject the other separate estate of E, she must show

that due diligence has been used by S in pursuing the interest of E in the Peatross estate, and that he has failed to make the debt out of that interest. *Idem*, 878

4. Though a married woman is to be treated as a *feme sole*, so far as the capacity to charge her estate with her pecuniary engagements is concerned; yet if in a litigation involving that question, the husband does not choose to defend her interests, and the trustee is negligent of his duty, it is incumbent upon the court to direct such enquiries as will prevent the sacrifice of her rights. *Idem*, 878

5. The plaintiff having failed to furnish the necessary evidence as to S's prosecution of his claim as assignee of E's interest in the Peatross fund, ordinarily the bill should be dismissed. But as it is apparent that the case has not been investigated upon its merits, a result attributable to the conduct of the defendants in a very great measure, the cause will be remanded for further proceedings in conformity to the views expressed by this court. *Idem*, 878

SHERIFFS AND SERGEANTS.

1. If a sergeant of a city is appointed to rent out property located therein and collect the rents, he need not be required to give security for the faithful performance of the duty, as it is covered by his official bond. Code of 1873, ch. 174, § 5.

Moran v. Johnston & als., 108

SPECIFIC PERFORMANCE.

1. In 1851 J marries and brings his wife to the house of his father E; and he lives there for years, under an understanding or agreement with E that E will leave him the land by his will upon condition that J will support E and his wife during their lives. J lives on the land which he cultivates, and he supports E and his wife until 1863, when he goes into the army, and dies in 1865. After J went into the army his widow and E and wife do not agree, and E and wife leave the place, and are supported by another son of E until the death of E in 1868, when he gives the land to this son, except fifty acres which he had previously given to J's widow and children. **Held:**

1. The court will not decree specific execution of the agreement between J and E. *Cox & als. v. Cox*, 305

2. J having received from the proceeds of the land a full satisfaction for the support of E and his wife and any improvements he had made upon it, is not entitled to further compensation. *Idem*, 305

2. S and his wife P had no children, and it was agreed between them that the survivor should have all the property during his or her life, and at his or her death it should be equally divided between his and her heirs and next of kin. S made his will by which he gave all his property to his wife absolutely.

He died in her lifetime, and she was so shocked *at his death, that she was immediately paralyzed, and remained unconscious until she died the day after he did. She died without making a will. **HOLD:**

1. A court of equity will not enforce the agreement at the suit of the heirs and next of kin of S against the heirs and next of kin of P.

Sprinkle & als. v. Hayworth & als., 384

2. In the absence of fraud on the part of a legatee, a court of equity will not enforce a ~~part~~ charge upon his legacy.

Idem, 384

3. If it appeared from the evidence in the case, that S intended P should have entire control of the whole property during her life, and use as much of it as she chose to use, and that only what remained at her death was to be divided between his and her heirs and next of kin, the trust would not be enforced even if it had been in writing.

Idem, 384

STATUTES.

1. § 3, of the act of March 15, 1867, which amended § 3, ch. 182, of the Code of 1860, in relation to the time of presenting a petition for appeal, &c., construed in

Bolling v. Lersner, 36

2. The act of February 28, 1872, Acts of 1871-72, ch. 124, p. 98, establishing a Special Court of Appeals, declared to be constitutional in

Idem, 36

3. The act of January 16, 1867, amending and re-enacting § 5 of ch. 119, of the Code of 1860, in relation to recording deeds, construed in

Blackford & als., trustees, v. Hurst & als., 203

4. The act, Code of 1873, ch. 168, § 5, 9, in relation to pleas of failure of consideration, construed in

Huff & al. v. Broyles & al., 283

5. The act, Code of 1849, ch. 177, § 19, in relation to judgments. See

Bush v. Campbell, 403

6. The acts, Code of 1860, ch. 119, § 2, and Sess. Acts 1866-67, p. 805, ch. 36, in relation to mechanics' liens, construed in

Henricks, by Stuart v. Fields, 447

7. The act, Code of 1873, ch. 117, § 4, as to the execution and acknowledgment of deeds by *femes covert*, construed in

Switzer v. Switzer, 574

8. The act of March 3, 1866, for scaling debts, construed in

Tardy, trustee, v. Boyd's adm'or & als., 631

9. The act, Code of 1860, ch. 56, § 6, in relation to compensation for land taken by Internal Improvement companies, construed in

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10. The act, Code of 1860, ch. 144, § 7, of 1873, ch. 141, § 7, in relation to negotiable notes, construed in

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11. The act, Code of 1860, ch. 167, § 1, of 1873, ch. 163, § 1, in relation to notices, construed in

Idem, 785

12. The act, Code of 1873, ch. 178, § 17, in relation to limitation of appeals, construed in

Otterback v. Alex. & Fred. Railway Co., 940

13. The act, Code of 1873, ch. 188, § 1, 2, 3, in relation to house-burning, construed in

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14. The act of March 27, 1874, § 4, in relation to grand juries, construed in

Mesmer's case, 976

15. The act of April 30th, 1874, § 110, in relation to sample merchants' licenses, construed in

Myerdock's case, 988

16. The act, Code of 1873, ch. 187, § 1, in relation to murder in the first degree, construed in

Howell's case, 995

TAXES AND TAXATION.

1. The council of the city of Richmond has authority, under the charter of the city, to impose a license tax upon a foreign telegraph company having an agency in the city and doing business therein. And there is nothing in the constitutions and laws of the state or of the United States, which forbids such tax, if it is equal and just in its provisions.

Western Union Telegraph Co. v. City of Richmond, 1

2. Though the ordinance of the city imposing taxes speaks only of persons or firms doing business in the city, yet it imposes a tax in terms, on telegraph companies, and obviously intends to include incorporated companies as well as individuals.

Idem, 1

1046 *3. For a thorough and exhaustive investigation of the power of a state, and its limitations, to tax agencies of the United States government, see opinion of *Staples J.*

Idem, 1

4. Corporations which derive their existence and exercise their franchises under authority of state laws, but are employed by the national government for certain duties and services; whilst Congress may exempt them from any state taxation which will really prevent or impede such services, yet in the absence of such legislation by Congress to indicate that exemption is deemed essential to the performance of governmental services, it cannot be claimed on the mere ground that the corporation is employed as an agency of the government. And the tax may be either upon the property or business of the corporation.

Idem, 1

5. The cases recognize a distinction between taxation of the property belonging to a private corporation employed by the government, and taxation of the instrumental-

ities or means of the government in the possession of such corporations. The state may tax a banking institution; but it cannot tax the currency of the government's bonds belonging to such bank. It may tax the railroad, but not the mail or the munitions or other property of the government. It may tax the contractor with the government, though not the contract. *Idem*, 1

6. The act approved April 30th, 1874, in relation to sample merchants' licences, authorizes a party who has obtained a license, to employ an agent to sell for the principal under the license.

Myerdock's case, 988

TENDER.

1. An offer by a purchaser of land sold by executors in October 1862, for Confederate treasury notes as the standard of value, the offer made a short time after it fell due, to pay the first bond due for the purchase money, he not showing any money, was not a good tender.

Moore & als. v. Harnsberger's ex'ors, 667

TRUSTS AND TRUSTEES.

1. A deed of trust purports to be given to secure a note for \$1000 given for the loan of that sum by E. to C. Though the note may not have been delivered by C to E, yet if he owed E a debt for which the note was to be given the deed is a valid security for it.

Eacho v. Cosby, 112

2. The trustee in a deed of trust executed by C is made a party plaintiff with the *cestui qui trust* E, in an original bill to enforce the trust, but his name is omitted in an amended and supplemental bill. He is under the statute a competent witness to prove what passed between E, C, who is dead, and himself as to the preparation of the deed and note intended to be secured thereby; he under the circumstances not being liable for costs. *Idem*, 112

3. The deed provides that the trustee shall receive five *per cent.* upon the amount of sales. All the property having been disposed of by the court so that the trustee can never sell it, even if his right to commissions on a sale by him would render him an incompetent witness, it cannot affect his competency under the circumstances. *Idem*, 112

4. By the act of January 16, 1867, amending and re-enacting § 5 of ch. 119 of the Code of 1860, deeds of trust &c. are to be recorded in the clerk's office of the county or corporation court within the jurisdiction of which the real estate conveyed &c. is situated.

Blackford & als., trustees, v. Hurst & als., 203

5. By the charter of the city of Lynchburg jurisdiction is given to the court of Hustings for said city, not only within the limits of the corporation, but also for the space of one mile without and around said city. A deed of trust conveying real estate lying outside

the corporation limits, but within one mile without and around said city, is to be recorded in the clerk's office of the corporation court of the city. And being so recorded it is valid, and has priority over subsequent judgments against the grantor in the deed docketed in the clerk's office of the county.

Idem, 203

6. A will giving the executor a discretion to sell the whole estate, real and personal, does not create a trust of the estate in the executor.

Mason v. Jones & wife, 271

7. Where a trustee in a deed to secure creditors has received in June 1861 in good money, a part of the trust fund applicable 1047 *to pay a creditor who is ready to receive payment, his investment of the fund in Confederate bonds, under an order of the court made on his motion, in a suit which he had brought for the administration of the trust, is invalid. and he continues liable for the fund; and this whether the creditor was or was not a party to the suit.

Kirby v. Goodykootz & als., 298

8. In this case the court below, whilst giving a decree in favor of the creditor for his debt, disallowed the interest on the debt during the war. On appeal by the trustee the decree of the court below was affirmed generally. *Idem*, 298

9. As to what deeds of trust are not fraudulent. See *Conveyances—Fraudulent*, No. 1, 2, 3, 4, and

Sipe v. Earman & als., 563

10. What relief a judgment creditor plaintiff may have, though the deed be held to be valid. See *Practice in Chancery*, No. 12, and *Idem*, 563

11. What deed by wife in trust for husband and children will be set aside. See *Husband & Wife*, No. 4, 5, 6, 7, and

Switzer v. Switzer, 574

12. See *Equitable Jurisdiction and Relief*, No. 5; and

Meade v. Grigsby's adm'ors, 612

13. An order by a county court made on the request of the life tenant and with the consent of the trustee for her and her children, removing the trustee and appointing another, is valid, though made without either bill or petition, and the bond given by the new trustee binds his sureties.

Shelton v. Jones' adm'x & als., 891

14. If the children might have objected to the order as not having been parties, yet having acquiesced for a long time, the parties to the bond cannot avoid it on that ground. *Idem*, 891

15. See *Judicial Sales*, No. 7, and *Fultz v. Davis*, 903

USURY.

1. B, of Harrisonburg in Va. was indebted to M, of Baltimore, Maryland, by various notes and accounts; on some of which notes usurious interest was charged. In February 1868 B and M made a full settlement, by which B transferred to M judgments and debts to the amount of his debt; and it was

agreed that M should prosecute these claims, and if any of them proved insolvent, that M might recover from B any deficit that remained: And M then delivered to B all his notes and accounts. Some of the claims transferred to M proved worthless; and in June 1869 B gave to M his note endorsed by C, made payable in Harrisonburg, for the amount of the deficit. **HOLD:** The note was founded on a new contract on a new consideration, and the usury in the previous notes given by B to M before their settlement does not affect it.

Coffman & Bruffy v. Miller & Co., 698

2. See *Practice in Chancery*, No. 8, and

Belton v. Apperson & als., 207

VENDOR AND PURCHASER.

1. A vendor of land refused to deliver possession according to the contract, and the vendee who has paid the purchase money, immediately sues for specific performance, and the vendee resists it, and asks for a rescission of the contract; but there is a decree for specific performance, and for an account of rents and profits. In estimating the rents and profits of the land thus held by the vendor, the annual value of the land in the hands of a prudent and discreet tenant, upon a judicious system of husbandry, is the proper rule in the case; to be influenced in some measure by the mode of treatment of the land by the occupant.

Bolling v. Lersner, 36

2. Though in such case the rents are estimated, it is proper to charge interest upon them. *Idem*, 36

3. When there has not been a conveyance to the vendee of land, on a bill by the administrator of the vendor to subject the land to the payment of a balance of the purchase money, the heirs of the vendor should be made parties before a decree for the sale.

Mott v. Carter's adm'r, 127

4. K sells to H a tract of land, expressing the belief, which he no doubt entertained, that there were 127 acres in the tract, and H, relying on that belief, purchased, and paid the purchase money. There were in fact but 81 acres. K having sold, and 1048 H having purchased under a mutual mistake, H is entitled to compensation for the deficiency.

Hoback v. Kilgore, 442

5. Although in cases of mere deficiency in quantity within the boundaries of a tract sold, the general rule of compensation is according to the average value of the whole tract, yet where, as in this case, there are valuable improvements upon the land, the value of which bears a very large proportion to the value of the land, the just and true measure of compensation is according to the average value of the land without the improvements, considering both together with the price for which it was sold, estimating the quantity of the land, as the parties did, at 127 acres. *Idem*, 442

6. A vendor of land, in his own right, is bound to convey it with general warranty, unless it be otherwise agreed between the

parties. But a party who had sold to the vendor, and had retained the legal title, or had some interest in the land, is only required to convey with special warranty.

Idem, 443

7. A case in which a sale of land was held, upon the written contract and the evidence, to have been a sale by the acre, and not a sale in gross; and the vendor was bound to make good the deficiency in the quantity at the average of the whole tract per acre.

Triplett v. Allen & als., 721

8. The conveyance of land, after giving the number of acres, adds the words "more or less." These words will not relieve the vendor or vendee, as the case may be, from the obligation to make compensation for an excess or deficiency, beyond what may be reasonably attributed to small errors from variation of instruments or otherwise, unless there be evidence to show that a contract of hazard was intended. *Idem*, 721

9. Ten acres, in a tract of 166 acres, where the land is worth fifty dollars an acre, is not one of these small deficiencies to be covered by the phrase "more or less." *Idem*, 721

10. In 1857 C, by a verbal contract, sold to N a lot in D, and N took possession of the lot, built a house upon it and improved it, but did not pay the purchase money at the time agreed. C having become the security of N as the guardian of W, and in a debt to K, in April 1861 they entered into a written agreement, whereby, reciting these facts, it was agreed that C should retain the legal and equitable title to the property until the purchase money for the lot and the debts for which C was bound as surety of N were fully paid. This agreement was not recorded. After the war N became a bankrupt; and in 1868 C filed his bill against N and his assignee, to have the property sold and applied to the payment of the purchase money for the lot, and the debts for which C was surety for N; and it was sold, not bringing enough to pay C for his purchase money and what he paid for N to W. Other judgment creditors of N intervene and claim the proceeds of the sale after payment of the purchase money. **HOLD:**

1. N had neither the legal nor equitable title to the property until the debts were paid.

Coffman v. Niswander & Co., 731

2. The judgment creditors of N have only the equities of N against C; and as against them, the agreement between C and N is valid, though not recorded. *Idem*, 731

WARRANTY.

1. A party who in an action of debt against him, files a plea under the statute, Code of 1873, ch. 168, p. 1098-1100, of a breach of warranty in the sale of an animal, and claims to be relieved to the extent of the price paid for the animal—in which he succeeds—cannot maintain another action for other damages and expenses he has incurred on account of the breach of said warranty.

Huff & al. v. Broyles & al., 283

2. A party filing a plea under said statute, may claim and recover all the damages he has sustained by the breach of the warranty, which he could recover in an action for a breach of the warranty. *Idem*, 283

3. If a party filing such a plea only claims and recovers a part of the damages he has sustained, and then brings an action to recover for other damages, a plea of former judgment is a good plea in bar to the action. *Idem*, 283

WILLS.

1. A bequest to an attorney who writes the will is not necessarily invalid.

Riddell & als. v. Johnson's ex'or & als., 152

1049 *2. The *onus probandi* lies in every case, upon the party propounding a will; and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator. *Idem*, 152

3. If a party writes or prepares a will under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument; in favor of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased. *Idem*, 152

4. A case in which a large bequest to the attorney who wrote the will, was held to be valid. *Idem*, 152

5. It is not necessary to the validity of a will that it should have a testamentary form, or that the decedent should know that he had performed a testamentary act, or that he should intend to perform such act. If the paper contains a disposition of the property to take effect after the death of the testator, though it was not intended to be a will, but an instrument of a different shape, yet if it cannot operate in the character intended, it may operate as a testamentary act.

McBride & als. v. McBride & als., 476

6. It is not necessary that the paper should be the identical one intended by the testator for his last will. If the instrument has once received the sanction of the testator as the final disposition of his property, it will so remain until revoked or cancelled in a way prescribed by the statute, though he may have always intended to make another will. *Idem*, 476

7. It is necessary, however, that the instrument, whatever it may be, whether note, deed, letter, or settlement, should have been designed to operate as a disposition of his property. That identical paper must have been intended to take effect in some form. It must have been written *animo testandi*. *Idem*, 476

8. But where the draft or notes of a will embody the provisions actually designed by

the testator with reference to his property, and declare the settled purposes of the testator, they will be established as his will, although his purpose may have been to extend the notes or draft into a more regular form. This, however, is only permitted where the testator is prevented by the act of God from completing the instrument in the form in which he designed it. And even in such a case it is essential that the paper shall contain the final determination of the testator with regard to the disposition of his property. *Idem*, 476

9. In all other cases, the paper offered for probate must have been designed thereby to dispose of his property. He must have looked to the paper as the means by which an object was to be accomplished; and that object the disposition of his estate after his death. Unless he intended this, the paper is not his will, whatever he may have called it. The intention is the controlling principle in such cases. *Idem*, 476

10. M has a will prepared by his counsel, which he examines and approves, and says he will meet the counsel in B, a village near, and execute it. A few days after this he writes to a brother in Texas, and after giving him a detailed account of his domestic troubles, which he suggests to him to burn, he states that he has made a will, and states the bequests in it, and that he has appointed this brother and his counsel his executors. He says it is not such a will as he expects to make. The letter is signed with the initial of his Christian name J—. Two months after seeing the will prepared for him he is accidentally killed, not having executed the paper. *Held*:

1. The letter is not a testamentary paper, either alone, or as connected with the unexecuted will. *Idem*, 476

2. *Quære*: If the signing the paper with the initial of his name is a sufficient signing by a testator. *Idem*, 476

WITNESSES.

1. As to the competency of a trustee as a witness. See *Trusts and Trustees*, No. 2, 3, and *Eacho v. Cosby*, 112

2. W brings debt on a bond against H, and H pleads payment and set-off, on which 1050 there is issue. H files with his *plea a statement of the payment, which was the amount of a bond of W & J to L, and that W agreed with H, if H would pay the bond due to L, H should have credit for the amount as a payment on the bond sued on. *Held*: H is a competent witness to prove what passed between himself and J, in relation to the arrangement between him and J, for the procurement of the bond of L, though J is dead. *Huffman v. Walker*, 314

3. The fact that a person is the counsel in the cause for one of the parties, does not render him incompetent as a witness for that party.

Rea's adm'x v. Totter & Bro., 585

REPORTS OF CASES
DECIDED IN THE
SUPREME COURT OF APPEALS
OF VIRGINIA.

BY PEACHY R. GRATTAN.

VOLUME XXVII.

FROM JANUARY 1, 1876, TO JANUARY 1, 1877.

JUDGES
OF THE
SUPREME COURT OF APPEALS

DURING THE TIME OF THESE REPORTS.

R. C. L. MONCURE, PRESIDENT.
JOSEPH CHRISTIAN, FRANCIS T. ANDERSON,
WALLER R. STAPLES, WOOD BOULDIN.*

Attorney General, RALEIGH T. DANIEL.

*Judge Bouldin did not sit in any of the cases reported in this volume. He died on the 10th day of October, A. D. 1876.

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CASES

DECIDED IN THE

Supreme Court of Appeals of Virginia.

Stone's Ex'or v. Nicholson & als.

November Term, 1876, Richmond.

Wills—Construction—Executory Devices.—Testator, by his will made in January 1807, lends to his daughter Sallie, who is one of eleven, one female slave named Phoebe, to be possessed by her during her natural life or widowhood of her present or future husband, and at her death, and the death or after marriage of her husband, then to be equally divided among her children; and if she has none, then to be equally divided among all testator's children.

Testator died in 1810, Sallie being then about fourteen years old. She lived until 1867 unmarried and without children, the descendants of Phoebe then numbering twenty-five. **Held:**

1. **Same—Same—Same—Perpetuity.**—The executory devise over to testator's children is too remote and void.
2. **Same—Same—Same.**—If the executory devise is not void, then it includes all the testator's children alive at his death, and Sallie as one of them.
3. **Same—Same—Same—Devise Over to Testator's Children.**—An executory devise over to testator's children will always be held to refer to children living at his death, unless there is a clear indication in the will that some other period is intended.

2. *The case is fully stated by Judge Moncure in his opinion.

Guy and Pettit, for the appellant.

There was no counsel for the appellees.

Moncure, P., delivered the opinion of the court.

The question to be decided in this case is in regard to the construction of the will of Caleb Stone; another question in regard to the construction of the same will having been decided by this court in the case of *Moon & wife v. Stone's ex'or, &c.*, 19 Gratt. 130-330.

The will bears date on the 27th of January 1807, and was admitted to probate in the county court of Fluvanna county on the 23d

***Wills—Construction—Devise Over to Testator's Children.**—An executory devise or bequest over to testator's children or to the survivors of a certain class, refers to those living at the testator's death, unless there be a plain indication in the will that some other period is intended. See *Brown v. Brown*, 31 Gratt. 502, and *note*; also, *Gish v. Moomaw*, 80 Va. 360, 15 S. E. Rep. 808; *Jameson v. Jameson*, 86 Va. 56; *Martin v. Kirby*, 11 Gratt. 67; *Stokes v. Van Wyck*, 83 Va. 724, 3 S. E. Rep. 387.

of April 1810. The testator left a wife and eleven children, who were the only objects of his bounty in his will, and all of whom were such objects. Six of his children were sons, and five of them were daughters. By the first item of his will he loaned to his wife for her better support, and for the support of his younger children during her natural life or widowhood, the tract of land on which he lived, together with fourteen slaves by name. By the second, third, fourth and fifth items, he gave to his sons and their heirs forever sundry tracts of land, except his son, William Taylor, to whom he had already advanced nearly a thousand dollars, and to whom by the fourth item he gave a negro boy. By the sixth, seventh, eighth, ninth and tenth items he loaned to each of his five daughters one hundred and forty acres of land therein particularly described, on certain terms and subject to certain limitations, which are set out in the sixth item, and are adopted by reference in the seventh, eighth, ninth and tenth items. The sixth item is in these words:

3 **"6th. I lend to my daughter, Nancy Perry, 140 acres of land, it being," &c., "to be possessed by her during her natural life or widowhood of her present or future husband, and at her death, and the death or after marriage of her husband, then to be equally divided among her children, if she has any, and if she has none, then to be equally divided among all my children."

The seventh, eighth, ninth and tenth items, loaning the same quantity of land to each of his other daughters are in the same words, *mutatis mutandis*; the tenth item being in these words:

"10th. I lend to my daughter, Sally, 140 acres of land, it being," &c., "to be possessed by her and any husband she may have, upon the same terms and conditions as Nancy Perry's."

The eleventh item is in these words:

"11th. I lend to my five daughters each one slave and her future increase, to be possessed by them on the same terms and conditions as they will hold their lands: that is to say, to Nancy Perry I lend Hannah; to Fanny I lend Joaney; to Elizabeth I lend Lucy; to Lucy I lend Nelly; and to Sally I lend Phoebe."

By the twelfth and thirteenth items he made certain bequests to his children, which are not material to be stated here. The fourteenth item is in these words:

"14th. All the rest and residue of my

estate, of what kind soever, I give and bequeath to my beloved wife for her support and the support of her children during her natural life or widowhood, and at her death or marriage my will and desire is, that the same, together with the slaves lent her, shall be equally divided among all of my children, but they are to possess the slaves upon the same terms and conditions as is

before mentioned respecting the lands
4 lent to them." *By the next and only remaining item of the will the testator nominated the executors thereof.

The controversy in the case of Moon & wife v. Stone's ex'or &c., supra, was, and the controversy in this case is, concerning the slave Phoebe and her increase, loaned by the testator, by the eleventh clause of his will, to his daughter Sally, upon the terms and conditions therein referred to.

It seems that the said Sally Stone was, at the date of her father's will, not more than ten or twelve years of age; that she died in 1857, about sixty-one years of age, having had no issue, and never having been married, but having left a will which was duly admitted to probate, whereby she made her niece, Christian Stone, who afterwards intermarried with Schuyler R. Moon, her residuary legatee. She received the land and the slave Phoebe loaned her by her father in his will, and the living descendants of Phoebe numbered twenty-five in 1857, when Sally Stone died. They have since been sold for a very large sum of money.

After the death of Sally Stone, a suit was brought in the county court of Fluvanna by the surviving children of Caleb Stone and the personal representatives of such as were dead; for the purpose of having a sale of the said slaves; and such sale was accordingly decreed to be made. There was also another suit in the same court, brought for the purpose of having a sale of the said land.

Whilst these suits were thus pending, Schuyler R. Moon and Christian, his wife, filed their bill in the circuit court of said county against the executor of Sally Stone and the other parties in said suits, in which they insisted that by the will of Caleb Stone, Sally took an estate tail in the land and an
absolute estate in the slave Phoebe;

5 and that by her will, the *land and the slaves passed to the plaintiff, Christian. They referred to the suits which had been brought for the sale of the slaves and the land; expressed themselves willing that the sale of the slaves should stand, and to take the purchase money in their stead; and among other things asked for general relief.

The defendants demurred to the bill and answered, contesting the construction put upon the will of Caleb Stone by the plaintiffs; insisting that Sally Stone took but a life estate in the property; and that upon her death, unmarried and without children, the bequest over to the children of Caleb Stone was valid.

On the 16th of September 1859, the cause came on to be heard, when the court was

of opinion that Sally Stone took but a life estate in the slaves under the will of Caleb Stone; and that upon her death, unmarried and without children, they either passed over under the fourteenth clause of the will to the testator's wife and children, or that both the land and slaves given to Sally Stone passed over to the testator's children, by virtue of the sixth, tenth and eleventh clauses of the will; that the words of these clauses created neither an estate tail in the land nor a perpetuity in the slaves; and the limitation over was therefore good; and the court sustained the demurrer and dismissed the bill.

From that decree the appeal in the case of Moon & wife v. Stone's ex'or, &c., supra, was taken. In that case this court held, that under the will of Caleb Stone, his daughter, Sally, was entitled only to a life estate in the land and slave and future increase of the slave loaned to her by the tenth and eleventh clauses of the will; but the court declined to decide who were entitled to the property at her death; considering that the solution of that question

6 belonged to the court in *the suits which, it appeared, were depending for a division of the land and slaves, or the distribution of the proceeds of the sale thereof, among the persons entitled thereto, to which suits the appellants could be made parties if they claimed to be entitled to participate in such division or distribution. And therefore the court affirmed the said decree; but without prejudice to any interest which the said Sally Stone or her representatives might have in the said property or any part thereof, otherwise than under the loan to her as aforesaid.

Accordingly after that decision was made, to wit: in April 1869, John W. Stone, executor of Sally Stone, filed his petition to the said circuit court in the suit for the division of the said slaves, or the proceeds of the sale thereof, which suit had been removed to the said circuit court from the county court of said county, in which petition he claimed that the remainder after the termination of the life estate of the said Sally Stone in said slaves, vested in all the children of the said Caleb Stone who survived him, either under the express limitation contained in these words, "to be equally divided among all my children," contained in the will of Caleb Stone; or, if this remainder was void for remoteness, then by operation of law, and under the statute of distributions; and that all the testator's children who survived him were equally entitled; and that Sally, the life-tenant, being one of them, her representative was entitled to her share; and thereupon the plaintiffs in the suit were summoned to show cause at the next term of the court, if any they could, against the relief sought by said petition.

On the 13th of April 1871 the circuit court decreed "that the persons who are entitled to the funds in controversy being the proceeds of the slaves loaned Sally
7 *Stone, deceased, for life by her

father, Caleb Stone, are the children of Caleb Stone, who were living at the time of his death, with the exception of Sally Stone; and in case of the death of any of the other children of the said Caleb Stone, that then the personal representatives of such deceased children take their shares." And the reports of the commissioner were recommitted with certain instructions set forth in the decree.

At the next September term 1871 of said court, to wit: on the 14th of the month, the commissioner having made his report in accordance with said decree, dividing the said fund into ten original shares, and excluding Sally Stone's personal representative from all participation therein, the court decreed the distribution accordingly.

From the said two decrees of the 13th of April and 14th of September 1871, John W. Stone, executor of Sally Stone, applied to a judge of this court for an appeal, which was accordingly allowed.

The first question which seems to arise for consideration and decision in this case is, whether the executory limitation contained in the will of Caleb Stone, to all his children, of the property loaned by said will to his daughter Sally Stone, is a valid limitation, or void for remoteness.

I am of opinion that it is void for remoteness. To make an executory limitation valid, the event on which it is to take effect must of necessity happen, if at all, within the duration of a life or lives in being at the time of the creation of the estate, and twenty-one years and ten months thereafter. It is not enough that it possibly may, or even probably will, happen within that period.

Now let us apply that test to this case. Here the *property was loaned to Sally Stone, to be possessed by her during her natural life and the natural life or widowhood of any husband she might thereafter have; and at her death, and the death or after marriage of such husband, then to be equally divided among her children, if she should have any, and if none, then to be divided equally among all the testator's children.

Sally Stone was very young at her father's death, not more than about fourteen years of age, and it was very possible for her afterwards to have married a man who was not born at her father's death, and who might have survived her more than twenty-one years and ten months, at the expiration of which time the executory limitation to the children of the testator would have to take effect if at all. But that period would be too remote, according to the rule before stated.

Then the question is, the limitation being void, what will become of the estate?

When a specific devise or bequest fails from any cause, the subject of it goes to the residuary devise or legatee, as the case may be, unless a different intention appears in the will. But when a residuary devise or bequest fails from any cause, the subject of it, to the extent of such failure, goes to

the heirs or distributees at law of the testator.

By the residuary clause of the will in this case, the testator gave all the rest and residue of his estate to his wife for her support and the support of her children during her natural life or widowhood, and at her death or marriage his will and desire was that the same, together with the slaves lent her, should be equally divided among all of his children, but they were to possess the slaves upon the same terms and conditions as was in the will before mentioned respecting the lands lent to them; that

9 is, his daughters *respectively were to possess their portions of the said slaves during their natural lives, and during the natural lives or widowhoods of any husbands they had or might have, and at their deaths, and the deaths or after marriages of any such husbands, then to be equally divided among their children, if any, and if none, then to be divided equally among all the testator's children.

Except, therefore, to the extent of an estate given to his wife for her support and that of her children, during her natural life or widowhood, all his children are his residuary devisees and legatees—his daughters in regard to the said slaves upon the terms and conditions aforesaid.

Now it is very obvious that the testator intended this residuary clause to be of very limited operation. He had a large family, consisting of a wife and eleven children, for each of whom he provided generally in separate items of his will, commencing with his wife, and continuing through with all of his children, disposing apparently of all his land and slaves and some of his perishable property, particularly by name and description; and having written the first thirteen items of his will, he had then only to dispose of any residuum there might be of his estate, and nominate his executors, which he did by the last two items of the will. The residuum to be disposed of consisted mainly of the remainder in the slaves, which by the first item he had loaned to his wife for her better support and the support of his younger children during her natural life or widowhood, and consisted further no doubt of some articles of personal property of no great value, which had been omitted or not disposed of in the prior items of his will. By the fourteenth or residuary

10 item he gave "all the rest and residue of his estate, of *what kind soever"

(meaning thereby no doubt the articles of personal property aforesaid, and certainly not meaning to embrace in the words describing the subject of the gift, though they were as comprehensive in their natural meaning as possible, the said remainder in the slaves loaned to his wife), "for her support and the support of her children during her natural life or widowhood, and at her death or marriage" his will and desire was, "that the same, together with the slaves lent her," should be equally divided among all of his children, but they were "to possess the slaves upon the same

terms and conditions as is before mentioned respecting the lands lent to them."

The interest provided by the testator for his wife, in the residuary item of his will, was limited and temporary only, and ending with her life or widowhood. The record does not inform us at what time it ended. The testator could not have expected it to continue long. If she was the mother of the eleven children provided for by the will, she must have been quite an old woman at its date. We do not even know that she was living at his death, which seems not to have occurred until several years after the will was written. He could not have contemplated to embrace in this residuum, given for this temporary and immediate purpose, a subject which might at a remote day happen to revert to his estate by the unexpected effect of an executory limitation contained in his will. If it appears from the will, construed with reference to the surrounding circumstances, that he did not intend to embrace that subject in the residuum, then he died intestate as to that subject, and it devolved upon his next of kin at his death, who were his eleven children, of whom the testatrix of the appellant was one.

But if that subject is embraced in 11 the residuum, *what then? It is directed by the residuary clause to be equally divided among all of his children. Who were all of his children? All of the eleven before mentioned? or only such of them as might happen to be living at the period fixed for division? But when did that period arrive? Before or after the death of the testator? and if after, how long? All this was unknown to the testator when he made his will, and he could not have supposed that it would occur long after his death. He must therefore have used these words: "All of my children," in their plain literal sense, and intended to embrace all who were living at his death, and not to exclude the families of those who might die after the death of the testator and before the period of division, leaving children. The concluding words of the item, "but they are to possess the slaves upon the same terms and conditions," &c., cannot affect the question. If they could have any effect at all, had they been used in reference to the subject aforesaid, they were not so used, but only in reference to the slaves loaned to his wife for life or widowhood by the first item of the will.

But let us suppose that I am wrong in the opinion that the executory limitation aforesaid is void for remoteness. Suppose that it is valid. And now let us enquire who, on that supposition, was entitled, in the event which actually happened, to participate in the division of the said subject, under the words of the will directing it, in that event, "to be divided equally among all my children?" Who are the children here referred to? The children living at the testator's death, or the children that might be living at the uncertain future period of

division? And if the former, is Sally Stone to be considered as one of the children, *and is her personal representative entitled to participate in the division?

The court below decided and decreed that the death of the testator is the period to which the said words of his will refer. But that Sally Stone herself is not embraced in these words according to their proper construction in this case, and therefore that her personal representative is not entitled to participate in the division.

I think the court was right in the first branch of its decision, to wit: that the death of the testator is the period to which the said words of his will refer; but erred in the latter branch of it, to wit: that Sally Stone herself is not embraced in those words, and that her personal representative is not entitled to participate in the division.

The testator knew who were his children at the date of his will and at his death. Probably all he ever had were then still alive. He could not know who would be his children at a remote future period, which turned out in regard to the subject in controversy to be forty or fifty years after his death. He could not know how many of his children would then be dead, or what issue, if any, they might leave; and he could hardly have intended to cut off such issue from any participation in the future divisions contingently provided for by his will. When therefore he used the most comprehensive words which the English language would afford in describing the class of persons who were to take, and directed the subject to be divided equally "among all his children," the fair presumption is, that he intended to embrace as many as the words would embrace, and to include all who were alive at his death.

13 *This construction is fortified by the rules of law, by the words of the gift, and by the context of the will, and is not inconsistent with any of the surrounding circumstances of the case so far as appears from the record.

It is a rule of law, that an estate or interest given by a will generally vests as soon as it may, consistently with the words used in giving it. This general rule is subject to an exception when it appears from the context of the will and the surrounding circumstances that the intention of the testator, as expressed by the words of his will was otherwise. The words, we have seen, are as comprehensive as possible. We have no reason to believe they were not used in their literal sense. On the contrary, we have reason, as is already shown, for believing that they were in fact used in such sense. If they had not been intended to be so used, nothing was easier than to have expressed such intention. The words, "then living," added to the sixth item, would have clearly fixed the period of the division, instead of the death of the testator, as that at which the persons who were to constitute the class among which the division was to be made were to be ascer-

tained. The context of the will supports the construction referred to, even in regard to embracing Sally Stone herself, or her personal representative, as one of those among whom the division is directed to be made. We find that there are five clauses in the will in which the same language is used, or adopted by reference, in regard to such a division. The testator gives the same direction in regard to the property loaned to each of his five daughters. He could hardly have intended that the personal representative of each of these daughters might share in the division of the property loaned to each of the others but not in the

14 *division of that loaned to herself—as would be the case according to the construction adopted by the court below.

The principles of law involved in the foregoing views are so well settled, that it is hardly necessary to refer to cases in support of them, many of which were cited in the argument. There is much apparent conflict in the cases, but it will be found on examination to arise mainly from the peculiar circumstances of each case. All agree in this, that the intention of the testator, as shown by his will, must prevail if legal. And the question in each case is, what was such intention?

In 2 Jarm. on Wills, 53 marg., the writer, after stating the general principle that the testator's death is the period for ascertaining the persons belonging to a class of objects of his bounty, thus proceeds: "The same construction prevails, though the tenant for life, at whose death the distribution is to be made, is himself one of the next of kin," to whom the property is limited. "As, where a testator bequeathed £5,000 in trust for his daughter for life, and after her decease for her children, living at her decease, in such shares as she should appoint; and in case she should leave no child, then as to £1,000, part thereof, in trust for the executors, administrators and assigns of the daughter; and as to £4,000, the remainder, in trust for the person or persons who should be his heir or heirs at law. The daughter died without leaving children. She, and two other daughters, were the testator's heirs at law. Sir R. P. Arden, M. R., held the heirs, at the time of the testator's death, to be entitled, from the absence of expression, showing that these words were necessarily confined to another period, which, he said, required something very special."

15 *In 2 Redfield on Wills, edition of 1876, page 92, that writer says: "In the case of *Pearce v. Vincent*, 2 Mylne & K. 800, the tenant for life was also nearest of kin at the death of the testator, to whom the estate was, in the event of his decease without appointment, directed to go; and the court of exchequer, 1 Crompt. & Mees. 598, to whom the case was first sent for advice, were of opinion there was no inconsistency in supposing the testator might have intended the same person both for tenant for life and in remainder. But the

opinion was not satisfactory to the master of the rolls, and the case was sent to the common pleas, 2 Bing. N. C. 328, who concurred in opinion with the court of exchequer; and Lord Langdale, the master of the rolls at the period for the final determination of the case, concurred in opinion with the courts of law, and gave judgment accordingly. 2 Keen 230." In a note to the same page of the same work the writer says: "The case of *Urquhart v. Urquhart*, 13 Simons 613, holds the same view. The cases are here extensively reviewed by the vice chancellor, Sir L. Shadwell. And the same rule is adopted by the same learned judge in *Nicholson v. Wilson*, 14 Simons 549, upon the authority of *Masters v. Hooper*, 4 Br. C. C. 207, saying: 'The argument for the plaintiff in this case was founded entirely on conjecture; but conjecture does not authorize the court to depart from the plain meaning of the words which are found in the will. And the same rule substantially was applied in the case of *Seifforth v. Badham*, 9 Beav. R. 370, by Lord Langdale, M. R. And in *Baker v. Gibson*, 12 Beav. R. 101, the same learned judge considered the rule so fully settled in that decision, that he would not allow the bill to be amended with a view to open it anew.

So that the law in England is now 16 regarded as fully settled.'" *The writer then proceeds to criticise to some extent the course pursued by the English courts.

See also 2 Lomax on Executors, p. 47, and the cases cited in the notes.

Bird v. Luckie is a case which was referred to in the argument, as were most of the cases and books before referred to. It was a decision of Knight Bruce, V. C. (sitting for Wigram, V. C.) and reported in *The Jurist*, vol. 14, p. 1015. It is an exceedingly interesting case, very pertinent to the one now under consideration, and strongly sustaining the views I have before presented. But I will only repeat here the concluding words of the opinion: "Therefore I must read 'next of kin' as meaning next of kin at the testator's death—a conclusion at which I have arrived not very willingly, its effect being to take the bulk of his property from his family in a manner that it may be fairly conjectured he would himself be disposed to prevent if he could have a voice in the matter; but we are allowed to hear him only through his will and codicil."

Bullock v. Downes is another case which was referred to in the argument, and is more recent and still more important, as it was a decision of the House of Lords, in which the law-lords, or most of them, delivered seriatim opinions, and were unanimous. The case is reported in 9 House of Lords Cases, p. 1, and was decided in 1860. The case was this: A. D., after specific bequests to different members of his family, gave the residue to three persons in trust to pay the dividends to his son for life, and after the son's decease, to pay to any widow of the son (who was not then married) an

annuity of £600 for life, and the residue to his son's children, and in case there should not be any child of the son, "then to stand possessed of the same in trust for such person or persons of the blood of me as
17 *would by virtue of the statute of distributions of intestate's effects have become and been then entitled thereto in case I had died intestate." At A. D.'s death he left the son and four daughters him surviving. The son married, enjoyed the dividends of the residue during life, and died without ever having had a child. It was held that the word "then," even if treated as an adverb of time, referred only to the time when the persons entitled would come into possession of what had been bequeathed to them; that the persons entitled were to be ascertained at the death of the testator; that the son was one of those persons, and that his right, as one of the next of kin, was not affected by the previous gift of a life-interest in the whole of the residue, so that on the death of the son without issue the residue became divisible into five shares, of which his personal representative took one, and his sisters the other four. The opinions delivered in the case are very interesting, but I will not prolong this opinion by repeating any portion of them.

Abbott v. Bradstreet &c., 3 Allen 587, also cited by the counsel for the appellant, was decided in 1862, and is an important case to the same effect; but I will not state it more fully here.

Two cases were cited by the same counsel from our own reports, which strongly support the same principle. They are Hansford v. Elliott, 9 Leigh 79; and Martin, adm'r, v. Kirby, adm'r, & als., 11 Gratt. 67.

In Hansford v. Elliott, a testator, after bequeathing the residuum of his estate to his wife during life or widowhood, bequeathed that the whole of his personal estate, at the death of his wife, should be equally divided among his surviving children thereafter named, (naming five), and in case his wife should then be with child, that child should have an equal

18 part of his personal *estate with the rest of his children before named: Held, that the word surviving refers to the death of the testator, not that of tenant for life, and so children of testator who survived him, but did not survive tenant for life, took vested interests in remainder. Words of survivorship, in such cases, are always to be referred to the period of the testator's death, if no special intent appears to the contrary.

In Martin, adm'r &c. v. Kirby, adm'r &c. & als., it was held that in a devise or bequest over to survivors at the death of a devisee or legatee for life, in the absence of the expression of a particular intent on the part of the testator, the survivorship has relation to the death of the testator.

Upon the whole, I am of opinion that the words, "All my children," in the will of the testator. Caleb Stone, mean "all my children living at my death;" that the said

children of the testator, living at his death, including Sally Stone, or the survivors of them, and the personal representatives of such of them as are dead, including the personal representative of the said Sally Stone, are entitled to the funds in controversy, being the proceeds of the slaves loaned to her for life by her said father; that so much of the decrees appealed from, as is in conflict with the foregoing opinion, is erroneous and ought to be reversed and annulled; and that the cause ought to be remanded to the said circuit court, to be further proceeded in to a final decree in conformity with the said opinion.

Decree reversed.

19 *Grasswitt's Ass'nee, &c. v. Connally & als.

November Term, 1876, Richmond.

Partnership—Unrecorded Agreements between Partners.—R, J & G form a partnership for the manufacture of tobacco, and in their article of co-partnership they say, it is understood that G shall contribute for the purposes of the business such an amount of capital as he may be able to command, which, when contributed, is to be placed to his credit on the books of the concern, to be used only in conducting the business, and to bear interest of six per cent. per annum. * * And in order to protect G against any losses that may arise from the business, hereby pledge and assign to him all the present and future interest in the stock, machinery, fixtures and claims of the concern.

G put in \$4,200, the others put in nothing. The business proved unprofitable, and the firm failed, and the partnership was dissolved.

About the commencement of the partnership they bought machinery, &c., giving the notes of the firm, and a deed of trust upon the machinery, &c., to secure them, and on their failure the trustee sold, and after satisfying the trust there was a balance left. On a contest between the creditors of the partnership and G—HELD:

1. **Same—Same—Possession of Property—Partnership Creditors.**—The property never having passed to the separate possession of G, but remaining in the possession of the partnership, the unrecorded executory agreement aforesaid is fraudulent as to creditors of the firm without notice.
2. **Same—Negotiable Notes—Dissolution.**—About the time the firm failed, to secure G for his advances, they made a note payable to their own order for \$4,500, secured by deed of trust on the machinery, &c.; but the note was not endorsed or delivered to G. The note not having been endorsed or delivered to him by the other partners, though he took possession of it after the dissolution, G is not entitled to it. It creates no liability without negotiation, and neither G nor either of his partners could afterwards negotiate it; and consequently the deed made to secure it is a nullity.

20 *By an article of agreement bearing date the 21st of January 1870, J. B. Royster, M. W. Grasswitt and J. J. Royster formed a partnership for the manufacture of tobacco in the city of Richmond, under

the name and style of Royster & Grasswitt. This agreement is set out in the opinion of Judge Anderson.

At the time this agreement was entered into, the parties were negotiating with James Gunn, and had agreed with him to purchase his machinery, fixtures, &c., for the manufacture of tobacco, and they executed to him their notes, in the name of the firm, dated February 1st, 1870, to the amount of \$6,890, and also a deed of trust to Thomas H. Gunn upon the said fixtures to secure the purchase money.

In February, Grasswitt put \$2,100 into the concern, and in March he put in the like sum, making \$4,200. The Roysters put in nothing during the continuance of the partnership. And the business proving unprofitable, the partnership was, by mutual consent, dissolved in October 1871. A short time previous to the dissolution however, James B. Royster, who was the financial manager of the business, seems to have suggested to Grasswitt the necessity of the partnership's doing something to secure him the money he had advanced, and, after consulting counsel, a note for \$4,500 was made in the name of the partnership, payable to their own order, and the tobacco fixtures were conveyed in trust to secure it, and this conveyance was put upon record. The note, however, does not seem to have been endorsed by the partnership, and was kept by Royster in their own chest until it was taken possession of by Grasswitt, as Royster says without his knowledge or consent. After this note and deed was made, they wrote to their creditors saying they had done nothing which would compromise their interests.

21 *Soon after the partnership stopped business, Thomas H. Gunn, the trustee in the deed to secure James H. Gunn, sold the tobacco fixtures; and, after paying James Gunn the amount due him, there remained of the proceeds of the sale, after paying all expenses, the sum of \$1,149.19. This money, or a part of it, was claimed by Zenas B. Stearns, the owner of the building in which the business of the partnership was conducted, for rent, and by Grasswitt; and Thomas H. Gunn filed his bill, making Stearns, Grasswitt and the Roysters defendants, and asking the court to direct him in the disposition of it. In this case Connally & Co., of New York, asked leave to file their petition, in which they claimed to be large creditors of the partnership, and insisted that the fund in court should be applied to satisfy their debt. The cause came on to be heard in February 1872, when the court refused to permit the petition of Connally & Co. to be filed, and made a decree, directing that after the payment of the costs of the suit Stearns should be paid \$900 in satisfaction of his claim for rent; and then the balance of the fund should be paid over to Grasswitt, with any other property conveyed in the deed to Gunn which had not been sold; "it appearing from the pleading and evidence in the cause that said Grasswitt, as one of the said partners,

is entitled to said surplus (which appears to be a part of the partnership assets) by virtue of the article of co-partnership and an assignment subsequently made by said concern in pursuance of said co-partnership agreement.

Immediately upon the making of this decree, and before the money was paid over, Connally & Co. filed their bill in the chancery court of the city of Richmond in behalf of themselves and all the other creditors *of the partnership of Royster & Grasswitt, claiming that the fund in the hands of the trustee, Gunn, was assets of the partnership, and liable to pay the partnership debts; charging that the note for \$4,500, and the deed of trust to secure it, were fraudulent, and asking that the said fund might be so applied, and that Gunn might be enjoined from paying it over. The injunction was granted.

Grasswitt answered, denying that the note and deed were fraudulent, and insisting that they were intended by being put upon record to secure to him the benefit of the provision in his favor in the article of agreement in relation to the money he might advance for the partnership.

Pending the cause Grasswitt was adjudged a bankrupt, and his assignee was made a party. And the cause was referred to a commissioner, who was directed to report of what the assets of Royster & Grasswitt then consisted, and take an account of the debts due by them, and their priorities if any, and particularly whether the funds then in the hands of the receiver of the court (to whom by a former decree Gunn was directed to transfer them) were partnership assets or the individual property of Grasswitt; and if the assets of Royster & Grasswitt were insufficient to pay their debts, then to apportion them among the creditors.

The commissioner reported the amount in the hands of the receiver to be \$1,775.72, subject to the order of the court in the cause; and this embraced all the available assets of the firm, and was subject to the creditors of the concern, and was not the individual property of Grasswitt. He reported three debts of the firm, amounting to \$13,486.83, and apportioned the fund pro rata among them.

This report was recommitted to the 23 commissioner, *with instructions to take such further evidence as might be offered by any of the parties, and report upon the questions referred to him by the former decree. And the commissioner returned his report, in which he adhered to the opinion expressed by him in his first report. And to this report Grasswitt's assignee excepted. Because,

1st. It erroneously reports that the fund and the property from which it was derived was, at the commencement of this suit, partnership property of the late concern of Royster & Grasswitt.

2d. It reports that the assignment or pledge of the partnership property by the other two members of the firm, in the article

of partnership, did not create a separate and individual estate in Grasswitt in said property.

3d. It reports that from the evidence in the cause, the claim of Grasswitt, as to the note of \$4,500, and the deed of trust securing it, is not sustained.

4th. It fails to report among the debts of Royster & Grasswitt, entitled to share in the distribution of their assets, the claim of Grasswitt for \$4,200, advanced to said firm.

The cause came on to be finally heard on the 4th of March 1873, when the court made a decree overruling the exceptions to the report, and confirming it; and it appearing that the fund in court was \$1,952.89, it was distributed pro rata among the three creditors of the partnership reported by the commissioner. And thereupon Grasswitt and his assignee applied to a judge of this court for an appeal; which was allowed.

Cannon & Courtney, for the appellants.

Guy & Gilliam, for the appellees.

24 *Anderson, J., delivered the opinion of the court.

Joint creditors as such have no lien upon the partnership property. They have no equity to appropriate it to their debts. If they proceed against the firm to a judgment at law, they may levy an execution upon the partnership effects, or upon the separate property of the partners, and thus acquire a lien upon the partnership property and also the separate property of the copartners. Their remedy is a legal one, and until the statute authorizing creditors in certain cases to sue in equity before they obtain judgment, &c., they must exhaust their remedy at law before they are entitled to invoke the assistance of a court of equity, and can only reach the partnership effects before they have acquired a lien upon them through the equities of the copartners.

Each partner has an equity to have the social effects appropriated as far as necessary to the payment of the joint debts towards the discharge of his individual liability for them. He has consequently an equity to prevent their diversion from that object by his copartner to his separate use. But he may bona fide, and for a valuable consideration, transfer the partnership effects to his copartner. By so doing he relinquishes his aforesaid equity, and cannot afterwards insist that they shall be subjected to the payment of the joint debts. The joint creditors in this case seek to enforce the aforesaid equity of the copartners.

The appellant, Grasswitt, contends that his co-partners, the Roysters, relinquished this equity by a stipulation in the articles of copartnership, whereby his copartners transferred to him the partnership effects to be his property until he was repaid the money he advanced. And his claim is

25 to be repaid the money he *advanced out of the fund in question, which he claims as his separate property. The clause

in the articles of co-partnership, upon which this claim is founded, is as follows: "It is understood that the said M. W. Grasswitt shall contribute, for the purposes of the business, such an amount of capital as he may be able to command, which, when contributed, is to be placed to his credit on the books of the concern, to be used only in conducting the business, and to bear interest of six per cent. per annum. Should the said J. B. Royster and J. J. Royster (the other parties to the agreement), or either of them, make any contribution of capital, the same to be placed to their credit on the books of the concern, and to bear a like interest. But until they shall do so (this is the language relied on as making the transfer), and in order to protect the said Grasswitt against any losses that may arise from the business, hereby pledge and assign to him all their present and future interest in the stock, machinery, fixtures and claims of the concern; this assignment to be relieved and abated as the respective interests of the said J. B. Royster and J. J. Royster in the profits of the business will justify."

At the date of this agreement, the 21st of January 1870, the company had no effects. At least it was after that date that the purchase of tobacco fixtures was completed by giving notes and a deed of trust to secure their payment to James Gunn, from whom they were purchased, to wit: on the first of February 1870. But J. B. Royster testifies that the said purchase was contemplated about simultaneously with a verbal agreement to form the partnership. Subsequent to the purchase of the fixtures, &c., to wit: on the 23d of February 1870, Grasswitt 26 contributed or advanced \$2,100, and the same amount on the 5th of March following.

By the articles of co-partnership, the Roysters do not, in terms, undertake to repay or to refund to Grasswitt the money to be advanced by him. That does not seem to have been contemplated. On the contrary, when contributed, it was to be placed "to his credit on the books of the concern," to be used only in the business, and he was to receive six per cent. interest. And a like provision is made with regard to it, should the Roysters, or either of them, make a contribution to the capital. Nor do they pledge or assign the partnership effects then owned or to be acquired to secure the repayment of the same—that we have seen was not contemplated—but for the purpose of protecting said Grasswitt "against any losses that may arise from the business." And this pledge or assignment was to be abated or relieved (which seems, though not clearly expressed, to have been their meaning) accordingly as the Roysters may make contributions. If their contributions were equal to Grasswitt's, they were entitled to be relieved from the pledge or assignment; if not equal, then to an abatement from the pledge, in proportion to their contributions.

The partnership effects, shortly before the dissolution, were sold under the deed of trust to Gunn, and applied to the payment

of rents, &c., due from the co-partnary and to the debt due to James Gunn, from whom they were purchased, which left a balance of \$1,873.12, which, together with the interest thereon, is the fund in dispute. Grasswitt claims that he is entitled to it under the co-partnership agreement; and the joint creditors contend that it should be applied to the payment of their debts. Has Grasswitt the right to the conversion of this fund, under the agreement aforesaid,

27 *to his separate use? or, is it applicable to the payment of the joint debts?

The court is of opinion, that the unrecorded executory agreement between copartners, such as is hereinbefore described, pledging or assigning all the partnership effects, then owned or which should afterwards be acquired, to indemnify or save harmless one of the partners, who has advanced money to carry on the business, the property never having passed to the separate possession of the pledgee or assignee, but remaining in the uninterrupted possession of the co-partnary, is fraudulent in law as to creditors without notice. In this case the partners themselves seemed to have regarded their agreement as only binding inter se. The property was bought by the copartners, and was held and treated by them as copartnership property after the said agreement was made; and shortly before the dissolution was conveyed by them (including Grasswitt) in trust as partnership property; and in their correspondence with the joint creditors, they (including Grasswitt) gave assurance that they had done nothing which would compromise their interests; and never an intimation made that the partnership effects were held by one of the copartners in pledge, or by assignment for his indemnity; and the court is of opinion, that to give effect to said agreement now, so as to convert the fund in question to the separate use of Grasswitt, and to divert it from the payment of the joint debts, all the partners being insolvent, and there being no other partnership property, would be fraudulent as to the joint creditors. And although the Roysters may have no equity against Grasswitt, to require the application of the partnership effects to the payment of the joint debts, and the joint creditors, therefore,

can have no relief in equity through
28 their *equities, yet, under the statute, a court of equity will give aid to a creditor even before he has obtained a judgment or decree for his claim, to avoid an assignment or transfer of, or charge upon, the estate of his debtor, which he might institute after obtaining such judgment or decree. (Code of 1860, chap. 179, § 2, p. 736.) These creditors have, therefore, in this case, though not having obtained judgment, the right to seek relief in a court of equity.

The court is further of opinion that the appellants cannot maintain their claim under the deed of trust to Lottier to secure a note for \$4,500, made payable to their own order. Said note was never negotiated. It was never ordered to be paid to Grasswitt, or delivered to him. It came into his pos-

session without the consent of his copartners, and he is not entitled to it. The said note creates no liability without negotiation, and Grasswitt nor either of his copartners could now negotiate it; and consequently the deed made to secure it is a nullity. Upon the whole, the court is of opinion that the assignment of Grasswitt in bankruptcy does not invest his assignee with the fund in question as the separate property of Grasswitt, but that it is liable to the joint debts of the copartnership; and that the decree of the chancellor must be affirmed.

Decree affirmed.

29

*Reynolds v. Zink.

November Term, 1876, Richmond.

1. **County Courts—Power to Remove Executors from Office.**—Under the facts of this case, the county court, in which an executor qualified as such, was warranted, in the exercise of the power vested in it by the statute, in removing him from his office. See Code of 1860, ch. 182, § 11; Code of 1873, ch. 123, § 18, p. 949.

2. **Same—Discretion—Appellate Interference.**—There must, of necessity, be vested in the court a very large discretion; and while it is a legal discretion, to be exercised in a proper case, an appellate court ought not to interfere, except in a case where manifest injustice has been done, or where it is plain that a proper case has not been made for the exercise of the powers which the law has specially conferred on the court from which the fiduciary derives his authority.

The case is stated by Judge Christian in his opinion.

Tutwiler, for the appellant.

Pettit, for the appellee.

Christian, J., delivered the opinion of the court.

The record shows that the appellant, Thomas H. Reynolds, qualified as executor of Garland Reynolds, in the county court of Louisa on the 18th of December 1868. The said Garland Reynolds, by his will, devised his whole estate, after the payment of his debts, to his son, W. T. Reynolds, and his daughter, Catharine Zink, to be held by trustees, for his son and daughter respectively.

In the year 1871 the following notice
30 was issued by *Mrs. Zink, one of the beneficiaries under said will, who was entitled to one-half of the estate of the testator after the payment of his debts:

To Truman H. Reynolds, executor of Garland Reynolds, deceased:

Whereas, your brother, as assignee of

*County Courts—Discretionary Powers.—For the proposition that a county court is vested by statute with the power to remove a fiduciary from office, in its discretion, where there is a proper case, see *Snavely v. Harkrader*, 29 Gratt. 128; *Lance v. McCoy*, 34 W. Va. 420, 12 S. E. Rep. 723, both citing the principal case.

your father, has brought suit against you as executor as aforesaid, for large sums for debts alleged to be due from your said testator, and would have recovered judgment therein at the late term of the circuit court of Louisa, without any enquiry or proof, and without any defence by you, but for timely interference on my part and behalf, although you and your counsel had been warned that these debts were believed by me not to be well founded or justly due; and whereas, your relationship to the party or parties preferring these claims, and the character of these claims and of the defence which ought justly to be made against them, and your past conduct aforesaid in respect thereto, make it probable, if not certain, that the estate of your testator will suffer if its defence to those claims be left to you, and make it improper that said estate should remain under your control: Therefore, take notice that I shall move the county court of Louisa, on the first day of its June term, 1871, to make an order revoking and annulling your powers as executor aforesaid.

The notice was served on Reynolds, the executor, and on the 15th of August 1871, the parties having been heard, upon the motion of Mrs. Zink the court revoked the powers of Truman H. Reynolds, as executor of Garland Reynolds, deceased; and he thereupon took an appeal to the circuit court of the county.

On this appeal, taken to the circuit 31 court, the judgment *of the county court was affirmed; and to that judgment a writ of error was awarded by one of the judges of this court.

The court is of opinion that there is no error either in the judgment of the county court or of the circuit court.

The statute, Code of 1860, ch. 132, § 11, has wisely deposited with "the court, under the order of which any (such) fiduciary derives his authority," the right and duty to revoke and annul his powers "whenever from any cause it appears proper."

There must, of necessity, be vested in that court a very large discretion; and while it is a legal discretion, to be exercised in a proper case, an appellate court ought not to interfere, except in a case where manifest injustice has been done, or where it is plain that a proper case has not been made for the exercise of the powers which the legislature has specially conferred upon that court, from which the fiduciary derives his authority.

It cannot be said, upon the facts of the case before us, that the discretion of the county court was improperly exercised, or that its authority was unlawfully asserted.

The record shows that two suits had been brought against the estate of the testator by the brother of the executor upon claims purporting to have been due to the father of the executor, and to have been assigned by him to his brother. These claims would, if successfully asserted, have consumed the whole estate of the testator, and his devisees would not have received a dollar.

The executor failed and refused to defend these suits, and but for the persistent efforts of the appellee judgment would have gone by default. The executor, indeed,

32 *refused to make any defence until after the order for his removal had been entered by the county court, and an appeal taken to the circuit court. Pending that appeal, he reluctantly, and after persevering efforts on the part of the appellee's counsel, was induced to put in the plea of non est factum in the action of debt, and in that suit a jury found for the defendant on that plea. The peculiar relations of the executor towards the parties, and his whole conduct in the premises, might well warrant the county court in revoking the powers of the executor. At least it cannot be said that the discretion vested by law in the county court has been improperly exercised. That court having before it the parties and the witnesses, and having personal knowledge of their character and standing, made an order revoking and annulling the powers of the executor, and removing him from his office as executor. This judgment of the county court was affirmed by the circuit court on appeal. This court is not disposed to interfere with these two judgments.

The court is therefore of opinion that the judgment of the circuit court affirming the judgment of the county court must be affirmed by this court.

Judgment affirmed.

33

*Spilman v. Johnson.

November Term, 1876. Richmond.

1. **Bankruptcy Proceedings—Conclusive Against Party to, Except on Appeal.**—A creditor by judgment of a bankrupt, who proves his debt in the bankruptcy proceedings, and takes an active part in these proceedings, cannot afterwards go into a state court to subject property sold by the assignee of the bankrupt, and the proceeds distributed in that proceeding, to satisfy his judgment, on any ground of error which might have been corrected in the bankrupt court, or by appeal from the order or decree of that court.

2. **Same—Same—Courses Open to Creditor of Bankrupt.**—A creditor of a bankrupt having a lien on his real estate, has two courses open to him, either of which he may adopt. He may decline to appear in the bankrupt court; and he will be unaffected by any proceeding in that court; unless, indeed, the proper steps are taken to sell the estate clear of all incumbrances; or he may elect to proceed in the bankrupt court, prove his debt there, and rely upon his security.

***Bankruptcy—Right of Judgment Creditors of Bankrupt.**—The principal case is cited in *McAllister v. Bodkin*, 76 Va. 814, and in *Gibbs v. Logan*, 22 W. Va. 212, for the proposition that the judgment creditors of a bankrupt may proceed to enforce their liens in a state court, if proceedings have not already been commenced in the bankrupt court. See also, *Francisco v. Shelton*, 85 Va. 779, 8 S. E. Rep. 739; *McCance v. Taylor*, 10 Gratt. 580; *Tichenor v. Allen & als.*, 13 Gratt. 15.

3. Same—Same—Same—Election to Proceed in Bankrupt Court.—If the creditor elects to proceed in the bankrupt court, this is a waiver of his right to institute any suit or proceeding at law or in equity, which is in any way inconsistent with his election to obtain satisfaction of his debt under the bankruptcy proceedings.

This was a suit in equity in the circuit court of Henrico county, brought in June 1871, by Luther R. Spilman against Bradley T. Johnson, John Johns and others, to subject certain land called the "Granite Quarry," in the county of Henrico, purchased by Johnson at a public sale made by John Johns, assignee of Henry Exall, a bankrupt, to the lien of two judgments which had been recovered against said Exall,

34 some years before his bankruptcy, one of them *by B. W. Green and the other by Taylor & Son, and which had been assigned to Spilman. This cause came on to be heard on the 18th of June 1872, when the court made a decree dismissing the bill, with costs. And thereupon Spilman applied to this court for an appeal; which was allowed. The cause is stated by Judge Staples in his opinion.

Guy & Gilliam, for the appellant.

Royall, for the appellees.

Staples, J. It is claimed by the appellant that the property known as the "Granite Quarry," in the possession of the appellee, Johnson, was sold under a decree of the circuit court of the United States; that the suit in which that decree was rendered, was brought not for the purpose of procuring a sale, but merely to vacate as fraudulent the lease made to Turner Exall; that he, the appellant, was not a party to that suit; that he had no connection with it; and he received no part of the purchase money.

The exhibits filed fully sustain the appellant in these positions. And if this was the whole case, the lien of his judgments would still be in force, and he might properly invoke the jurisdiction of the state courts to enforce the same against the property in the possession of the appellee. But unfortunately for him this is not the whole case. There are other facts to be considered which conclusively show that the appellant has waived his right to assert this lien by any proceeding or suit in a state court. In order to understand this more clearly, it is proper to inquire into the proceedings in the bankrupt court. In October 1868 the assignee filed his petition in that court,

35 setting forth the real estate *belonging to Exall, the bankrupt, the number and amount of the liens thereon, the parties entitled to the same, and asking for a sale of the property, discharged of all the incumbrances. Several of the judgment creditors united in this petition. Among those so uniting were the creditors, under whom the appellant now claims. A decree of sale was accordingly made. Subsequently the assignee filed his bill in the circuit court of the United States to vacate the lease to

Turner Exall as fraudulent. A decree was entered vacating the lease, and directing a sale of the "Granite Quarry." The property was advertised accordingly; but the sale was enjoined by Armistead & Cary, creditors, claiming to have a lien upon it for money expended or advanced in developing the quarry. This injunction was awarded by the Hon. John C. Underwood, as judge of the district court, to whom the application was addressed. The decree of sale was set aside by him, and a rehearing of the cause directed at an adjourned term of the circuit court of the United States. Afterwards the same judge, sitting in the circuit court however, rendered a decree for the sale of the property, and under that decree the sale was made, at which the appellee became the purchaser. It would thus seem the various orders and decrees were uniformly entered by the same judge, presiding indifferently in the circuit court and in the district court. And although the assignee proposed to sell under a decree of the circuit court, he had at the same time the authority of the district court sitting in bankruptcy, conferred by the decree of the 12th October 1868, already adverted to. His reports of the sales were both returned to and filed in the latter court. These reports distinctly set forth the names of the several

36 purchasers, the amount of the purchase money, the *charges, costs, fees attending the sales, and the balance remaining in the hands of the assignee for distribution among the creditors.

It further appears that on motion of John P. Tabb, a preferred creditor, after the reports were so filed, an order was entered in the bankrupt court for an account of the liens upon the estate of the bankrupt and their respective priorities. The special commissioner, O. G. Kean, appointed for that purpose, notified the creditors that he would take the account on the 9th November 1870, and that to enable them to share in the distribution their liens must be asserted in the bankrupt suit. This notice was served on the appellant, and on the day indicated he, as assignee of B. W. Green, proved his debt as a secured creditor, claiming a lien on the real estate and upon the proceeds of sale in the hands of the assignee. The other judgment held by the appellant, as assignee of William Taylor & Sons, had been previously proved by the latter before the assignment was made.

Three months after this, in January 1871, the following order was entered: "It appearing from the report of the assignee in this cause that there is in his hands, after the payment of all expenses incurred by him in this suit, the sum of \$1,577.79, one-half of which was derived from the sale of the realty, and the other half from the sale of the personalty, it is ordered that John Johns, said assignee, do distribute said fund to the parties entitled to the same as ascertained by the report of O. G. Kean, special master, filed herein, respect being had to the priorities declared to exist among them by said report; that is to say \$788.89 to those hold-

ing liens upon the realty, and \$788.89 to those holding liens upon the personalty, after deducting the \$10 due to the laborers, and the \$36 to the United States, as a
37 *joint charge on the two funds and the register's fees." This order is signed by W. W. Forbes, register.

It was asserted in the argument, and it was not controverted, that it is the practice in the bankrupt courts for the register to enter orders for distribution of the assets where there is no controversy. If a party is dissatisfied with the ruling, an appeal is taken to the court for the correction of the errors. It is laid down in the books on Bankruptcy, that while the register is subject to the control and supervision of the court, it is, nevertheless, competent for him to convene the creditors, declare dividends and make distribution of the assets. Bump on Bankruptcy 64. However this may be, the order in question is proved to be in the handwriting of the appellant. The fair inference is that it was signed by the register at his suggestion. The language of the order plainly shows that the appellant was well acquainted with the reports made by the assignee. These reports showed that the granite quarry was sold under a decree of the circuit court, and not of the bankrupt court; that the greater part of the funds in the hands of the assignee was derived from the sale of that property to the appellee, General Johnson. With all this knowledge, the appellant prepares an order for its distribution among the lien creditors according to their priorities, he being an assignee of two of the judgments named in the report of the commissioner.

But this is not all. The papers of the bankrupt court show that the appellant contested the liens of four of the creditors; that he filed exceptions to the report of commissioner Kean; and that on the 24th of January 1871, he objected to the discharge of the assignee for various reasons, which were overruled by the register, and he took no appeal.

38 *It thus appears, that the appellant not only proved his debt and asserted his lien in the bankrupt court, but he actively participated as a party in the proceedings at every step of the adjudication. A creditor having a lien upon the estate of his bankrupt debtor has two courses open to him, either of which he may adopt. He may decline to appear in the bankrupt court, and he will, of course, be unaffected by any proceeding in that court, unless, indeed, the proper steps are taken to sell the estate clear of all encumbrances; or, the creditor may elect to proceed in the bankrupt court, prove his debt there, and rely upon his security. Should he adopt the latter course, it is an election to proceed in the bankrupt court, and a waiver of his right to institute any suit or proceeding at law or in equity which is in any way inconsistent with his election to obtain satisfaction of the debt under the bankruptcy proceedings. This principle is well settled. Bump on Bank-

ruptcy, page—, Wilson v. Capuro, 41 Calif. R. 345; Hoyt v. Freel, 8 Abb. Pr. N. S. 220; Haxtun v. Corse, 2 Bar. Ch. R. 506.

The only case cited for the appellant, as holding a contrary view is that of "Re Bland," decided by Jackson, J., and published in 3 Nat. Bank. Reg. 324. That was, however, a case arising in a bankrupt court, and the question was as to the mode of administering the assets in that court. Here the question is, whether a creditor having elected to assert his lien in a bankrupt court, having made himself a party to the proceedings in that court, can afterwards resort to a state tribunal to enforce his lien against the same property which was the subject of adjudication in the bankrupt court. According to the Virginia practice, a creditor may go into a court of equity to enforce his lien; other creditors having liens may come in by petition, or,
39 when "there is a decree for an account, they may prove before a commissioner. In either case they are considered parties to the suit, and are bound by the proceedings. Will it be maintained that a creditor thus coming in, proving his debt, excepting to commissioner's reports, contesting the liens of other creditors, and in every way identifying himself with the case, is at liberty to resort to another court for the assertion of the same lien against the property in the hands of a bona fide purchaser.

This principle applies very strongly to the district court of the United States, which, in matters of bankruptcy, has exclusive jurisdiction in adjudicating the rights of creditors, liquidating liens, settling conflicting claims to priority, and in distributing the assets of the bankrupt. If the creditor fails to realize here what is justly due him, it is not for the want of power in the bankrupt court to afford relief, but because of some error or mismanagement in the conduct of the cause, to be corrected by the court itself or some other tribunal having appellate jurisdiction over that court.

It is no doubt true that the appellant failed to receive any part of the fund. Whether he was rightfully excluded it is impossible for this court to undertake to decide. The report of commissioner Kean, to which appellant excepted, shows there were liens prior to those of the appellant, amounting to fifteen or eighteen hundred dollars, probably more than sufficient to absorb the entire fund. The result would perhaps have been different if appellant's exceptions had been sustained. If any error was committed to the prejudice of the judgment creditors of the bankrupt, it was in the decree sustaining the claim of Armistead & Cary. This claim was strongly contested by the assignee, but was approved by a judge of
40 the district court, and allowed "by a judge of the circuit court. With the lights before us how can we review this decision? By what authority can we pass upon it at all. All that can be said is, if

the claim was just and valid, the appellant is not prejudiced, and under no state of circumstances could he ever have realized any part of his judgments. The reason is, that this claim and the prior judgments would have left nothing for the satisfaction of the appellant's judgments. On the other hand, if the claim of Armistead & Cary was not just, if the decrees allowing it are erroneous, the remedy, if any, was by application to the bankrupt court to interfere, or by appeal to the proper appellate court to correct its error. The decision of Chief Justice Wait in *Re Taliaferro*, cited by the appellant, is authority for this proposition. That was an appeal to the circuit court from erroneous orders and decrees of the bankrupt court, and plainly indicates the course the appellant ought to have pursued in this case.

If the appellant is not bound by the proceedings in the bankrupt court, neither are the other creditors. If he may institute a separate suit, so may each one of them. But this will scarcely be claimed. In any event, all the creditors having liens ought to be before the court, in order that all conflicting claims and questions of priority may be settled in one suit, and the purchaser quieted in his possession and title. If William Sutton & Co., and Armistead & Cary were justly entitled to priority over the appellant, the appellee, whose money paid those debts, ought to have credit for the amount. He is clearly entitled to be subrogated to the rights of those creditors. In effect this court, or the court below, must re-open the proceedings in bankruptcy,

revise the decisions of that court, and

41 *proceed to administer the assets of the bankrupt. The statement of the proposition is its own refutation.

There is nothing in the record before us casting the least suspicion of unfairness upon the appellee. He appears to have been a bona fide purchaser at a public sale. He complied with all the terms by paying the several instalments of the purchase money. If the property was sold at a sacrifice, there is nothing to show it. If the proceeds of sale were misapplied, there is nothing to connect the appellee with it. It was said in the argument, although no issue of the kind is made in the pleadings, that the appellee was the attorney of the assignee, and as such he was incapable of purchasing at a sale made by the assignee. If there is anything in the objection, it ought to have been made in the bankrupt court; and not in this collateral way in another court. That question has been effectually settled by repeated adjudications of this court. See *Cline v. Catron*, 22 Gratt. 378, where the authorities are cited.

Upon the whole, for the reasons stated, I am of opinion the decree of the circuit court is correct, and must be affirmed.

The other judges concurred in the opinion of Staples, J.

Decree affirmed.

42

*Lacy v. Stamper & als.

Crump v. Stamper & als.

January Term, 1876, Richmond.

Absent, CHRISTIAN, J.*

1. **Personal Representatives — Liability for Negligence.**—S, of New Kent county, died in 1856, and H qualified as his executor and received as a part of his estate bonds executed without security to S, the obligors being then solvent. H did not collect the money due on these bonds; and on his death in 1862, they were turned over by his administrator to C, who had qualified as administrator *de bonis non* of S, the obligors still being solvent. C sued on the bonds, but owing to the state of things in the county during the war judgments could not be recovered upon them, and by the results of the war the obligors became insolvent. **Held:**

1. **Same—Liability of Successive Personal Representatives.**—Where there are several successive administrations upon the same estate, and debts due to the estate might have been collected by each of the personal representatives of said estate, by the use of due and reasonable diligence, but was collected by none of them, and was lost by the negligence of each and all of them; whilst all of them are liable for said debts, their relative liability is in the inverse order of their qualifications as such personal representatives.

2. **Same—Same—Laches of First.**—H might have collected these debts, and his estate and his sureties are responsible for the loss of them.

3. **Same — Same—Due Diligence of Second.**—C having used due diligence to collect them after they came into his hands, and having failed to collect them owing to the condition of the county, is not responsible for them.

4. **Same—When Not Liable.**—Though where an estate is to be invested to await a distribution

43 *at a distant day, a bond executed to the testator well secured on real estate, or even secured by undoubted personal security, may be continued as an investment by the personal representative, this cannot be done with a bond without security either real or personal; especially where there is a large amount of interest due upon it at the death of the testator.

5. **Same—Same—Liability of Sureties.**—Under the circumstances of this case the legatees of S were not bound to proceed against the heirs of H before they could have a decree against his sureties; and one decree against the administrator of H and his sureties that they should pay the amount found due from H to S's estate, into bank to the credit of the cause is not erroneous.

6. **Same—Same—War Interest.**—Under the circum-

*JUDGE CHRISTIAN had made a decree in the cause in the circuit court, though not the one from which the appeal was taken.

†**Personal Representatives—Liability of Sureties.**—The principal case is cited in *Horton v. Bond*, 28 Gratt. 826, and also in *Barnes v. Trafton*, 80 Va. 534, for the statement that, under certain circumstances, the sureties on the bond of a personal representative, may be sued for the liabilities of their principal, before the remedy against the latter's heirs and personal representatives has been exhausted.

‡**Liability of Fiduciaries for "War Interest."**—See

stances interest disallowed from the 17th of April 1861 to April 10th, 1865.

7. *Same—Same—Effect of War.*—An administrator who qualified as such in New Kent county in 1862, not held liable for failing to sue in that county during the war, in cases in which he knew there would be defences, there having been but one court held in the county during the war, and the enemy either encamping or passing through it constantly.

James Stamper, late of the county of New Kent, died in the year 1856, leaving a widow and four children, three of whom were infants. He left a will, which was admitted to probate in the county court of New Kent at its October term 1856, and Robert Howle qualified as his executor. By his will the testator left to his wife for her life all his property, to be applied to the support of herself and his children; and at her death the property left her was to be divided among his children. There were other provisions which it is not necessary to state.

Robert Howle, the executor, died early in 1862, and in April of that year William P. Richardson qualified as his administrator. And in December 1862 Leonard C. Crump qualified as administrator *de bonis non* with the will annexed of James Stamper; and he continued in office until 1866, when
44 upon the motion of his sureties *he was removed, and the unadministered estate of Stamper was committed to H. D. Vaiden, the sheriff of the county.

Stamper's estate seems to have consisted of a tract of land on which he lived, personal property on the land, slaves, and a number of bonds upon individuals.

In 1863 Mrs. Stamper, for herself and as next friend of her three infant children, filed her bill in the circuit court of New Kent, against Howle's administrator, Crump, and others to have a settlement of Howle's and Crump's accounts; but New Kent being in the route of the Union armies, all the records of the courts of the county were sent to Richmond for safe-keeping, and they were consumed in the fire which occurred in that city on the 3d of April 1865. In the year 1866 she filed this bill in her own right, and as next friend of her three infant children, against Richardson as the administrator of Howle, Richmond T. Lacy, and five others, as the sureties of Howle in his bond as executor, Vaiden and Crump and his sureties, in which, after setting out the facts, she asked for a settlement of the accounts of Howle, Crump and Vaiden, as representatives of Stamper, and for payment of what should be found due. In the progress of the cause she amended her bill, and made Howle's heirs parties.

Lacy answered the bill. He says he transacted business with Robert Howle, as executor of Stamper, but he had no knowledge or recollection of having executed a

citation of principal case in *Brent v. Clevinger*, 78 Va. 14, and especially, see general note on "Interest," appended to *Fred v. Dixon*, 27 Gratt. 541.

bond as security of said Howle, as executor of the will of James Stamper, deceased, and calls for strict legal evidence of the fact.

Crump and Richardson also answered, and Crump insisted very earnestly that he faithfully performed his duties as administrator, &c., of Stamper. It is not

45 *necessary, however, to set out the averments of the answers.

The case was referred to commissioner Barham to settle the accounts, and report upon several questions referred to him.

The commissioner returned his report in November 1867; to which the defendants filed fifty-six exceptions.

The cause came on to be heard the 20th of April 1871, when the court passed upon all the exceptions, overruling some of them, sustaining others, and leaving some open for further enquiry; and recommitted the report to the commissioner, with directions to reform the report and make certain enquiries, and among them, whether Richmond T. Lacy was one of the sureties in Howle's executorial bond.

In August 1871 the commissioner returned his report. He made several statements of the indebtedness of Howle to Stamper's estate, and two of the indebtedness of Crump. By that which was adopted by the court, Howle was indebted of principal \$6,023.32, and of interest \$6,792.27; but Howle had paid to Mrs. Stamper \$2,831, which was not credited in that statement, but which was allowed by the decree, leaving \$3,961.27 of interest up to December 31st, 1870. The amount so charged to Howle was made up in part of three bonds: one of John D. Christian, of principal \$2,307.99, of interest \$1,657.03; one of John D. and Bat. D. Christian, of principal \$397.04, of interest \$62.68; and one of Wm. C. Talley, deducting offsets, \$329.90; making together of principal \$3,034.93, and of interest \$1,719.71. These bonds constituted a part of the estate of Stamper, which went into the hands of Howle upon his qualification as executor, and not having been collected by him, were, with others, delivered to Crump when

46 he qualified as administrator **de bonis non* with the will annexed of Stamper. The proof was clear that the parties were entirely solvent when the bonds were received by Howle, and when they were delivered to Crump; but they afterwards failed, and the debts were lost. To this charge the administrator and sureties of Howle excepted. The facts bearing on the question of their liability are stated by Judge Moncure in his opinion.

In the account of Crump, the whole balance reported against him was made up of the amount of two bonds, which had been in the hands of Howle, and on his death were turned over to Crump. This balance was of principal \$630.47, and interest to the 31st of December 1870, \$858.76. To the charge of these bonds Crump excepted. The facts in relation to them are also stated by Judge Moncure in his opinion.

There were some other questions on the

accounts noticed in the opinion of the court; but they are mere matters of fact.

The commissioner reported, that the only evidence as to who were the sureties of Robert Howle in his official bond, as executor of Stamper, was furnished by two exhibits, B and H, from which it appears that R. T. Lacy was one of his securities in that bond. For these exhibits see the opinion.

The cause came on to be heard on the 18th of April 1872, when the court decreed that Richardson, administrator of Howle, out of the assets of his intestate in his hands, R. T. Lacy, and the other sureties of Howle, do deposit in the State Bank of Virginia at Richmond, to the credit of this cause, and subject to the order of this court, the sum of \$9,984.59, with legal interest on \$6,023.32, from the 31st of December 1870, until so deposited. And further decreed that Crump

should deposit in like manner in said bank the sum of \$1,489.16, with legal interest on \$630.40 from the same date. From this decree Lacy and Crump applied separately for appeals; which were allowed.

Courtney, Jones, Crump and Lacy, for the appellants.

Meredith, for the appellees.

Moncure, P., delivered the opinion of the court.

We will first consider the case of Lacy v. Stamper, &c. There are five assignments of error in the petition of appeal in that case, which we will notice in their order.

1. The first assignment of error is: "because the securities of Howle, as the administrator of Stamper, are charged with a liability of more than \$6,000, the amount of Christian's and Talley's bonds, although it was shown that those bonds were not lost by Howle's neglect, but were good and available, not only at the death of Howle, but when they were subsequently turned over by his representative to Crump, the administrator de bonis non of Stamper."

As a general rule, it is the duty of a personal representative to collect all debts due to the estate he represents, which can be collected, and to use due and reasonable diligence in making such collection; and if any such debt be lost by not being collected, he and his sureties are liable therefor, if he might have collected it by the use of due and reasonable diligence. This general rule has not been, and cannot be denied, and it is unnecessary to refer to authority to sustain it.

It is not pretended that the estate of Howle, or his sureties, as executor of Stamper, have been charged in this case with a single debt due to the said testator at his death, which was not then per-

fectly solvent, and *which might not have been collected by the executor, Howle, by the use of due and reasonable diligence. If, therefore, the general rule before stated be applicable to the case, it follows that the estate and sureties of Howle

are liable for all the debts of said testator so charged to them.

But it is contended in their behalf, that while the debts referred to in the exception were solvent at the death of Stamper, and might have been collected by his executor, Howle, whose estate and sureties are therefore liable for them, yet they were also solvent when L. C. Crump became administrator de bonis non with the will annexed of Stamper, and they came to the hands of said Crump as such administrator, whose duty it was to collect them, and who might have collected them by the use of due and reasonable diligence; that said Crump is therefore also liable for them; and that his liability is prior and paramount to that of the liability of the estate and sureties of Howle.

It is no doubt true, as a legal proposition, that where there are several successive administrations upon the same estate, and debts due to the estate might have been collected by each of the personal representatives of said estate, by the use of due and reasonable diligence, but were collected by none of them, and were lost by the negligence of each and all of them; while all of them are liable for said debts, their relative liability is in the inverse order of their qualifications as such personal representatives.

It would follow, therefore, if the facts were as contended for in behalf of the estate and sureties of Howle; and the debts referred to in the exception might have been collected by the use of due and reasonable

diligence by Crump, as administrator de bonis non with the will annexed of Stamper, he and his sureties would be liable for said debts prior to, and in exoneration of, the estate and sureties of Howle.

The question then is, whether the fact be as thus contended for.

The liability of Howle's estate and sureties for these debts is very clear. If they were good and solvent debts when Crump qualified, they were certainly good and solvent debts when Howle qualified as personal representative of Stamper. And for four or five years after the qualification of Howle, there was profound peace throughout the land; the courts of the county were in full operation; there were no stay-laws in force; and there was no obstruction of any kind to the administration of justice in the state. And yet no action was ever brought by Howle for the recovery of any of these debts.

To relieve Howle's estate and sureties from this clear liability for said debts, by fixing a liability therefor on the subsequent personal representative Crump, the evidence on which the latter liability must depend, ought, certainly, to be very strong.

Crump was very prompt in the institution of suits for the recovery of said debts. He certainly brought them in due time. Did he prosecute them with due diligence?

In ordinary time of peace he might, and no doubt would, have obtained judgments for the said debts much sooner than he did; and probably might, and would, have collected

all or most of them. But he instituted the suits in the midst of the war, which was actively prosecuted for more than two years thereafter. During almost the whole of that period, the county of New Kent, in which the suits were brought, was in the hands of the public enemy, or daily liable to

50 hostile *raids; and sessions of courts in the county were prevented. The records of the courts were removed to Richmond for preservation, and were afterwards destroyed there by the great fire of the 3d of April 1865. After the war, there were still many, and great, difficulties attending the prosecution of suits and the recovery of debts, growing out of stay-laws and other obstructions thrown in the way of suitors.

We cannot therefore say, that according to the evidence afforded by the record, the said Crump did not use due and reasonable diligence to collect the said debts; and certainly we cannot say that the said evidence is sufficient to relieve Howle's estate and sureties from the clear liability for said debts, by fixing a liability therefor on Crump.

It seems to be supposed, however, by the counsel for the appellant, that the general rule before stated is not applicable to this case, and that it was not the duty of Howle to collect the said debts, but as the estate was not to be distributed at once among the legatees, but invested and held for the use of the widow and children during her life or widowhood, it was the duty of the executor, instead of collecting the debts and reinvesting the amount, to consider the said debts as investments already made by the testator for the purposes of his will, and to let them stand accordingly.

We do not mean to say that there may not be cases in which an executor, instead of collecting a debt and investing the amount for the purposes of the will, might not very properly let it stand as an investment already made for said purposes. As for example, if in this case a debt had been well secured on real estate, the executor might well have permitted it to stand as an investment already made of so much of the estate.

And even if it had been secured by 51 personal security *only, provided the security was undoubted, he might have been warranted in not collecting the debt by letting it stand as an investment already made.

But the debts due to the testator at the time of his death in this case were certainly none of them, except as will be hereinafter mentioned, such as might properly have been adopted and continued by the executor Howle, as investments already made for the purposes of his said testator's will. They were none of them secured on real estate, and for very few of them was there even any personal security. For the far largest of the debts, that of John D. Christian, the principal of which was \$2,307.99, and interest to the 31st of December 1857 was \$1,657.03, there was no security whatever, either real or personal. Surely the executor would not have been justifiable in letting that debt

stand uncollected, and adopting it as an investment already made of so much of the testator's estate for the permanent purposes of the will. The rest of the debts due to the estate were very numerous, and were comparatively small in amount, and there was no security of any kind for scarcely any of them. Certainly none of them, except as aforesaid, would have been suitable as permanent investments under the will. None of them were regarded as permanent investments by the testator, nor by the executor, nor was the said debt of John D. Christian. Besides the fact that they were unsecured, is the fact that a large amount of interest was permitted to accumulate upon them, both by the testator and by the executor, which facts are inconsistent with the idea that they were intended or considered as permanent investments, either by the testator or the executor.

There was certainly nothing in the state of the currency before the war to make 52 it improper or difficult *to collect the debts, and there was then ample time to collect them, and the money might then have been safely and permanently invested on real and personal security. It was the plain duty of the executor to pursue that course. He was acting not for himself but for the widow and infant children of his testator, who were incapable of acting for themselves. The law empowered and required him to act for them, and instructed him as to his duties. It will not do to say that if he had collected the money he would probably have held it until after the war, when it might have been converted into Confederate money and Confederate bonds, and ultimately have perished. It could have gone through that process only by the default and the breach of trust of the executor, who cannot therefore defend himself on that ground.

We are therefore of opinion, that the estate and sureties of Howle, are properly chargeable with the bonds referred to in the first assignment of error, and that the Circuit court did not err in regard to the matter of that assignment.

2. The next assignment of error is, that the court decreed against the appellant Lacy as one of the sureties of Howle as executor of Stamper, when he denied in his answer, all knowledge of having ever signed the bond as surety for Howle, and called for proof of the fact, and it was not proved.

The record of the courts of New Kent county, including the original bond of Howle as executor of Stamper seem to have been destroyed by fire; and therefore it could not be proved by primary evidence, to wit: the production of the bond, who were the sureties of the executor, and that R. T. Lacy was one of them. But we think that fact is conclusively proved by secondary and circumstantial evidence. Exhibit B

53 *filed with the bill, is an official copy made December 20th 1869, of an official copy of an order of New Kent County court made November 18th 1856, stating that "Robert Howle, one of the executors

named in the last will and testament of James Stamper dec'd, appeared in court, and qualified thereto, and together with John D. Christian, Ira L. Bowles, John G. Crump, R. T. Lacy, Wm. C. Talley and Bat. D. Christian his sureties, who justified as to their sufficiency, entered into and acknowledged a bond in the penalty of \$40,000, conditioned according to law, which bond is ordered to be recorded. And liberty is reserved Bat. D. Christian, the other executor, to qualify when he shall think fit."

Exhibit X filed with the answer of Wms. P. Richardson, is an official extract, made September 9th 1871, from the record of the list of fiduciaries in New Kent County court, which shows that R. T. Lacy was one of the sureties of the said executor.

Commissioner Barham having been required to ascertain and report whether the defendant R. T. Lacy was one of the securities of Robert Howle as aforesaid, accordingly reported the two exhibits aforesaid as the only evidence which was before him on the subject, and that it appeared from said evidence that said Lacy was one of the said securities. It does not appear that there was any exception to the said report in that respect.

There is nothing in the record to repel or weaken the effect of the evidence aforesaid; nothing tending to show that the defendant Lacy was not one of the securities; or that there was any other person of the same name in the county, who might have been such security instead of the defendant Lacy.

This litigation has been long pending, 54 and the amplest opportunity, *and the strongest inducement have existed for introducing countervailing testimony, if any had existed; and yet none has ever been offered.

We conclude, therefore, that the Circuit court did not err in regard to the matter of the second assignment of error.

3. The next assignment of error is, that "the decree is, upon its face, palpably erroneous, in that it decreed, in the first instance and uno flatu, against the administrator of Howle, and the securities of Howle, not only without an effort to make the balance appearing to be due from Howle, before resort should be made to the securities but actually refusing at the same time, to direct a sale of Howle's estate to pay the debt, and without ordering any account of Howle's estate by his executor."

Formerly it was determined in several cases, that before an action at law could be maintained against the sureties in the bond of an executor or administrator, there must be, not only a suit against the executor or administrator as such to establish the amount of the debt due from the testator or intestate, but there must be a second action against the executor or administrator personally, suggesting a devastavit, and a verdict and judgment rendered therein for the plaintiff. In consequence of these decisions, an act was passed authorizing a suit to be brought against the executor or administrator and his sureties, or either of

them, upon their official bond, upon the return of nulla bona on the judgment against the executor or administrator as such, and without the necessity of any judgment in or action suggesting a devastavit. See 1 Rob. old Pr. pp. 55-57 in which the former law is thus laid down, the said act is set out, and the decisions aforesaid are referred to.

55 *But a suit in equity might always have been, as it now may be, brought by creditors or legatees against the executor or administrator and his sureties, for a discovery and account of assets, and for payment of debts and legacies; in which suit, there might always have been, as there now may be, a decree against the sureties. See 2 Rob. old Pr. pp. 78, and 112. and the cases there cited.

While, however, a court of law, in a proper case for an action in that court, will give a joint judgment against the executor or administrator and his sureties, on which a joint execution will issue, a court of equity will proceed according to its own peculiar principles of administering justice, and generally lay the burden first upon the principal, and subject the sureties only in the event that the decree against the principal is unavailing. In Dabney's adm'r & al. v. Smith's legatees, 5 Leigh 13, Tucker P., in an opinion concurred in by the other judges, Cabell and Carr, who sat with him in the case, said: "Such, I take it, is without question, the practice of the court, where such a measure can be adopted 'without any material delay or injury to the creditor;' 2 Rand. 400. And, if Buller Claiborne and Isham Dabney (the sheriff to whom an estate was committed for administration, and the deputy who actually administered it—the suit being brought by legatees of the decedent) had been alive at the date of the decree, it ought to have been entered against them, in the first instance. However, they being dead, it was entered very properly against their estates in the hands of their personal representatives; and on this decree a fieri facias has been returned, nulla bona testatoris. But it is contended, that the plaintiffs should then have proceeded to have the accounts of the administrators of Claiborne and Dabney *settled, in order to a decree against them personally, if a devastavit should be established. I think not. This would indeed be to impose too onerous terms on the creditor. He ought not to be delayed in his recovery until he has pursued the personal representatives of the principal to the utmost limit of litigation. The surety must be content with his right of subrogation, and take upon himself that pursuit, as the consequence of his having become sponsor for the principal. For a like reason I do not think there was any obligation on the creditor to pursue the heirs of Buller Claiborne," &c.

56 We think the principle of that case applies to and governs this, and that according to that principle there was no error in the decree which was made for the payment into bank of the balance due by the representatives and sureties of Howle, as executor of

Stamper. Howle had long been dead when the suit was brought, and there could therefore be no execution against the assets of the testator in his hands. There could properly be none, and were not in fact any in the hands of his personal representative Richardson after his death, after which the assets of Stamper, left unadministered by Howle at his death, legally vested in Crump as administrator de bonis non with the will annexed of Stamper. The case of Dabney's adm'or v. Smith's legatees, is an express authority to show that before rendering a decree against the sureties of Howle there was no necessity for any further proceedings than were had in the case to establish a devastavit by him of the estate of his testator Stamper, and to fix a liability therefor on any estate of his, for which his administrator, Richardson, may be accountable.

The case of Aylett's ex'or v. King &c., 11 Leigh 486, *is not in conflict with the case of Dabney's adm'or &c. v. Smith's legatees, and certainly was not intended so to be.

In Aylett's ex'or v. King &c., Judge Allen distinguishes that case from Dabney's adm'or &c. v. Smith's legatees, the correctness of which he does not question; and Tucker, P., reaffirms much of what was said by him in that case, and says that upon a review of the case he thinks it was properly decided; and he then proceeds to distinguish the two cases, and concurs in the decision which was made in Aylett's ex'or v. King &c. Roberts v. Colvin, 3 Gratt. 358, was certainly not intended, and cannot have the effect of overruling Dabney's adm'or &c. v. Smith's legatees. It takes no notice of that case, is very brief, and was intended no doubt to rest on its own peculiar circumstances.

In the case now under consideration the testator died in 1856, and his estate has since been in the hands of three successive personal representatives. His principal and residuary legatees being his widow and three infant children, have, it seems, been most, or much of the time since, in extreme want and destitution, and been trying to recover what is due to them under the will, but thus far with little or no success, although it is manifest that a very large amount is due to them. They brought their first suit to recover it some time in 1863, and prosecuted the suit until the papers therein were destroyed by fire at the close of the war in April 1865. They brought this suit as soon as they could do so after the war, and during the next year 1866, and seem to have actively prosecuted it ever since. There have been many decrees for accounts, and many reports made under such decrees, and many exceptions taken to such reports, and many decisions made upon said exceptions, until the decree

58 *was made in 1872, from which this appeal was obtained. By that decree, the amounts due to the plaintiffs from the different personal representatives of the testator were ascertained, and the said amounts were directed to be paid into bank by par-

ties respectively liable therefor. And it is objected in this court, that before there should have been any such decree against the sureties of Howle as executor of Stamper, there should have been further proceedings and further litigation in the court below, to fix some liability for a devastavit on the personal representatives of Howle, and on the real estate of Howle, as being primarily liable for the said amounts. Surely there could not be a stronger case than this for the application of much of what was said by Tucker, P., in the two cases before referred to. To send these plaintiffs back to the court below, to engage in renewed litigation under the circumstances, "would, indeed, be to impose too onerous terms on" them. They ought not to be delayed in their recovery until they have "pursued the personal representatives of the principal to the utmost limit of litigation. The surety must be content with his right of subrogation, and take upon himself that pursuit as the consequence of his having become sponsor for the principal." It was expressly held in that case that it was not necessary to pursue the heirs of the personal representative in exoneration of his sureties, and that the latter may properly be turned over to their right of subrogation in regard to the said heirs. We do not mean to decide that in no case will a creditor or legatee be compelled to exhaust his remedy against the personal representative and heirs of the executor before resorting to the sureties, or to lay down any general rule on the subject, but merely to say that there are cases in which he will not be so required (as authorities 59 *before cited plainly show), and this is one of them.

But in this case the decree appealed from was not final, but merely interlocutory. The case is still pending in the court below, where perfect justice can yet be done; either at the suit of the plaintiffs, or by subrogation at the suit of the sureties, who may file their cross-bill, if necessary, and obtain, in that or some other way, all the relief to which they are entitled. After what has been done, and the length of time employed, and labor and money expended, in litigation; and after ascertaining what was unquestionably due by the representatives and sureties of Howle as executor of Stamper to the plaintiff, it was meet and right that there should be a decree for that amount, and for its payment into bank, by parties undoubtedly liable therefor; leaving ulterior liabilities over, if any, to be adjusted between the parties inter se, as may be equitable. It was not expected or intended, that each of the parties decreed against would pay into bank the whole amount of the decree. The chief object of the decree was to ascertain and settle the amount due to the plaintiffs. No execution can issue on the decree without further order; certainly there cannot be a joint execution against the said personal representatives and sureties. The decree against the former is de bonis testatoris, that against the latter de bonis propriis. All or any of both classes, or either, have a right to make pay-

ment into bank, and thus relieve themselves from liability, and after doing so to assert any liability over to them to which they may be entitled. Beyond all question, the estate of the principal debtor, if any, will be sufficient to pay but a small portion comparatively, of what is due to the plaintiffs. The larger portion of it—perhaps at least four-fifths—will have to be paid by the sureties, ultimately if not directly:

60 *and yet they do not offer to pay a dollar into bank, but appeal from the whole decree. If they had made a reasonable payment into bank, there can be no question but that the plaintiffs would have been willing to wait for the balance until an opportunity was afforded the sureties to proceed against parties supposed to be primarily liable; or the court would, even without such consent, have afforded such opportunity. The sureties, to the extent of any payment they may make in discharge of their liability, will of course be entitled to be subrogated to the rights of the plaintiffs, against those who are primarily liable; and even before making such payment, they are entitled, by a proceeding quia timet, to compel those parties to account for and pay any money for which they may be liable, in exoneration of the sureties. In fact, so far as parties and subjects primarily liable for the claim are concerned, the sureties have heretofore, in effect, been coplaintiffs with the legatees in the prosecution of this suit, and will no doubt hereafter continue to be so, until the object of the suit shall have been, as far as possible, fully attained.

We are therefore of opinion that the Circuit court did not err in regard to the matter of the third assignment of error.

4. The next assignment of error is, that the decree is against that party for the whole amount, without any provision that if it be paid by one it shall not be paid by the other.

This has already perhaps been sufficiently answered. All that was necessary to be done to satisfy the decree was the payment of the amount into bank, which could be done by all, or any, or either of the parties directed to make such payment. When that was done by any, or either, it

61 was done as to all, so far as the *plaintiffs were concerned, although the parties or party making such payment might have recourse over against other parties. We think the court did not err in omitting to make such a provision as is referred to in this assignment of error.

5. The next and last assignment of error in the petition is, that no refunding bond is required.

The decree was interlocutory and not final. The money was not decreed to be paid to the legatees but into bank, where it will be still liable to creditors, and more accessible to them than it would be in the hands of the debtors. Such provision as may be proper in regard to refunding bonds may be made by decree in the cause hereafter.

But besides the assignment of error con-

tained in the petition, other objections were made to the decree in the brief and argument of the counsel of the appellant Lacy, which objections will now be noticed:

1. The first of these objections is, that Howle paid \$186.97 to Pollard & Frayser for necessities for Mrs. Stamper and her children, and \$62.50 for repairs to a mill on her account, which payments ought to have been allowed, but were disallowed by the commissioner as credits to Howle in the settlements of his account as executor of Stamper.

As to the item of \$62.50, it appears that it has already in fact been allowed to the said Howle as a credit in his account. It constitutes an item in the account of Howle against Mrs. Stamper, marked F, and referred to in the answer of Wms. P. Richardson; the said item being: "1859, July 19—To cash paid Mr. Wilcox for repairs to mill \$62.50;" and it corresponds precisely in amount, date, names, &c., with the receipt referred to in the defendant's thirty-fourth exception to the commissioner's re-

62 port, on which exception the *said first objection is in part based. The said account of Howle, amounting to \$2,139, constitutes a part of the sum of \$2,830, allowed to said Howle in the decree appealed from as amount of payments and advances made by him to Mrs. Stamper under the will of her husband, the said James Stamper. As to the said sum of \$62.50, therefore, the objection must be overruled.

As to the item of \$186.97, it does not appear that it has already been allowed as a credit to Howle, though it may, possibly, have been included in the item of \$300 charged in the account of payments and advances aforesaid as "amount paid Martha J. Stamper by Robert Howle, ex'or of James Stamper dec'd, 30th June, 1860." To be sure that date does not correspond with the date of the receipt to Howle for the \$186.97, which is September 2d 1859. But it is not probable that so large an item would have been forgotten by the parties in the settlement between them which appears to have been on the 18th June 1860, which is the date of the receipt for the \$300. It is possible, however, that the said item of \$186.97 may have been overlooked and never allowed as a credit to Howle in the said account of payments and advances, as it ought to have been; and therefore it seems to be proper that there should be an enquiry by a commissioner on the subject, in order that such further action may be had in regard to it as justice may require.

2. The next of these objections is, that "it is not yet ascertained that the bonds, or at least many of them, delivered up by the administrator of the executor of Howle to Stamper's administrator d. b. n. are not good, either in whole or in part. They have not been prosecuted to judgment and execution."

63 These and all other matters connected with the estate of Stamper were long the subjects of enquiry and *settlement before a commissioner, who re-

ported upon the evidence before him which of the bonds and other evidences of debt due to Stamper's estate were solvent and which insolvent, or supposed to be so, when they came to the hands of Crump as administrator d. b. n., or had since become so; and the fullest notice was given by the commissioner of his action in the premises to all parties concerned, and the amplest opportunity afforded them to appear before him and exhibit such evidence as they thought proper; and yet no attempt was made by any of them to show that his action was wrong in regard to the question of the solvency or insolvency of the said debts. The presumption therefore is, that the report of the commissioner on that subject is right, and the decree appealed from was properly rendered accordingly. If, however, any of the said debts are still in fact solvent, they have not been released by the action of the court, but their payment may be enforced at the instance of any party concerned, who will be aided by the court in such enforcement. This objection therefore must be overruled.

3. The next of these objections is, that "the court held that Stamper's executor should not have credit for his payment of the debts due by Stamper, as one of the firm of Stamper & Williams, unless it should appear that Williams the surviving partner was insolvent. And it appearing the latter was not insolvent, the executor was denied credit for his payments—which were large—of the debts of Stamper as one of the firm of Stamper & Williams."

The firm closed their business in September or October 1850, and Stamper, it seems, was to wind up the partnership, and took charge of the bonds and accounts for collection. This matter

64 remained unsettled *at Stamper's death, in 1856, after which Howle, his executor, tendered the bonds and accounts due Stamper & Williams which were in Stamper's hands to Williams as surviving partner; but at Williams' request, and as Stamper's estate was entitled to one-half the amount, Howle agreed to retain and collect them, and was to be paid therefor by the firm. The money received and paid by Howle on account of this partnership, was not introduced into the account of Howle as executor of Stamper, and no account has ever been taken to show whether Howle was a debtor or creditor in regard to that transaction. The commissioner and court below seem to have regarded this transaction as an agency of Howle for the firm of Stamper & Williams, or rather for Williams as surviving partner, and as therefore not properly belonging to the account of Howle as executor of Stamper. This seems to be a correct view of the case, and at all events it is now too late to attempt to adjust this stale transaction of account. The partnership ended in 1850. Stamper might have had a settlement in his lifetime, which ended in 1856. His executor Howle might have had a settlement in his lifetime, which ended in 1862. It is too late now to have a settlement; and it was too late in 1872, when

the decree appealed from was rendered. This objection therefore must be overruled.

4. The fourth and last of these objections is, that "if the sum found chargeable to the executor Howle be so chargeable, he is entitled to an abatement of interest on the same from the 17th of April 1861 to the 10th of April 1865. Code of 1873, ch. 173, § 14, page 1120."

The provision of the Code here referred to is as follows: "That in all suits for the recovery of money, founded on contracts,

65 *of action, or on liabilities which were entered into or existed, or where the original consideration accrued prior to the 10th day of April 1865, it shall be lawful for the court or jury by whom the suit may be tried, to remit the interest upon the original debt found to be due or any part thereof, for the period commencing on the 17th day of April 1861, and ending on the 10th day of April 1865, or for any portion of said period," &c.

This question was not raised in the court below; nor even in the petition for an appeal; but for the first time on argument before this court. Still, a majority of the court is of opinion that it was not raised too late; and that, under the peculiar circumstances of this case, there ought to be an abatement of interest during the period aforesaid. The condition of things in the county of New Kent, and the rest of the peninsula during the war, was such as to render it extremely difficult, if not impossible, to make money productive of any interest during that period; and the majority of the court consider that it would be too harsh, to subject a fiduciary residing in that locality during that period, and his sureties, to the payment, not only of the principal, but also of the interest during that period, of a debt not collected by him, but lost by his default in not collecting it. The majority of the court, therefore, without intending to lay down any general rule as to the construction and effect of the act aforesaid, is of opinion that in this case and all others precisely like it, there ought to be an abatement of interest as aforesaid. The objection therefore is sustained.

Having considered and disposed of all the questions arising in the case of *Lacy v.*

66 *Stamper &c.*, we will now take up the case of *Crump v. Stamper &c.* *In the petition for an appeal in that case there are two assignments of error, which we will notice in their order.

1. The first assignment of error by this petitioner in the decree complained of (in addition to the errors assigned in the petition of the appellant *Lacy*, of which this petitioner claims the benefit so far as they may affect his rights) is "that it charges this petitioner with the bond of B. P. Crump and John G. Crump, amounting to \$497.80 of principal, and \$543.48 of interest, at the date of the commissioner's report—December 31st, 1866; and the bond of J. A. Clayton and John D. Christian, amounting to \$369.55

of principal, and \$129.47 of interest at same date."

Two very striking facts in regard to this fiduciary are prominently presented on the face of this record: first, his general diligence in endeavoring to collect the debts due to his testator's estate; and, secondly, the extraordinary difficulties with which he had to contend in making the effort to collect. He qualified as executor in the midst of the war—in December 1862. His testator lived and died in the county of New Kent; which was in the hands of the public enemy, or daily liable to be overrun and plundered by them, from the time of his qualification until the end of the war. It does not appear that there was more than one session of any court in that county during that period, and that was a session of the Circuit court.

This fiduciary, directly after qualifying as such, consulted counsel, and acted in accordance with his advice; and accordingly brought suits immediately for the recovery of all debts due to the estate which were considered solvent, and which were believed to be due and unpaid. And he seems

67 to have prosecuted these *suits with all the diligence which he could use, consistently with the obstruction which the extraordinary state of the times interposed in his way, during the whole period of his administration. On that subject the testimony of Wms. P. Richardson, cross examined by A. R. Courtney, counsel for L. C. Crump, was as follows:

1st question by A. R. Courtney. Was the state of public business in the county of New Kent, in the year 1862, when the Federal army, under General McClellan, passed through said county, to the end of the war, such as to permit of the transaction of business in the courts?

Answer. I think not. Agitation, excitement and confusion prevailed to such an extent, that no public business could be prudently or discreetly attended to.

2d question by same. Were any regular courts held in this county during the interval aforesaid?

Answer. I think that Judge Gregory undertook to hold court in 1863, but the courts were so irregular and uncertain that no business could be transacted with any satisfaction. During that interval raids were constantly being made by the enemy into this section, and persons did not know whether courts would be held or not.

3d question by same. Would you have brought suit in this county during the period aforesaid upon any claim due to you personally?

Answer. I would not have thought of it.

4th question by same. Do you know anything of the conduct of Dr. L. C. Crump, as administrator of the estate of James Stamper, deceased, in collecting and securing the assets during the period aforesaid?

Answer. I know, of my own knowledge, that Dr. Crump was very prompt in
68 getting me to turn over to *him the papers of James Stamper, deceased. I think he was more diligent than most any

other person would have been under the circumstances."

With this strong evidence of extraordinary diligence in the discharge of his fiduciary duties generally, the strong presumption is that he used due diligence in the discharge of all of them; and strong evidence to the contrary ought to be required to counteract this presumption in any particular case.

We have seen that this fiduciary has been charged by the decree of the court below with two debts, each of quite a large amount, both of principal and interest, as having been lost by his neglect, viz: the debts of B. P. Crump and John G. Crump, and of J. A. Clayton and John D. Christian. Were they in fact lost by his neglect? and is he accountable for them? We think not, and now let us enquire as to each of them; and

1st, as to the debt of the Crumps. No action was brought to recover this debt during the war, because the administrator, Crump, knew that it was disputed, was informed and believed that nothing was due upon it, and did not believe that a trial could be obtained during the war of any suit in which there would be a contest. Bat. D. Christian being enquired of as to the indebtedness of the estate of Stamper to John G. and B. P. Crump, answered thus: "I have heard Bev. P. Crump and Robert Howle each say that James Stamper, as the agent of the said B. R. and J. G. Crump, had sold a negro man belonging to the estate of Benedict Crump, deceased, the brother of the said J. G. and B. P. Crump, and that he was indebted to the said J. G. and B. P. Crump on that account. I think that the negro sold by Stamper was worth about \$500." L. C. Crump testified that John G. Crump died in May 1860. And

69 being asked "Did you think, *while acting as administrator of James Stamper, that anything was due on the bond of J. G. and B. P. Crump, and if not what reason had you for so thinking?" answered "I did not, upon the grounds that B. P. Crump stated to me that there was not a cent due from him or them to the estate of James Stamper, but, upon the contrary, that Stamper's estate was indebted to them on account of the sale of a negro, which was sold by Stamper, as the agent for the said John G. and B. P. Crump; and, furthermore, Robert Howle, the first representative of James Stamper, was also the representative of John G. Crump, and I presume that he would have paid the said bond if anything was due. I, however, brought suit against B. P. Crump on these bonds immediately after the war, because advised by my counsel that it was safe to do so; and Bev. P. Crump did not defend the suit, because he had conveyed his property before the trial of the suit; and if I had sued upon the bond during the war I could not have gotten judgment." We think that L. C. Crump is not liable for this debt.

2dly, as to the debt of J. A. Clayton and John D. Christian. This debt was perfectly

solvent at the commencement of the war. Each of the debtors had ample estate, real and personal, for its payment. Clayton lived in Surry, and Christian in New Kent counties, on different sides of the James river. Clayton was examined as a witness in the case, and being asked by the counsel for L. C. Crump "Was there any arrangement between you and John D. Christian, your co-obligor in the bond before mentioned, as to which of you should pay it?" answered: "The last time I was in the county I paid to Robert Howle, the executor of James Stamper, \$200 in part of said bond, and at that time there was an agreement between

70 *John D. Christian and myself that he was to pay the balance due upon said bond. I apprised Robert Howle of the agreement made by John D. Christian and myself, and he said that it was all right. John D. Christian was largely indebted to me at the time of said arrangement, and at the time of his death." No action was brought upon this bond during the war against both or either of the obligors. There was the same, or nearly the same difficulty in suing, and from the same cause in Surry as in New Kent county, and there was no postal, and little other communication between the two counties during that period. Had Christian been sued upon the bond, judgment would probably not have been recovered, as judgment was not recovered on his other bonds on which he was sued until after he became insolvent, he having set up a claim of set-off to the bonds, which would no doubt have been set up, and with the same effect to the said bond of Clayton and Christian. We think that L. C. Crump is not liable for this debt. He had no apparent motive but to do his duty both in regard to this and the before mentioned debt, and he seems to have acted in regard to both in the most perfect good faith.

2. The 2d and only other assignment of error in the petition of L. C. Crump is, that the decree appealed from "requires him to deposit in bank to the credit of this cause the sum of \$1,489.16, amount of the two bonds with which he is charged as hereinbefore stated, the court reserving for future decision the question whether the payments made by him to Martha J. Stamper shall be deducted therefrom on account of her share in the estate of James Stamper dec'd."

Being of opinion that L. C. Crump is not chargeable with the amount of either 71 of the said two bonds, *the foundation of the 2d assignment of error is taken away, and it is therefore unnecessary to consider it.

In regard to the questions discussed in the brief of the counsel for L. C. Crump in addition to those presented by the petition of appeal, they do not now arise, or will be disposed of by the court below, after the case goes back to it.

But L. C. Crump not being chargeable with the amount of the said two bonds of B. P. and John G. Crump, and J. A. Clayton and John D. Christian, a question now

arises whether it does not result therefrom that Howle and his sureties as executor of Stamper are chargeable with the said amount?

We are of opinion that they are not, and that the same or nearly the same reasons which exempt L. C. Crump also exempt them from such liability.

In regard to the bond of the Crumps, it appears that there was probably nothing due thereon, and that probably nothing would have been recovered by Howle if he had brought suit thereon. At all events while it might have been safer and better for Howle to have brought such a suit though at the risk of subjecting the estate to the loss of costs, yet we think it would be too harsh under the circumstances to subject him and his sureties to the payment of the debt on the ground of its having been lost by his neglect, especially as he seems to have acted with perfect good faith in the matter.

In regard to the bond of Clayton and Christian it was a perfectly good debt at the death of Stamper and continued to be so until the end of the war, by the disastrous effects of which, Clayton the principal debtor, if not Christian the surety also was totally ruined. This debt was so good and so secure when it came to the

72 *hands of Howle as executor that he would have been justifiable in not calling it in, but letting it stand as an investment already made for the benefit of those who were entitled to the profits of the estate under the will of the testator. We therefore think in this case also that it would be too harsh under the circumstances, to subject Howle and his sureties to the payment of this debt, on the ground of its having been lost by his neglect, especially as he seems to have acted with perfectly good faith in the matter.

It does not appear from the record whether payment has ever been made of the three hundred dollars directed, by decree made in this cause on the 17th day of November 1868 to be paid by Wms. P. Richardson administrator of Robert Howle to Martha J. Stamper, or of the like sum of three hundred dollars directed by decree made in this cause on the 15th day of November 1869, to be paid in like manner. The presumption is that these payments have been made; and if so, credit ought of course to be given therefor, on the debt due by the estate of Howle to the estate of Stamper. At least there ought to be an enquiry on the subject by a commissioner, in order to such further action by the court as may appear to be proper.

The result of the foregoing opinion is, that the decree appealed from must be affirmed in part and reversed in part according as it is consistent, or in conflict, with the said opinion; with costs to the appellants respectively; but to be paid out of the estate of Stamper; and as to the costs of the appellant Lacy, to be credited on, and deducted from, the debt due by Howle and his sureties to the estate of Stamper. And

the case ought to be remanded to the court below, in order that an enquiry may be made *by a commissioner of the court in regard to the sum of \$186.97, which appears to have been paid by Howle to Pollard and Frayser for necessities for Mrs. Stamper and her children, and for which it is charged no credit has been given to the estate of Howle. Also an account may be taken by said commissioner of the interest which accrued on the debt due by Howle as executor of Stamper during the period commencing on the 17th day of April 1861, and ending on the 10th day of April 1865, in order that there may be an abatement of the amount of said interest according to the foregoing opinion. Also an enquiry may be made by said commissioner in regard to the payment of said two sums of \$300 each, under the said decrees of the 17th day of November 1868 and the 15th day of November 1869; and that further proceedings may be had to a final decree, in conformity with the foregoing opinion.

The decree was as follows:

The court is of opinion, for reasons stated in writing, and filed with the record, that the sum of one hundred and eighty-six dollars and ninety-seven cents, paid by Robert Howle, executor of James Stamper, deceased, on the 2d day of September 1859, to Pollard and Frayser for necessities bought of them for Mrs. Martha J. Stamper and her children, ought to have been, if it was not, deducted from the interest on the balance due by said Howle, as executor of said Stamper. It may possibly have been included in the sum of two thousand eight hundred and thirty-one dollars deducted, according to the said decree, from the said interest, for payments and advances made by said Howle to Martha J. Stamper. If so, that matter is all right; but, if not so, the said decree is erroneous in that respect.

74 *The court is further of opinion that there ought to have been an abatement of interest on the balance of principal due from the estate of Robert Howle to the estate of James Stamper, for the period commencing on the 11th day of April 1861, and ending on the 10th day of April 1865; and no such abatement having been made by the said decree, it is erroneous in that respect.

It does not appear from the record whether payment has ever been made of the three hundred dollars directed by decree rendered in this cause on the 17th day of November 1868, to be paid by Wms. P. Richardson, administrator of Robert Howle to Martha J. Stamper, or of the like sum of three hundred dollars, directed by decree rendered in this cause on the 15th day of November 1869, to be paid in like manner. The presumption is, that these payments have been made, and if so, credit ought, of course, to be given therefor on the interest of the debt due by the estate of Howle to the estate of Stamper, and there ought to be an enquiry on the subject by a commissioner, in order to such further action of the court as may be proper.

The court is further of opinion that the Circuit court erred in charging Leonard C. Crump, administrator de bonis non, with the will annexed of James Stamper, deceased, with the bond of B. P. Crump and John G. Crump, amounting to \$497.89 of principal, and \$543.48 of interest, at the date of the commissioner's report, December 31st, 1866, and the bond of J. A. Clayton and John D. Christian, amounting to \$369.55 of principal, and \$129.47 of interest, at the same date; and in ordering the said L. C. Crump to deposit in the State Bank of Virginia at Richmond, to the credit of this cause and subject to the order of the said 75 court, *the sum of fourteen hundred and eighty-nine dollars, with legal interest on six hundred and thirty dollars and forty cents, from the 31st of December 1870 until so deposited.

The court is further of opinion that so much of the decree appealed from, as is in conflict with the foregoing opinion, is erroneous, and that there is no error in the residue of the said decree. Therefore it is decreed and ordered that so much of the said decree as is above declared to be erroneous, be reversed and annulled, and the residue thereof affirmed; and that the appellees, Martha J. Stamper, and her children, James Stamper, John Stamper, and Catherine N. Stamper, pay to the appellant, Richmond T. Lacy, his costs by him expended in the prosecution of his appeal aforesaid here, for which said costs no execution is to be issued, but the same are to be credited on and deducted from the interest on the debt due by Howle and his sureties to the estate of said Stamper.

And it is further decreed and ordered that this cause be remanded to the said Circuit court in order that an enquiry may be made by a commissioner of the court in regard to the sum of \$186.97 as aforesaid; and also that an account may be taken by said commissioner of the interest which accrued on the debt due by Howle, as executor of Stamper, during the period commencing on the 17th day of April 1861, and ending on the 10th day of April 1865; and also that an enquiry may be made by said commissioner in regard to the payment of said two sums of \$300 each, under the said decrees of the 17th day of November 1868, and the 15th day of November 1869; and that further proceedings may be had to a final decree in conformity with the foregoing opinion.

No execution can properly be issued 76 upon the decree *appealed from without a further order of court for that purpose; and if it shall appear to the court that in a reasonable time payment of any portion of the balance due by the estate and sureties of Howle to Stamper's estate can be recovered of the estate of Howle in any proceeding which may be instituted and carried on in this suit, by the sureties of Howle or their representatives, or any of them, enforcement, by execution or otherwise, of so much of the said decree as may not exceed the probable amount of such portion, may

be delayed by the court for a reasonable time to afford an opportunity for such a recovery.

Which is ordered to be certified to the said Circuit court of New Kent county.

Decree affirmed in part and reversed in part.

77

*Stevenson v. Wallace.

January Term, 1876, Richmond.

1. **Easements—Lateral Support—Land.**†—Every person has a natural right, *ex jure natura*, to support to his land from the adjacent and subjacent soil.
2. **Same—Same—Same.**—This natural right to support exists in respect of land only, and not in respect of buildings; but the former right remains though houses are built on the land.
3. **Same—Same—Buildings.**—But a right to support for buildings may be acquired; and when so acquired it is an easement.
4. **Same—Same—Same—Grant.**‡—An easement for support of a building is acquired by grant, which may be express, implied or presumed. And when acquired it gives the same right of support in respect of the buildings that there was *ex jure natura* in respect of the land.
5. **Same—Same—Same—Prescription—Reservation.**§—The grant of such an easement will be presumed from twenty years enjoyment; and will be implied, in the absence of express stipulations, in every case where the owner of adjoining houses or of houses and lands severs the property by sale. Rights of support in such cases are mutually granted and reserved between the original owner and first grantee, and the second grantee succeeds to the owner's reserved rights.

¶**Easements—Definition.**—In *Tardy v. Creasy*, 81 Va. 556, the court cited the principal case for the following definition: "We may define an easement to be 'a privilege without profit, which the owner of one tenement has a right to enjoy in respect of that tenement in or over the tenement of another person, by reason whereof the latter is obliged to suffer, or refrain from doing something on his own tenement for the advantage of the former.'"

†**Same—Lateral Support—Land.**—That the right of support for land arises *ex jure natura*, see 3 Min. Inst. (2d Ed.) 25; *Tunstall v. Christian*, 80 Va. 3; *Salamone v. Kelley*, 80 Va. 86; *Stearns v. City of Richmond*, 88 Va. 992, 14 S. E. Rep. 847.

‡**Same—Same—Buildings—Grant—Implied.**—The right of lateral support for buildings can only be acquired by grant. 3 Min. Inst. (2d Ed.) 26; *Tunstall v. Christian*, 80 Va. 4. That such an easement may arise by implied as well as express grant, see *Tunstall v. Christian*, 80 Va. 7; *Sanderlin v. Baxter*, 76 Va. 299; *Scott v. Beutel*, 23 Gratt. 1; *Hardy v. McCullough*, 23 Gratt. 251; *Burwell v. Hobson*, 12 Gratt. 322.

§**Same—Same—Same—Same—Prescription.**—The English authorities hold that the right of lateral support for buildings may be acquired by prescription. 3 Min. Inst. (2d Ed.) 25, citing the principal case. The weight of American authority, however, is that such a right cannot be obtained by prescription. See the opinion of **PRESIDENT LEWIS** in the important case of *Tunstall v. Christian*, 80 Va. on page 5, practically overruling the doctrine of the principal case, where, speaking of this prescriptive right to support for

6. **Same—Same—Same—Same—Reservation.**—M owns two adjoining lots in R. He conveys one with a house on it to R and reserves in the deed the right to join the two end walls of the house free of costs. M retained the right, which passed with the land to those who derive title under him, to join his building to that conveyed to R, by an independent wall along side of it, or to make it a part of his building by joining only the end walls; and the privilege of joining R's building in the mode indicated in the reservation, did not extinguish or impair his implied reservation of support.

7. **Same—Same—Same—Loss of Building by Fire—Right of Support Not Extinguished.**—If S holding title to the second lot had a building upon it, which was supported by the land and building conveyed to R for twenty years or more with the knowledge of the owner thereof, prior to a fire

78 *which destroyed both buildings, a grant of the easement of support will be presumed; and said easement was not lost or extinguished by the destruction of S's building, but adhered to the building S erected on its ruins; and any right of support which S derived from the reservation in the deed to R, express or implied, was not extinguished by the destruction of the old building, but survived and adhered to the new one.

8. **Same—Same—Same—Care in Removing.**—The mere fact of contiguity of buildings imposes an obligation upon the owners, to use due care and skill in removing the one building, not to damage the other, even though no right to support has been acquired.

9. **Same—Same—Same—Same—Liability.**—But if in such case S is entitled to the support of her building by the foundation wall and land of W, claiming under R, W cannot withdraw the support without being liable in damages for the injury which occurs to S thereby.

10. **Same—Same—Same.**—In such a case S is not bound to protect her building by providing other supports, in place of the supports which W is removing, though she may have had notice that W was removing the supports.

11. **Same—Same—Same.**—If the house of S was so badly constructed and its foundation and materials were so defective that the fall could not have been arrested by timely precautions when W was excavating upon his lot in order to build upon it, these facts would not constitute a bar to the action of S against W, so as to defeat it; but they would be proper to be considered by the jury upon the question of damages.

12. **Same—Same—Same.**—Though W contracted with an experienced and competent excavator, of good standing in his business, to make the excavations upon his own lot, and gave notice thereof to S in time to enable her to adopt precautions for the protection of her adjoining building, W is still liable for any damage that may have resulted to S's building in consequence of negligence or unskill-

buildings, he said: "It is true that in some of the American cases are to be found *dicta* of the judges in favor of the doctrine. And in *Stevenson v. Wallace*, 27 Gratt. *supra*, there are expressions in the opinion of the court formed on certain English cases to the same effect. But the decision of the question was not necessarily involved, inasmuch as the right asserted in that case was held to be clearly implied from the terms of a deed by a common predecessor in title of the parties."

fulness in the making of said excavation by reason of leaving insufficient support to S's premises.

13. Practice—Instructions—Incorrectness—Saving Exceptions.—If upon a trial instructions are given to the jury, to which no exception is taken, and after verdict a motion is made for a new trial, on the ground of misdirection as well as that the verdict is contrary to the evidence, it is the duty of the court of trial to consider the correctness of the instructions, and if of opinion that they are not correct, and were calculated to mislead the jury, to set aside the verdict and grant a new trial; and the appellate court will supervise his actions in this respect.

79 *This was an action of trespass on the case in the Circuit court of the city of Richmond, brought in April 1872, by L. T. Stevenson against Charles M. Wallace, to recover damages for injury to the plaintiff's house by excavation by the defendant made on his adjoining lot. On the trial the judge gave several instructions to the jury, to which the plaintiff did not except; and there was a verdict and judgment for the defendant.

The instructions are as follows:

"1. The jury are instructed, that the plaintiff was not entitled to demand of the defendant the lateral support of his land for her adjoining building to any extent which deprived him of the right to excavate thereon for the purpose of building, or imposed upon him liability for damages consequent upon the prudent and careful exercise of that right.

"2. But the jury are further instructed, that it was the duty of the defendant before proceeding to make his excavation and endanger the safety of the plaintiff's building, to give her timely notice to enable her to adopt suitable precautions for the protection of her property; and that if he failed to do so, he was guilty of negligence, and is liable to the plaintiff for such damages as were consequent upon the excavation, and which the plaintiff could not after knowledge of the danger avert by prompt and diligent action.

"3. If the jury believe from the evidence, that the building of the plaintiff was so badly constructed, and its foundation and materials so defective, that the fall could not have been averted by timely precautions when the excavation was made by the defendant, or that the plaintiff, or her agents, after they had knowledge of the necessity, could have then, by prompt and provident action, protected the building, and
80 neglected *to do so, or that they prevented the defendant from doing so by refusing to allow him to build a foundation on that part of his wall occupied by the plaintiff, or by retaining illegal possession and occupancy of a part of his rear wall, in either event the plaintiff cannot recover in this action.

"4. The court instructs the jury, that if they

*Instructions—Saving Exceptions.—See general note on "Instructions" appended to *Womack v. Circle*, 29 Gratt. 192; also *Danville Bank v. Waddill*, 31 Gratt. 469, and note; *Peery v. Peery*, 26 Gratt. 320, and note.

believe from the evidence that the defendant contracted with an experienced and competent excavator, of good standing in his business, to make the excavations in the declaration mentioned upon the defendant's own lot, and gave notice thereof to the plaintiff in time to enable her to adopt precautions for the protection of her adjoining building, or if she had such knowledge in such time, the defendant is not liable for any damage which may have resulted to the plaintiff's premises in consequence of negligence or unskillfulness, if any, in the making of said excavation by reason of leaving insufficient support to the plaintiff's premises or otherwise."

At the same term the plaintiff moved the court to set aside the judgment and verdict and grant her a new trial, on the grounds that the verdict was contrary to the evidence, and that the court had misdirected the jury; and the court set aside the judgment; and not being advised of its judgment to be given on the motion to set aside the verdict, time was taken to consider thereof until the next term.

At the next term of the court, the court overruled the motion for a new trial; and the plaintiff excepted; and the evidence being in some respects contradictory the court declined to certify the facts proved, but certified the evidence.

By deed bearing date the 1st of May 1817, Joseph Marx and wife conveyed to
81 Thomas Richardson a lot *on Thirteenth street, between Main and Cary streets, in the city of Richmond, with a brick tenement thereon; and Marx reserved to himself the right of joining the two end walls of said tenement free of cost. This is the lot owned by the defendant Wallace.

By another deed, bearing date the 8th of July 1817, Joseph Marx and wife conveyed to Mary Stevenson a lot on Thirteenth street, adjoining the lot he had conveyed to Richardson; and further conveyed to her the privilege of joining the end walls of the brick tenement conveyed to Richardson free of cost.

Buildings were standing on both these lots on the 3rd of April 1865, when they were consumed in the great fire of that day. In the year 1866 plaintiff's lot was leased to one Bauman, for the term of five years, who bound himself to erect a building thereon; and Bauman did erect the building, and at the end of his lease he rented the premises for six months; and during this period the plaintiff's building fell. It appeared in evidence, that in building, Bauman had built the main building upon a new foundation close against the foundation wall of the old building on the defendant's lot, which was standing thereon at the time Marx conveyed to Richardson, and had been burnt in 1865, but from the end of the house had occupied the wall of the defendant as a support for a kitchen in the rear.

It was further shown in evidence that the defendant in the fall of 1872, proposing to build upon his lot, contracted with a mechanic in writing as follows: "I propose to

clean out the cellar on 13th street, which you spoke to me about to the depth of nine feet, below the offset on the wall adjoining, for one hundred *and forty-four dollars, and clean and hack the bricks for sixty cents per thousand.

W. T. Ford."

Richmond, October 10, 1871.

C. M. Wallace, Esq.

Endorsed Feb'y 17th, 1872:

Rec'd on within contract the sum of one hundred and forty-four dollars.

W. T. Ford."

to make excavation for the foundation of his building; and introduced testimony tending to show that the mechanic he employed was an experienced and competent excavator of good standing in his business. The excavation was completed some time in the month of January, 1872, to a depth of three feet below the old foundation, which was deeper than the foundation of plaintiff's house; that a margin of a foot at the top and a foot and a half at the bottom was left between plaintiff's building and the excavation. It did not appear that the defendant gave any notice to the plaintiff or her agents of his proposed excavation, and no apprehension of danger seems to have been entertained until February 12th, 1872, when the tenant of plaintiff called attention of her agent to the matter; but it did appear that at a sale of the property on December 14th, 1871, after the excavation was complete to the depth of two and a half feet below the old foundation, the defendant had called attention of plaintiff's counsel, who was then present, to the fact that the kitchen of plaintiff's lot was built upon his wall and interfered with his proposed building; *and that some negoti-

83 ation was had between them with regard to the removal of the kitchen, but that the plaintiff's counsel did not agree to remove the wall. After the 12th of February, 1872, the plaintiff's counsel communicated with the defendant the apprehensions entertained about the security of her house, and required him to take measures for its security. This he refused to do; and nothing was done until March 16th 1872, when the plaintiff's agents were ordered by the chief of the police of the city of Richmond, to whom the tenant had made complaint, to protect the building. And thereupon the plaintiff's agent employed an experienced bricklayer to proceed to underpin and protect the building, addressing the following letter to the defendant:

"Richmond, Va., March 18, 1872.

Dear Sir:

We separated on Saturday with the understanding that I should inform you what action Mrs. Stevenson's agents should finally determine on in view of your refusal, then made known, to underpin or protect her house by building, except upon conditions with which she could not comply, as to allowing you to take down the old wall in the rear, &c. I write to say that they have directed a builder to underpin the main building, and in accordance with the

theory of your liability to protect the house frequently expressed by me, in conversation between us, that she will look to you for reimbursement to the amount of expense thereby necessarily incurred, when the work has been done, which it shall be upon the most reasonable terms attainable. I will let you know the amount, and if you are not willing to admit the claim, will be willing to carry out the spirit of our 84 *conference as to referring the subject to some amicable tribunal for adjustment.

In haste, I am very resp'y and truly,
Jas. N. Dunlop."

C. M. Wallace, Esq., present.

During the progress of the work by the workmen employed by the plaintiff, the building fell. There was conflicting evidence before the jury as to the manner in which the work was performed—some witnesses testifying that it was done in the most prudent and judicious manner, and others testifying to the contrary. There was also testimony tending to prove that the building had been so much damaged by the excavation before the effort to protect it was made, that it was then beyond the hope of successful protection; and there was conflicting evidence as to whether by prompt and provident action, on the 12th of February, 1872, the building could have been saved. There was also evidence tending to show that the building had been originally constructed of very indifferent material, and carelessly and imprudently built upon an insufficient and insecure foundation. There was also evidence tending to prove that, but for the excavation in defendant's lot, the building of plaintiff would have stood an indefinite length of time. There was also conflicting evidence as to the manner in which the excavation had been performed: some witnesses testifying that the excavation had been and others that it had not been skillfully and prudently made. There was evidence tending to show that in December 1871, the defendant had made all necessary arrangements to build upon his premises, and delayed in consequence of the refusal of the plaintiff to remove her 85 kitchen from *his wall. There was evidence in the case that the agent of the plaintiff frequently passed the premises after the excavation had been made, and before the tenant of plaintiff called attention to the danger.

Upon the application of S. T. Stevenson, a writ of error and supersedeas to the judgment was awarded.

James N. Dunlop, for the appellant.

John Howard, for the appellee.

Anderson J. delivered the opinion of the court.

This is an action by the owner of a tenement in the city of Richmond against the owner of an adjoining tenement, to recover damages of the defendant for digging in his lot so near the foundation of

the plaintiff's house, and to such a depth, as to cause it to fall. The defendant's lot, together with the brick dwelling-house thereon, was conveyed to Thomas Richardson, defendant's grantor, by Joseph Marx and wife, by deed bearing date on the 1st of May 1817, the grantor reserving the right to join the two end walls of said tenement. And the plaintiff's lot was conveyed to Mary Stevenson, from whom the plaintiff derives title, by the same grantor, by deed bearing date the 8th of July, in the same year, and is described as adjoining the tenement conveyed as aforesaid to defendant, beginning at the northeast corner thereof, and "running thence along the wall of said tenement, north 54 degrees west, 68 feet eight inches to Edward Hallam's line;" also the privilege of joining the end walls of the brick tenement conveyed to Thomas Richardson as aforesaid, free of any cost, together with all and singular the buildings, ways, easements, hereditaments and appurtenances, &c. There seems to have *been

no building on the parcel of land reserved by the grantor, and which he soon afterwards conveyed to Mary Stevenson. But the language of his deed to the defendant clearly implies the reservation of a right to build on it, and to join the end walls of the building which he conveyed to the defendant. And the right so by him reserved, he conveyed by his deed to Mary Stevenson; and it is implied that the land was sold and conveyed to her for the purpose of building thereon. A building was erected thereon, but when or by whom it does not appear, which, together with the defendant's building, was destroyed by the memorable fire which occurred on the 3d of April 1865. The plaintiff afterwards, in 1866, caused another building to be erected on the same site, laying the foundation wall of her main building jam against the old foundation wall of the defendant's building, and building one of the walls of her kitchen in the rear of her main building, on the old foundation wall of the defendant's building.

In the latter part of the year 1871, the defendant intending to rebuild, caused the old foundation wall of his building, contiguous to which the foundation wall of the plaintiff's main building was laid, to be removed, and the excavation of his cellar to be a depth of three feet below his old foundation, which was lower than the foundation of the plaintiff's building, which the plaintiff alleges caused her main building to fall, and for which she seeks to recover damages of him.

Every person has a natural right, *ex jure naturæ*, to support to his land from the adjacent and subjacent soil. This natural right is incident to land, and the owner is as much entitled to it as he is to the land itself, without any grant by the servient owner, or any act of acquisition on his own part. It is a right therefore

87 *which the law annexes to the ownership of land, that he shall have suffi-

cient support for his ground from the subjacent and adjacent soil. The right to subjacent support, it is said, was first determined in *Humphries v. Brogden*, 12 Q. B. 739, 64 Eng. Com. Law R. 739, upon the ground that there were the same reasons for it that there were to maintain the right to lateral support which had been previously determined. Both rest upon the same foundation.

But this natural right to support exists in respect of land only, and not in respect of buildings; but the former right remains, though houses are built. *Brown v. Robins*, 4 Hurl. & Nor. R. 186, 28 L. J. Exch. 250; *Stroyan v. Knowles*, 6 Hurl. & Nor. R. 454, 30 L. J. Exch. 102. But a right to support for buildings may be acquired; and when so acquired it is an easement—which is defined to be "a privilege without profit, which the owner of one tenement has a right to enjoy in respect of that tenement in or over the tenement of another person; by reason whereof the latter is obliged to suffer, or refrain from doing something on his own tenement for the advantage of the former." *Goddard on Easements*, page 2.

An easement for support may be acquired in different modes, but all are reducible to one by grant; which may be express, implied or presumed. When the owner of land acquires the easement of support, it would seem that his natural right of support in respect of the soil is enlarged, so as to embrace the buildings which he may erect on his land, and invests him with the same right of support in respect of his buildings that he has *ex jure naturæ* in respect of the soil.

If the plaintiff has enjoyed the support of the land or buildings of the defendant for twenty years, to keep up his house, and both parties knew of that support, 88 *the plaintiff had a right to it as an easement, and the defendant could not withdraw the support without being liable in damages for any injury that accrues to the plaintiff thereby. *Hide v. Thornborough*, 61 Eng. Com. L. R. 250, 255, *Parke B.*; *Goddard on Easements* and cases cited, p. 31; *Humphries v. Brogden*, 64 Eng. Com. L. R., page 739. In such case the grant is presumed.

The grant is implied, in the absence of express stipulations, in every case where the owner of adjoining houses, or of houses and land, severs the property by sale; for, in every such case, rights to support are granted by implication by the vendors and purchasers respectively, for the preservation of the buildings belonging to each other. *Goddard on Easements*, p. 154, and cases cited. Rights of support in such cases are mutually granted and reserved between original owner and first grantee; and the second grantee succeeds to owner's reserved rights. *Richards v. Rose*, 9 Welsb., Hurl. & Gor. 218; *Gayford v. Nicholls*, *Idem* 702.

In the case under judgment, the court is of opinion, that the defendant's grantor, Joseph Marx, when he conveyed a part and parcel of his land to the defendant, with the brick building thereon, reserved the

right to build on the parcel which he retained; and the reservation of his right to support to such building when erected, by the land and building which he conveyed to the defendant, must be implied as an easement. And that said right of support, or easement, passed from him by his deed of conveyance to Mary Stevenson, and from her, with the title to the tenement, to its present owner in fee.

The court is also of opinion, that the original grantor, by his reservation in
 89 his deed to the defendant, *of the right to join the end walls of the building he conveyed to him, retained the right, which passed with the land to those who derived title from him, to join his building to the defendant's by an independent wall alongside the defendant's building, or to make it a part of his building by joining only his end walls; and that the privilege of joining his building in the mode indicated by the reservation, did not extinguish or impair his implied reservation of support.

The court is also of opinion, that if it be shown that the plaintiff had a building on her lot which was supported by the land and the building of the defendant for twenty years or more, with the knowledge of the defendant, prior to the fire of April 3d, 1865, which destroyed both buildings, a grant of the easement of support will be presumed; and that said easement was not lost or extinguished by the destruction of her building, but adhered to the building which she caused to be erected on its ruins: and that any right of support which she may have derived from the reservation of the deed of conveyance of her grantor to the defendant, express or implied, was not extinguished by the destruction of the old building, but survived and adhered to the new.

With regard to the instructions given by the court to the jury, the court is of opinion, that the mere fact of the contiguity of buildings imposed an obligation on the owners, to use due care and skill in removing the one building, not to damage the other, even though no right of support has been acquired. *Goddard on Easements*, p. 33, citing *Dodd v. Holme*, 1 A. & E. 493. But if the plaintiff was entitled to the support of her building, by the foundation wall and land of the defendant, the defendant could not withdraw the support without
 90 being liable in damages for the injury which accrued to the plaintiff thereby. This doctrine has already been announced, and cases cited in support of it. The first instruction therefore should have been given with the foregoing qualification.

With regard to the second instruction, so far as it implies that though the plaintiff was entitled to the easement of support to her building, it devolved upon her to protect her building, by providing herself other supports, and that the defendant was not liable if the plaintiff had knowledge of the danger, and could have averted it by prompt

action, the court is of opinion it is erroneous.

With regard to the third instruction, it does not seem to have been settled, whether the defective construction of the plaintiff's building with defective materials, upon a defective foundation, which would increase its liability to fall, should affect the plaintiff's right of recovery, or relieve the defendant from liability in damages. It is argued on the one hand, that the plaintiff's building, although defective in its construction, would not have fallen or been impaired, but might have stood a great while, but for the act of the defendant in removing its supports. On the other hand it is contended, that it would be unreasonable and unjust to allow the dominant tenant to deprive the servient of the privilege of improving his own property, and enjoying the benefit of it, by erecting a building upon her lot, so defective in its construction, or in materials, or in its foundation, that the servient tenant cannot with all due care and proper precaution improve his own property without incurring the liability of paying for his neighbor's. Respectable courts and able judges have decided the question differently. One side must have

erred, and neither perhaps have placed
 91 it upon the true ground. The *court is of opinion, that whilst the facts supposed should not constitute a bar to the plaintiff's recovery, so as to defeat her action, they would be proper to be considered by the jury upon the question of damages; and that so far as the instruction gives them an effect to defeat the plaintiff's right of recovery, it is erroneous. The court is of opinion, that the remainder of the instruction is erroneous, the first clause of it because inconsistent with principles already enunciated; and the last clause, because if the plaintiff wrongfully erected her kitchen wall, upon the defendant's wall, in relation to which the court does not intend to indicate an opinion, it would be virtually to set off the defendant's aggression by the plaintiff's trespass.

With regard to the fourth and last instruction given by the court:

The material part of this instruction is, that if the defendant contracted with an experienced and competent excavator, of good standing in his business, to do the work, he is not liable in damages for any injury which the plaintiff sustained by his negligent and unskillful execution of it. The instruction is evidently designed to rest upon the distinction between execution of work by an independent contractor, and an agent or servant. Without attempting to draw the line of distinction, which is not always well defined, between the two descriptions of contract, it is sufficient to say, that the instruction is objectionable, in so far as it decides for the jury, that the contract was of the former description. Whether the work was done by an independent and responsible contractor, or by an agent or servant, in either case it would be by contract.

The instruction must be considered in connection with the evidence which was before the jury, and which is certified by the court. That evidence tends to show that the work was not undertaken by a contractor, as contradistinguished from an agent, or servant, or laborer.

There is a class of men whose business it is, to undertake the erection of buildings, or other works for reward. They do not generally propose to do the work in person. They are not always competent. They may be neither bricklayers, masons, nor carpenters, plumbers, nor painters, nor slaters; but they are contractors, and they employ bricklayers, carpenters, &c., to do the work. Or one may be contractor for the brick work, and another for the carpenters' work, &c., all of whom expect to employ agents and laborers to execute the work. They who undertake to have the work done are contractors, and they who do the work are their servants or agents. Perhaps there the distinction lies, between those who do the work and those who contract to have it done. The defendant might have let out the whole building, excavation, foundation, and superstructure, to a contractor, or he might have let the whole work of building, and reserved to himself the work of excavation and preparation for the foundation; and in that case it would have been just as necessary that he should have an experienced laborer to do the work of excavation as if he had let it to contract. It was no part of the main work which the defendant had in contemplation, the erection of a building on his premises: it was only a preparation for it. And as it was necessary to be done with caution and prudence, as it might endanger his neighbor's property—and as it was a small job—the work to be done was inconsiderable and inexpensive, but the defendant was interested in having it done

with great care, and would be therefore inclined to have it done *under' his own supervision; and we find him contracting directly with the laborer who did the work, and not with one who undertook it as a responsible contractor, to have it done under his own supervision, by his agents or servants. The jury might well be warranted in coming to the conclusion, that the defendant had employed the man who did the work, as his agent or servant to do it for a specified price, and not as a responsible contractor, to have it done through his agents or servants, under his direction and supervision. The fault of the instruction is that it excludes that conclusion, though the jury might think the evidence warrants it.

But another objection fatal to the instruction is, that it ignores the plaintiff's easement of support, and holds that the defendant would not be liable in damages for any injury to the plaintiff's building, which was caused by the negligence or unskillfulness of the excavator in removing the supports; which involves the absurdity, that though the defendant was responsible for injury to the plaintiff's building by remov-

ing the supports (she being entitled to them), though every care and precaution were used to prevent injury, he would not be liable for the injury if the supports were negligently removed by the excavator whom he employed to remove them. The court is of opinion that this instruction is also erroneous.

It cannot be doubted that it would have been competent for the Circuit court, if in reviewing the instructions which in general are given without much time for reflection or investigation pending the jury trial, it should have been satisfied that he had mistaken the law and misdirected the jury in matters which had a material and important bearing upon the issue, and had most

probably influenced its verdict, *upon that ground to have set aside the verdict and awarded a new trial, and that it would have been his duty so to have ruled. But if upon that review the court below should adhere to its first ruling, and hold that the instruction was rightly given, and refuse to set aside the verdict upon that ground, and the rulings of that court should by a bill of exceptions thereto be brought under the review of the appellate tribunal, if the appellate tribunal should be of opinion that the jury had been misdirected, and that its verdict had been probably influenced by the erroneous instruction to the prejudice of the exceptor, and that the court of trial had erred upon that ground in overruling the motion for a new trial, surely it would be competent for the appellate court to reverse the judgment for that cause, and to make such order as ought to have been made by the court below. This conclusion is fortified by the opinion of this court in Bull's case. 14 Gratt. 613.

The court is therefore of opinion to reverse the judgment of the Circuit court with costs, and to remand the cause for further proceedings to be had therein in conformity with this opinion.

The court has expressed no opinion as to the demurrer to the declaration, nor is it necessary to do so now, as the general principles governing the case have been laid down.

There is one defect running through all the counts, that whilst they allege that the common grantor in the conveyance he made to Mary Stevenson of the piece or parcel of his land which he did not convey to the defendant, conveyed the right to join the ends of the defendant's building, neither of them allege that he reserved to himself the said right or the right of support in his deed of conveyance to the defendant. There are also other defects in the declaration

of a *more formal character, which the court will not decide are fatal to it upon demurrer; but as the cause will be remanded for further proceedings, the plaintiff may have leave to amend her declaration if she desires it.

Staples, J. concurred in the opinion of Judge Anderson, with the exception of that portion which holds that the owner of a building defectively constructed, with de-

fective materials, and upon an insufficient foundation, is entitled to damages, resulting from an excavation upon the adjoining lot made in a skillful and proper manner. He was inclined to think that in such case the owner of the building was not entitled to any damage for an injury resulting from the excavation.

Judgment reversed.

96 *Young by &c. v. Barner & als.

January Term, 1876, Richmond.

1. **Wills—Evidence—Testamentary Capacity—Experts.***—In controversies touching testamentary capacity, as a general rule the evidence of witnesses, unless founded on fact, except in the case of experts, is entitled to but little weight.
2. **Same—Same—Same—Attesting Witnesses.**†—The evidence of the attesting witnesses is an exception to this rule. But if an attesting witness to a will attempts to impeach its validity, though his evidence will not be positively rejected, it is to be received with the most scrupulous jealousy.
3. **Same—Same—Same—As Evidenced by Provisions of Will.**‡—In all questions of testamentary capacity, particularly where the evidence is conflicting, the courts are much inclined to consider the dispositions contained in it. If these be in themselves consistent with the situation of the testator—in conformity with his affections and previous declarations—if they be such as might justly have been expected, this is said to be of itself persuasive evidence of testamentary capacity.
4. **Same—Same—Same—Province of Jury.**—The jury are the proper judges of the weight and credit due to the testimony of the witnesses, and their verdict, when sanctioned, as in this case, by the county and circuit judges who heard the evidence, is entitled to the highest respect in the appellate court. In such a case the deviation from the proof must be very plain and palpable to warrant the interference of the appellate court.
5. **Same—Same—Same—Presumption.**—If the witnesses to a will are dead, or if there is a failure of

***Testamentary Capacity—Evidence of.**—As to the admissibility of testimony to prove the capacity of a testator in making a will, see *Whitelaw v. Sims*, 90 Va. 500, 19 S. E. Rep. 118, where the court, citing the principal case, said: "The court also erred in excluding the opinions of witnesses having peculiar advantages of knowing as to the capacity of the testatrix." See also, *Cheatham v. Hatcher*, 80 Gratt. 56, and *note*; *McMechen v. McMechen*, 17 W. Va. 684; *Hartman v. Strickler*, 82 Va. 238.

†**Same—Attesting Witnesses.**—The testimony of an attesting witness against the validity of a will is received with jealousy and suspicion. *Cheatham v. Hatcher*, 80 Gratt. 56, and *note*; *Tucker v. Sandidge*, 85 Va. 571, 8 S. E. Rep. 650.

‡**Same—As Evidenced by Provisions of Will.**—In *Hartman v. Strickler*, 82 Va. 237, citing the principal case, the court says: "Where the provisions of the will accord with the affections and previous declarations of the testator, and are such as might have been justly expected, that is persuasive evidence both of testamentary capacity and freedom of action." See also, *Martin v. Thayer*, 37 W. Va. 38, 16 S. E. Rep. 489.

recollection on their part, the court will often presume (the will being in other respects regular that the requirements of the statute have been complied with in the formal execution of the instrument.

At a County court held for the county of Dinwiddie, in September 1874, a paper writing purporting to be the will of Mary

H. Young, deceased, was offered for
97 *probate, when the court, on its own motion, ordered that a jury be summoned, to try at the bar of the court, and to ascertain whether any and if any how much of what was offered, was or was not the will of the testatrix. A jury having been empanelled and having heard the evidence of witnesses, rendered the following verdict, viz: "We of the jury find this the will of Mary H. Young;" And the court affirmed the judgment. Whereupon the said will was proved by the oaths of the subscribing witnesses thereto, and ordered to be recorded as the true last will of Mary H. Young deceased: And thereupon Wm. F. Barner, the father and heir at law of the testatrix, in open court prayed an appeal as of right, from said decision, to the Circuit court of the county of Dinwiddie; which was granted.

The will is as follows:

In the name of God Amen. I Mary H. Young being of sound mind but infirm body, do make this my last will and testament. I wish my executor hereafter named, to pay all my just debts in the first place.

I loan to my nephew Drury Young, my adopted child, my land and its proceeds during his natural life, my said executor to manage the same until he obtains his majority. Should he die before coming of age or after, I give and bequeath my land to my brothers.

The residue of my estate I lend to my mother so long as she lives, and at her death I give it to my sisters.

I appoint my father, Wm. F. Barner, to be my executor and administrator of my estate, and request the court not to exact him to give any security for the same.

98 *Given under my hand and seal this 13th day of June eighteen hundred and seventy-four.

M. H. Young Seal.

In presence of
Caroline Hamilton,
Tempe Boisseau,
C. G. Zehmur.

The case came on to be heard in the Circuit court in November 1874, when six witnesses were examined, and their testimony was taken down as it was given by a person appointed by the court. From this testimony it appears that two questions were involved in the case. The first was, whether Mrs. Young was capable of making a will when she signed the paper; and second, whether the witnesses attested in the presence of the testatrix.

The will was prepared by Dr. C. G. Zehmur, her attending physician, and was signed by Mrs. Young a very short time before her death. She was a widow without

children, had adopted the boy to whom she gives her land for his life, and was much attached to him, and she left a father, mother, and eight brothers and sisters.

It appears that some person present suggested to Mrs. Young to make a will, and that Dr. Zehmur suggested that a nuncupative will was not legal. It was then proposed to send for Mr. Epes to get him to write her will; but after the messenger left, the Dr. thinking that she would not live long enough for Mr. Epes to get there, proposed to write it. There were several persons present who made suggestions to her as to how she should dispose of her property;

though these suggestions were not made by any person to whom anything was given by the will. Dr. Zehmur says—I gathered more from what she said to her friends how she wanted the will written than from any express statement from her. Had no suggestions been made to her she was competent.

Having understood, as he supposed, what were her wishes, Dr. Zehmur went into the dining room, and there prepared the paper. Whilst he was absent she spoke of having paid two servants some money which she had not set down; and that another servant had got some corn.

On the question of the capacity of the testatrix at the time of her signing the paper, Dr. Zehmur says—"I carried it to her after writing it, and read it to her; found she was sinking fast. After reading it to her, from her dullness I suspected that she did not understand what I read, and presented it to her, and told her to read it for herself. She took and glanced at it, and without reading it commenced signing it, and I saw her making marks down, and thinking she intended signing her initials, told her that would not do. She only made three straight marks for the letter M. My impression is I gave her the pen. I told her where to sign her name. When the paper was handed to her I do not think she had an intelligent understanding of the contents of the paper, but she knew it was a will."

Miss Boisseau was present when the will was read by Dr. Zehmur to Mrs. Young; did not hear her say a word; did not see her notice it at all.

Mrs. Hamilton says—When I was requested by Dr. Zehmur to sign the will I did so reluctantly, because it was so different from what I had heard her say in health how she would dispose of what little she had. When the witnesses signed the paper I think she was very nearly gone. She said she could not see us all. She spoke in monosyllables, but she recognized me. When Dr. Zehmur read the will and handed it to her, she neither by word or gesture signified her assent to it.

Upon the question whether the witnesses attested in the presence of the testatrix, there was no doubt that Mrs. Hamilton attested in the porch out of sight of the testatrix; Miss Boisseau attested it in the door between the porch and the chamber in which the

testatrix was lying, and might have been seen by her. The doubt was as to where Dr. Zehmur attested it. He says—Before she signed the will I requested all to leave the room except the witnesses. Her mother, I think, held her up in bed, and a book was handed her to sign the will upon. After signing it I took the will and presented it to the witnesses with the book. The subscribing witnesses were present when she signed the will. * * I cannot tell where I signed it. I thought I signed it at the side-table; that was more convenient than anything else I saw in the room. Until I came here I thought I signed first of the witnesses, but I find I signed last. From the manner in which my name is signed it most have been on something firm. I could not have signed as I did unless I had something firm to write on. I cannot say whether I was in or out of the room when I signed the will; my impression is I was in the room. I knew it was necessary that the testatrix should sign in the presence of the witnesses, but I did not know that the witnesses should sign in the presence of the testatrix. * * The witnesses signed it a very few seconds after she signed it. I have no recollection of when I signed the will. I do not remember whether or not I asked the witnesses to step into the porch.

Miss Boisseau had no idea where Dr. Zehmur signed the will. Mrs. Hamilton says—I was in the piazza when I signed it. I think Dr. Zehmur signed it either in the porch or in the dining room. I could almost declare positively that Dr. Zehmur did not sign it in the parlor, the room in which Mrs. Young was. * * There was not a table in the room sufficiently large for him to sign upon; I mean with sufficient room upon it. The table in the room was filled with vials, glasses, lamp, &c. After signing it, Dr. Zehmur brought the paper in the room and offered it to Mrs. Barner, and told her she was the proper person to keep it. Where he did sign it I am not prepared to say. He might have signed it near the door, where she, Mrs. Young, could have seen him, but I do not think she could. Dr. Zehmur did not sign it in the sick-room.

Mrs. J. W. Young says—I was present when the testatrix signed the will. When Dr. Zehmur requested all but the witnesses to leave, I remained. * * I saw Miss Tempe Boisseau sign her name in the door; saw Dr. Zehmur standing at the side-table in the room, with paper, pen and ink in his hands; do not know whether he signed it or not. The table was a small table, and there was a lamp on it.

The evidence having been introduced, and the cause fully argued, the court was of opinion, that it was not necessary to decide upon the testamentary capacity of the said Mrs. Mary H. Young; but if it was, and this was the only question in the cause, then upon the evidence, and drawing the proper legal presumptions in such cases, the court was inclined to think the paper writing aforesaid ought to be admitted to probate

as her will. But being of opinion that though the evidence clearly shows that Mrs. Young signed the will in the presence of all three of the subscribing witnesses, 102 *and that all of them were present together at said signing by Mrs. Young; yet the evidence does not show that more than one witness, viz: Miss Tempe Boisseau, signed the will as a witness in the presence of the testatrix, and there was no evidence that either this witness or any of the others were requested by the deceased to attest said paper as her will. And though the court does not base its judgment upon this last fact, yet it is a pregnant circumstance in the case: and for these reasons the court, reversing the judgment of the County court, refused to admit to probate the paper writing aforesaid. To which opinion of the court, the appellant Drury F. Young, by his next friend, excepted; and applied to this court for a supersedeas; which was awarded.

Bernard and Gregory, for the appellant.

Collier, Budd and Eppes, for the appellee.

Staples, J., delivered the opinion of the court.

This is a controversy as to the probate of a will. It involves two questions, one of testamentary capacity, and the other relating to the formal execution of the instrument. A jury was empanelled in the County court, and a verdict rendered in favor of the will; which was approved by the presiding judge. An appeal was taken to the Circuit court. The judge of that court, after hearing the evidence, was inclined to think that the testatrix was possessed of sufficient testamentary capacity: he however held that the writing was not executed in accordance with the requirements of the statute; and for that reason refused to admit the will to probate. From that decision an appeal was taken to this court.

The case has been argued here, both 103 *upon the question of testamentary capacity, and that of the formal execution of the instrument. It must therefore be considered by us in both aspects.

In controversies touching testamentary capacity, the evidence being a mere matter of opinion, is generally of a conflicting character.

As a general rule such evidence unless founded on facts, except in the case of experts, has but little weight with the courts and juries. An exception to this rule is allowed as to the subscribing witnesses, who are regarded in the law as placed around the testator to guard against fraud, and to ascertain and to judge of his capacity.

But it is also held upon good authority, that a person who signs his name as a witness to a will, by his act of attestation solemnly testifies to the sanity of the testator. If he afterwards attempts to impeach the validity of the will his evidence is not to be positively rejected; but it is to be received with the most scrupulous jealousy.

1 Jarman on Wills 77, and cases cited in note 1.

In all questions of testamentary capacity, particularly where the evidence is conflicting, the courts are inclined much to consider the dispositions contained in the will. If such dispositions be in themselves consistent with the situation of the testator, in conformity with his affections and previous declarations—if they be such as might justly have been expected—this is itself said to be persuasive evidence of testamentary capacity. The rationality of the act goes to show the reason of the person. This rule has been repeatedly applied in the English courts in cases of doubtful capacity from age or sickness. 1 Jarman, page 62, note.

In the case before us, the testatrix 104 had no children *of her own, but she had an adopted son, a nephew, to whom she was greatly attached. To him she gave her real estate for life, and at his death it was to pass in fee to her brothers. The residue of her property she gave to her mother for life, and then in fee to the sisters of the testatrix. One of the witnesses states that these provisions are different from what he heard the testatrix say in health she intended to make. What that disposition was we are not told. But to whom could she have given her estate more deserving her just regard and bounty than these devisees, her adopted son, mother, brothers and sisters. It is true her father was also living at the time, but he, of course, receives the benefit of the bequest made to the mother. A will containing provisions so just in themselves, so thoughtful, is very persuasive evidence of a disposing mind and memory. It is very true, as counsel have insisted, that suggestions were made at the time by persons in the room to the testatrix as to the objects of her bounty; but it is equally true that no suggestions were made by any one who is provided for in the will, and that all the provisions are in conformity with the directions given by the testatrix herself. Her declarations, her recollection of money she had paid two of her servants, and of grain gotten by another, occurring whilst the will was being prepared, show that she was of disposing mind and memory, down to within a few moments of the execution of the will. When the various provisions were read over to her, she was raised in her bed and signed her name without hesitation or serious difficulty. There is nothing, certainly nothing positive or reliable, to show that at that time, or at the time of the attestation of the witnesses, she was not fully conscious of all that was being done by herself and them.

105 *It is unnecessary however to enter into a minute discussion of the evidence. Upon well settled principles the jury were the proper judges of the weight and credit due to the testimony of the witnesses, and their verdict when sanctioned by the two judges who heard the evidence, is entitled to the highest respect in this court. In such case the deviation from the proof

must be very plain and palpable to warrant the interference of an appellate court. *Jessee v. Parker's adm'r*, 6 Gratt. 57; *Greer v. Greer's adm'r*, 9 Gratt. 330; *Dudleys v. Dudley's adm'r*, 3 Leigh 471, 484.

The next point for consideration is the question of the due execution of the instrument. Upon this point, as upon that of the testamentary capacity, the decision of the lower court is of course entitled to the greatest respect; but the force of that consideration is much diminished by the fact that the verdict and judgment in the County court were reversed by the circuit judge upon the question of the formal execution of the will. The matter is therefore before us in a great measure unaffected by the weight generally due to the opinion of the trying court.

Our statute prescribes that the witnesses shall subscribe the will in the presence of the testator; but no form of attestation shall be necessary. The cases do not very accurately define what is meant by the phrase "in the presence of the testator." Upon this subject the judges of this court have held very conflicting opinions. *Neil et als. v. Neil*, 1 Leigh 6; *Moore v. Moore's ex'or*, 8 Gratt. 307; *Sturdivant v. Birchett*, 10 Gratt. 67; *Nock v. Nock's ex'ors*, 10 Gratt. 106.

But whatever may have been the conflict of opinion upon other points, it is well settled that though the attestation of the witnesses is in a different room, and even in a different house, it is good as being 106 in the "presence of the testator, if within the range of his vision, so that he might have seen it. It is not necessary that he should actually have seen the attestation. It is sufficient that he might have seen it if he chose to do so. *Casson v. Dade*, 1 Bro. C. C. 69.

Another rule is equally well settled; and that is when the attestation is in the same room with the testator, it is presumed to have been made in his presence until it appears that he could not have seen it. If the witnesses to the will are dead, or if there is failure of recollection on their part, the court will often presume (the will being in other respects regular) that the requirements of the statute have been complied with in the formal execution of the instrument. Such presumptions are absolutely essential to the protection of property and the security of titles. Were it otherwise the most important and solemn instruments would often fail to take effect by the death, or from the mere failure of attesting witnesses—real or assumed—to recall each and every formality presented for the execution of testamentary papers.

Bearing these principles in mind, we may easily determine whether the paper offered as a will is sufficiently proved to justify its admission to probate. There are three subscribing witnesses. It is certain that one of them did sign, and another did not sign, in the presence of the testatrix. The real difficulty is in respect to the third witness. This witness is Dr. Zehmur, the attending

physician, and the draftsman of the will. He went out of the room in which the testatrix was lying into a porch, and from the porch into the dining room, where there was a table, upon which he wrote the will. He then returned to the sick room with the pen and ink and paper in his hand. The testatrix having signed in the pres-

107 ence of the witnesses, "one of those then went into the porch out of the range of the testatrix's vision, and subscribed her name; the second signed while standing in the doorway, with the paper resting upon the door-facing. Where then did Dr. Zehmur make his attestation? His statement is, "I cannot tell where I signed the will. I thought I signed it at the side-table; that was more convenient than anything I saw in the room. Until I came here I thought I signed first of the witnesses; but I find that I signed last." Again he says: "I can't say whether I was in or out of the room when I signed the will. My impression is, that I was in the room." It is impossible to read the testimony of this witness without feeling that the witness had originally a very strong conviction upon his mind that he had subscribed the will in the same room with the testatrix. This conviction, it is obvious, was not in any degree lessened by his own reflections, but by the statements of others; conversations and discussions doubtless occurring in his presence before the trial in the Circuit court. The evidence of Mrs. Hamilton, it is highly probable, had much to do in creating the doubt at the time of the trial upon the mind of the witness in respect to his locality. She says: "I think Dr. Zehmur signed either in the porch or in the dining room." But she gives no satisfactory reason for this opinion. It is at best a mere conjecture. Again she says: "I could almost declare positively that he did not sign in the parlor." One of the reasons assigned for this opinion is, that she and Miss Boisseau did not see him sign, as they would, had he been in the room at the time of his attestation. It is however much more probable that their whole attention was engrossed with the dying friend before them, than the act (unimportant to them) of subscribing a paper by a witness.

108 "They might, or might not, have seen the signing; it is impossible to say. The other reason given by Mrs. Hamilton for her opinion is, that there was no convenient place in the room for writing; as the only table in it was covered with vials and bottles."

But Dr. Zehmur does not concur with Mrs. Hamilton as to the side-table. He says, "I thought I signed it at the side-table; that was more convenient than anything else I saw in the room." It is apparent throughout that Dr. Zehmur, though much impressed with the somewhat positive declarations of Mrs. Hamilton, still adhered to his original convictions, that he attested the will in the room in which the testatrix was lying. And his recollection is to some extent confirmed by Mrs. Young, another wit-

ness, who says: "I saw Miss Tempe Boisseau sign her name in the door; I saw Dr. Zehmur standing at the side-table in the room with pen and ink and paper in his hands." The most just and reasonable inference from all the evidence is, that Mrs. Hamilton having signed the will in the porch, handed it to Miss Boisseau, who signed while standing in the door-way, and then delivered it to Dr. Zehmur, who signed in the room where all the parties were then present.

Be this as it may, we have here the strong impression of the subscribing witness one way, the negative testimony of another witness another way. We have the opinion of the circuit judge giving the greatest weight to the negative testimony, the verdict of the jury and the judgment of the county judge maintaining the subscribing witness, when the events were fresher in the recollection of all the witnesses. How ought an appellate court to decide under such circumstances? Surely every reasonable presumption ought to be made in favor of the proper execution of the will; a will just and beneficent in all its provisions, and as to which there is not a suggestion or even a hint of fraud, undue influence, or unfair dealing.

For these reasons the judgment of the Circuit court must be reversed, and that of the County court affirmed.

Anderson, J., was in great doubt as to the sanity of the testatrix when she signed the will, and whether the witness Zehmur signed in her presence; but he yielded to the views of the court.

Judgment of the Circuit court reversed; and judgment of the County court affirmed.

110 *Miller's Ex'or v. The Commonwealth. Barrett's Adm'rs v. The Commonwealth.

January Term, 1876, Richmond.

1. **Corporations—"Persons" in Statutes.**—Corporations are included under the term "persons" in a statute, unless they are exempted by its terms, or by the nature of the subject to which the statute relates.

2. **Same—Taxation—Collateral Inheritances.**—Corporations are included in the act of 1867, ch. 64, § 8, Sess. Acts 1866-67, imposing a tax on collateral inheritances.

***Corporations—"Persons" in Statutes.**—"Wherever the governing principle is taxation, the term 'persons' in a statute has been held to include corporations; and, under the assessment and tax laws, corporations are assessed and taxed, although the word persons is used therein, and corporation is not mentioned." *Crafford v. Supervisors*, 87 Va. 115, 12 S. E. Rep. 147. See also, *Stribbling v. Bank*, 5 Rand. 180; *U. S. v. Bank*, 1 Rob. 590; *B. & O. R. R. Co. v. Gallahue*, 14 Gratt. 568; Va. Code, § 5, thirteenth sub.; *City of Lynchburg v. N. & W. R. R. Co.*, 80 Va. 247; *W. U. Tel. Co. v. City of Richmond*, 26 Gratt. 1, and *note*.

3. **Same—Same—Same—Charitable Institutions.**—

Though the statute exempts from taxation the property of orphan asylums and other charitable institutions, this exemption does not include a tax on a devise or bequest of property to such institutions.

Samuel Miller, of the county of Campbell, died in March 1869. He left a very large estate, and by his will, among other bequests, he gave to the Lynchburg Female Orphan Asylum, a large amount of public bonds and a tract of land; and the residue of his estate, not before disposed of, he gave to the county of Albemarle, for the purpose of establishing a school for the education of poor orphan white children.

William Barrett, of the city of Richmond, died in January 1871; and he also left a large estate. By his will, after a great many legacies to individuals, he gave the residuum of his estate to be equally shared, by the Richmond Male Orphan Asylum, The Female Humane Association of Richmond, and The St. Paul's Church Home. All of these were incorporated institutions.

111 *The question whether these bequests were subject to the tax on collateral inheritances having been made, it was agreed by the parties that it should be submitted to the decision of the courts; and accordingly motions were made in the Circuit court of the city of Richmond, by the Attorney General, against the executor of Miller and the administrators with the will annexed of Barrett, for the amount of the tax on these legacies. The motions came on to be heard on the 3d and 7th of April 1875, when the court rendered judgment in favor of the Commonwealth in both cases. And thereupon the defendants applied for writs of supersedeas, which were awarded.

The cases were argued by Stiles, Gen'l Early, Craighill, Meredith, Wm. J. Robertson, and Grattan, for the appellants, and the Attorney General, for the Commonwealth.

Christian, J. These two cases were heard together. They involve precisely the same, and a single question, to wit: whether certain legacies which were bequeathed by the testators, Wm. Barrett and Samuel Miller, are subject to the tax imposed by law upon what is known as collateral inheritances.

In the first named case the legatees are three orphan asylums located in the city of Richmond. In the other, the legacies bequeathed by the will of Samuel Miller are, one to the Lynchburg Female Orphan Asylum, and the other to the Board of the Literary Fund, "to establish a school in the county of Albemarle for the education of as

***Same—Taxation—Collateral Inheritances—Charitable Institutions.**—That such succession tax is not a "tax on property," and hence does not fall within the statute exempting charitable institutions from taxation, see *Schoolfield v. City of Lynchburg*, 78 Va. 371; *Peters v. City of Lynchburg*, 76 Va. 600, in both of which cases the principal case is cited. It is also approved by the supreme court of the United States in *Plummer v. Coler*, 178 U. S. 115, 20 Sup. Ct. Rep. 829.

many poor orphan children and other white children, residents of the county, as the profits and income of the fund so devised will admit of or compass."

112 *It is conceded that in both cases the legacies are bequeathed to corporations, and in both cases these corporations are charitable institutions.

The proceeding in the Circuit court was, by motion of the Attorney General, without any formal pleadings; and that court gave judgment for the commonwealth for the amount of the tax imposed by law. To which judgment a writ of error was awarded by this court.

These judgments are assailed here upon two grounds: 1st. That the legatees being corporations are not within the terms of the section of the act imposing a tax upon collateral inheritances; and 2d, if within the terms of the act, these legatees are exempted under that provision of the statute which exempts from taxation "all personal property belonging to orphan asylums or other charitable institutions."

Upon the first proposition that corporations are not, but only natural persons are, included within the terms of the act imposing a tax upon collateral inheritances, it becomes necessary to trace somewhat in detail the legislation on this subject.

The first act on the subject was passed on the 6th February 1844, and provided as follows: "All estate real, personal and mixed, of ever kind whatsoever, passing from every person who may die seized or possessed of such estate, being within this commonwealth either by will or under the intestate laws thereof, to any person or persons or to bodies politic and corporate in trust or otherwise, other than to or for the use of a father, mother, husband, wife, brother, sister, children or lineal descendants born in lawful wedlock, shall be and they are hereby made subject to a tax or duty imposed by law, on every hundred dollars of the clear value thereof,"

113 "and at and after the same rate for any less amount, to be paid to the use of the commonwealth." Sess. Acts 1843-'44, p. 9 Sec. 1.

Until the Code of 1849 this phraseology was used: "to any person or persons or to bodies politic or corporate, in trust or otherwise, other than to or for the use of a father &c. &c." In that Code the words "bodies politic or corporate" were omitted, and the law taxing collateral inheritances was enacted in the following form: ch. 39, § 6, Code 1849: "When any estate within this commonwealth, of any decedent shall pass under his will or the laws regulating descents and distributions, to any other person or to any other use, than to or for the use of the father, mother, husband, wife, brother, sister or lineal descendant of such decedent, the estate so passing, if of greater value than two hundred and fifty dollars, shall be subject to a tax of a certain per cent." The act continued in this form until the session of 1855-'6, when this tax upon collateral inheritances was omitted from

the tax law; which omission was declared by this court in Fox's adm'r v. Commonwealth, 16 Gratt. 1, to operate as a repeal of the statute imposing such tax.

The law creating this tax was again enacted in 1863. The act of March 28th, 1863, § 15, provides as follows:

"§ 15. On the estate of a decedent, which passes under his will, or by descent to any other person, or for any other use than to or for the use of the father, mother, husband, wife, brother, sister, nephew, niece, or lineal descendant of such decedent, there shall be a tax of three per centum of such estate."

This tax was again omitted from the general tax law until 1867, when it was provided by the 3d section of ch. 64, Sess. Acts 1866-'7, as follows:

114 *"§ 3. Upon any estate of a decedent which shall pass by his will, or upon his intestacy to any person other than his lineal descendants, or his father, mother, husband, wife, brother, sister, nephew or niece, five per centum upon the value of the amount thereof." This last is the provision of the statute under which the tax in these cases has been imposed.

It is insisted by the learned counsel for the appellants, that, the legatees under both of these wills being corporations are not within the term or scope of the act, and it was argued with much force and ingenuity, that inasmuch as the words "bodies corporate and politic," and the words "to any other use than to or for the use of the father, &c." have been left out of the present act, this omission indicates the intention of the legislature to exempt corporations from the operation of the statute, and confine it to natural persons. I do not think that this is a sound construction. That the word person in a statute may embrace, and does often embrace a corporation, an artificial as well as natural person, must be conceded. Indeed the general rule would seem to be, that corporations are included in the word person unless it appears from the words of the act, or from the very nature of the act itself, that corporations are excluded from its operation. The statutory rules of construction embodied in the Code of 1849, and continued in every codification of the laws since that time to the present, declare plainly and emphatically the general principle above stated. The 17th section of chap. 16, Code of 1849, lays down fourteen rules of construction, and declares that "in the construction of all statutes the following rules shall be observed, unless such construction would be inconsistent with the manifest intention of the legislature."

115 In the rules following *this declaration of the statute law, the thirteenth rule provides that "the word 'person' may extend and be applied to bodies politic and corporate as well as individuals."

The adoption of this rule of construction in 1849, accounts for the omission of the words "bodies politic and corporate," in subsequent acts, which, up to that time,

had been used in acts imposing a tax upon collateral inheritances.

We all know that one great object of the revisors was to simplify the statute law, and relieve it from unnecessary verbiage, which oftime obscured its meaning. The omission therefore of the words, "bodies politic and corporate," and of the words, "to any other use than to or for the use of the father," &c., cannot be taken as an indication of an intention of the legislature to exempt corporations from this tax. If the word "person" in the act embraces corporations, then these words were useless and unnecessary, and were properly omitted. That word "person," does certainly include corporations, unless the intention of the legislature is manifest that corporations were intended to be excluded. How is such intention manifested in this case? Certainly not by the terms of the act. Corporations are not in terms excluded from its operation. The omission of the word corporation does not exclude them, for the act uses a word, to wit, person, which may include them, and which must include them, unless it was the manifest intention of the legislature to exclude them from the operation of the act. Nor is there anything in the nature of the act which excludes corporations from its operation.

I admit there are statutes which, from their very nature, exclude corporations from the meaning of the word "person." 116 Such, for instance, are all statutes *declaring a person committing certain acts guilty of a felony, or other criminal offence, and affixing certain punishment for the offence. In such cases, and others that might be named, corporations, from the very nature of the act itself, are not included in the word "person," for very obvious reasons. But there certainly is nothing in the nature of the law we are considering which excludes corporations from its operation. It is a law imposing a tax. Corporations are very common, and I may add, favorite subjects of taxation; and in a statute imposing taxes, the word person must be taken as embracing corporations, unless they are excluded by express terms or by the clearest implication.

It may be well to remark, that the argument of the learned counsel for the appellants would exclude not only orphan asylums and other charitable institutions from this tax, but all other corporations, so that if these views be correct, an estate which is devised to a railroad company, or a cotton factory, or to the city of Richmond, or to any other corporation, would be exempt from this tax, simply because the legatee was a corporation; because, according to the argument, only natural persons are included in the terms of the act. I cannot give my assent to such a construction.

But it is insisted as the second ground of error in the judgment of the Circuit court of Richmond, that the appellants ought not to have this tax imposed on them, because the law exempts from taxation "all personal

property of orphan asylums and other charitable institutions."

In respect to this assignment of error, it is sufficient to say that the tax imposed in these cases is not a tax on property.

The case of *Eyre v. Jacob*, 14 Gratt. 117 422, is decisive *of the question, and must govern this case. Judge Lee, delivering the opinion of the majority of the court in that case, speaking of the tax upon collateral inheritances (which is the tax imposed upon the legatees in this case) says, page 428: "It cannot be regarded in a proper legal sense as a tax upon property. * * * The intention of the legislature was plainly to tax the transmission of property, by devise or descent, to collateral kindred; to require that a party thus taking the benefit of a civil right, secured to him under the law, should pay a certain premium for its enjoyment. * * * That the general assembly of Virginia, in the absence of a constitutional prohibition, does possess the power to tax a civil right or privilege like this, is beyond all question. This is fully embraced within its general and comprehensive power of taxation. But it may be deduced from the very nature of the subject itself. The right to take property by devise or descent is the creature of the law, and protected by its authority."

Having plenary powers, only restricted by the constitution, over the subject of taxation, it certainly has the power to appropriate a modicum of the estate, call it a tax or what you will, as a condition upon which those who take the estate shall be permitted to enjoy it. The legislature might, if it saw fit, prohibit bequests to all charitable institutions, and declare all such devises absolutely void. Surely it may prescribe the terms and conditions upon which such institutions may receive legacies. It may say to such institutions you may accept legacies bequeathed to you, provided you pay for the privilege a certain per centum of the value of the property so bequeathed; and this property shall be held forever free from taxation, when it comes to your hands; but this premium you must pay for its enjoyment. It is illogical and unrea-

118 sonable to *conclude, that because the property of such institutions, after it is acquired, is exempted from taxation, that therefore they would be relieved from paying a premium or tax on the civil right or privilege of acquiring property by devise. It must, of course, be presumed that the legislature, at the time it passed the act relied on, exempting from taxation the personal property of orphan asylums and other charitable institutions, was aware that this court had held, that the tax here sought to be imposed was not a tax on property. Knowing, as they must have known, the law on this subject, the legislature exempt such institutions from taxation on personal property, and confine that exemption to tax on property. This certainly does not embrace an exemption from a tax for the privilege or civil right of taking an estate by devise or descent.

I am for affirming the judgment of the Circuit Court of the city of Richmond.

Moncure P. and Anderson J. concurred in the opinion of Christian J.

Staples J. dissented.

Judgment affirmed.

119 *Silliman & als. v. Fredericksburg, Or. & Charl. R. R. Co.*

January Term, 1876, Richmond.

1. Corporations—Charter Provisions—Conditions—Construction.—By statute the charter of a railroad company is extended to enable it to complete its road; and it is authorized to issue its bonds, registered or coupon, for \$1,200,000, and sell them at less than par, and secure them by mortgage or deed of trust upon all the property and franchises of the company. And by the same act it is provided, that unless the road is completed to a certain point by a certain day, the company shall forfeit to the state their corporate franchises and rights, together with their road track and road bed, and all works and materials thereon, to other property; the state to hold the same as trustee for certain parties named. The company accepted the charter, issued \$480,000 of bonds, and executed a deed of trust upon its property and franchises to secure them. The company failed to complete the road to the point fixed by the time prescribed, or, as it would seem, to expend any money in its construction; and the state proceeded to declare the charter forfeited, and to take possession of the road and the other property and franchises of the company, and to turn it all over to the *causui que trust*, who organized another company. Persons, one of whom was the president of the road, and all were the principals in the road when the said act was passed, or were connected with them, claimed that they were the holders of \$323,500 of the bonds issued, and filed their bill to enforce the deed of trust. **Held:**

1. **Same—Same—Same—Same—Forfeiture.**—Under the provision for the forfeiture of the charter, the state took the property and franchises of the company free from the trust.

2. **Same—Same—Same—Same—Same.**—Upon the failure of the company to complete the road to the point fixed by the day prescribed, the forfeiture became absolute and complete; and the state having entered and elected to hold under the forfeiture, no inquisition or judicial proceedings, *or inquest or finding of any kind, was required to consummate the forfeiture.

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3. **Same—Same—Notice of Terms.**—From the relations of these plaintiffs to the company and to each other, they must be held to have had notice of the terms of the act, which authorized the execution of the deed of trust under which they claim; and as no money was expended on the road, or as they claim paid for interest, the strong presumption is, that the company received no money for the said bonds. The plaintiffs are not, therefore, innocent purchasers for value, and holders of said bonds without notice of the provisions of said act.

*For monographic note on Agencies, see end of case.

4. **Same—Same—Same.***—Persons dealing with corporations must take notice of what is contained in the law of their organization; and they must be presumed to be informed as to the restrictions annexed to the grant of power, by the law by which the corporation is authorized to act.

5. **Negotiable Instruments—Agents—Authority.**—In all cases, even in cases of negotiable instruments, a party contracting with an agent must enquire into his authority; and either a state or a corporation is bound only when its agents keep within the limit of their authority.

In March 1853 a company styled the Fredericksburg and Gordonsville Railroad Company, was incorporated and organized to build a railroad from Fredericksburg to Gordonsville. This company was authorized to borrow money, and give a mortgage on its franchises and property to pay it. The company did act under this power, and having failed to pay, the property and franchise was sold under the mortgage, and was purchased by Thomas G. Walker, Z. P. Boyer and others; and they proceeded at once to organize a joint stock company, under the name and style of the Fredericksburg, Orange and Charlottesville Railroad Company, for the purpose of completing the railroad to Gordonsville and extending it to Charlottesville. By an act of the General Assembly, passed February 21st 1872, the charter of this company was extended for a period of five years, from the 1st of 121 March 1872; and the *company was authorized to borrow a sum not exceeding twelve hundred thousand dollars, upon a rate of interest not exceeding seven per cent. per annum; and to issue either coupon or registered bonds for the sums borrowed; and to secure the same, principal and interest, by a lien on all the property, rights and franchises of the company, and to sell the bonds at less than par.

Section 4 of the act provided, that an amount of the bonds so issued, not exceeding \$30,000, should be applied to pay to citizens of Virginia debts due from the former company, for work done and materials furnished in and about the construction of that part of the road then constructed; and these bonds should be a preferred debt.

Section 5 provided, that if the said company failed to complete the said railroad from Fredericksburg as far as Orange Courthouse, in the style and manner prescribed in the act, by the 1st of May 1873,

***Corporations—Charter Provisions.—Notice of Terms.**—In the case of *Bocock v. Ally, C. & I. Co.*, 82 Va. 919, 1 S. E. Rep. 825, the court said: "This court, per HINTON, J., in *Bocock v. Life Association of America*, 77 Va. 91, quoting from the supreme court of the United States, in *Rolfe v. Rurdle*, 13 Otto 222, said: 'Every person dealing with a corporation is bound to take notice of its constitution, by-laws and way of doing business.' And to the same effect is the opinion of FAUNTLEROY, J., speaking for the court in *Haden v. Mechanics Fire Association*, 80 Va. 601." See the still later case of *Whitehurst v. Whitehurst*, 83 Va. 155, 1 S. E. Rep. 801; also *Smith v. Cornelius*, 41 W. Va. 74, 23 S. E. Rep. 603, citing the principal case.

the company should forfeit to the state of Virginia their corporate franchises, together with their railroad track, road bed, and all work and materials thereon, and all other property of said company; and the state of Virginia should thereupon have the right to enter upon and take possession of said railroad track, &c., and hold the same as trustee, for the benefit of herself, the corporation of Fredericksburg, and the other private stockholders of the original Fredericksburg and Gordonsville Railroad Company, according to the respective amounts of stock in that company originally subscribed and held by them.

In pursuance of this act the company directed the issue of \$700,000 of the bonds of the company; and by deed of the 1st of November 1872, conveyed to the National

Trust Company, of the city of New York, "all its franchises and property of every description in the state of Virginia, in trust to secure the bonds so issued, with power to sell upon the failure for ninety days to pay the interest on the bonds, or upon the failure to pay the bonds when they fell due.

In March 1875 Edward S. Silliman, Zaccus P. Boyer, and the Miners Trust Company Bank, all of Pennsylvania, who sued for themselves and all other lien creditors of the Fredericksburg, Gordonsville and Charlottesville Railroad Company, filed their bill in the Circuit court of the city of Richmond, against the National Trust Company of the city of New York, as trustee, the Fredericksburg and Gordonsville Railroad Company, the Fredericksburg, Gordonsville and Charlottesville Railroad Company, and the Board of Public Works of the state of Virginia, in which, having set out the foregoing facts, they stated that only about \$480,000 of bonds were issued; and that the plaintiffs became the purchasers, and were then the owners of said bonds so issued, amounting to \$323,500, nearly three-fourths in value of the said bonds so issued. And they file a list of their bonds, and offer to produce them if required. They charge that a large amount of interest is due upon their bonds; that they have demanded payment, and have failed for more than ninety days to receive it; and that the railroad company have made no provision for its payment.

The bill further states that the Board of Public Works of Virginia claiming to act under the several acts relating to said Fredericksburg, Gordonsville and Charlottesville Railroad Company, did on the 2d day of December 1873, or thereabout, declare a forfeiture of the charter of said company, and proceed to take possession of the said railroad track &c., professing to hold the same in trust for the state of Virginia, the
123 *corporation of Fredericksburg and the original stockholders of the original Fredericksburg and Gordonsville Railroad Company. That after such forfeiture this company, claiming that their powers, rights and franchises had been revived thereby, re-organized and received from the

said Board of Public Works all the property, real and personal, which said board had taken in pursuance of said forfeiture, and so hold and use the same, and claim to exercise all the rights and franchises of the Fredericksburg, Gordonsville and Charlottesville Railroad Company.

The prayer of the bill was, that the railroad company might be compelled to pay the plaintiffs the money due them respectively, with interest; that the deed of trust might be enforced, and a sale of the property thereby conveyed might be made by a special commissioner, and for general relief.

The Fredericksburg, Gordonsville and Charlottesville Railroad Co., and the Board of Public Works of the state of Virginia, filed their pleas in the cause. They set out the act of 21st of February 1872; and aver that the railroad company referred to in that act, had not built the road as provided in said act—setting out what was to be done as it is set out in the act—and that said company had up to this time wholly failed to comply with any of said requirements of the statute touching the completion of said railroad; and said railroad was still wholly incomplete in all of the above particulars. That in consequence of this failure the said company had incurred the forfeiture to the state of Virginia declared by said act, of their corporate franchises &c., and all other property embraced in said deed of trust; and that the legal effect of said forfeiture is to extinguish said deed of trust, and to

release all the said property embraced
124 therein, from "any lien, by reason of said deed of trust, and from all liability for the payment of the bonds issued thereunder, or any of them; and that said deed of trust is utterly void, and cannot be enforced.

The plaintiffs demurred to these pleas. And the cause came on to be heard on the 2d day of July 1875, when the court overruled the demurrers; and the plaintiffs declining to reply to the pleas, it was decreed that the bill be dismissed as to these defendants. The plaintiffs thereupon applied to this court for an appeal; which was allowed.

Hundley and Farquhar for the appellants.

Marye & Fitzhugh, Wm. A. Little, Jno. T. Goolrick, and the Attorney General, for the appellees.

Anderson J. delivered the opinion of the court.

By section 1, of the act of assembly of the 21st of February 1872 (Sess. Acts of 1871-'72, ch. 114, p. 91) the charter of the Fredericksburg, Orange and Charlottesville Railroad Company is extended for a period of five years from the first day of March 1872, for the purpose of enabling the company to complete the railroad, and to extend the same.

For that purpose, and to pay certain debts, the said company, by section 2, is authorized and empowered to borrow a sum of money.

not exceeding twelve hundred thousand dollars, and at a rate of interest not exceeding seven per cent. per annum; and to secure the money so borrowed, to issue coupon or registered bonds, in such sums as the directors may deem best; and the president and directors are authorized and empowered "to execute a lien on all the property, rights and franchises of said company, existing at the time of the execution of such lien, 125 and which may *thereafter be acquired by said company," to secure the payment of moneys so borrowed and the interest accruing thereon: and said company may sell said bonds at less than par.

By section 5, it is provided, that if the said company shall fail to complete the said railroad from the town of Fredericksburg, as far as Orange Courthouse, with a single track, of the quality and capacity therein described, and the depots therein mentioned, on or before the 1st day of May 1873, "the company shall forfeit to the State of Virginia, their corporate franchises and rights, together with their railroad track, road bed and all work and materials thereon, and other property, to hold the same as a trustee for the benefit of herself, the corporation of Fredericksburg and other private stockholders of the original Fredericksburg Railroad Company, according to the respective amounts of the stock in that company originally subscribed and held by them."

Section 6 limits the power of the company in the issue of bonds, until after the road is fully completed to Orange Courthouse, to \$600,000.

Section 7 provides that this act shall not be in force until the said company shall file in the office of the board of public works their acceptance of the same and its conditions, signed by the president and secretary of the company, with the common seal of the company affixed thereto. This condition, it is admitted by the pleadings, was complied with by the company.

On the first day of November 1872, the said company executed a mortgage or deed of trust, conveying all its property, real and personal, rights and franchises, to secure the payment of principal and interest of its bonds for \$700,000, which the 126 company determined *to issue. And for default in payment of interest, or principal, for ninety days after demand, the trustee, upon the written request of the holders of not less than twenty-five per cent. of the bonds then outstanding, is required to sell. The bill alleges that bonds of the aggregate par value of only \$480,000 were issued; and that of them the plaintiffs became the purchasers, and the owners, of \$323,000, secured by the mortgage.

The material question we are to consider is: Is the mortgage subject to the conditions of forfeiture prescribed by the said 5th section of the act of assembly?

The court is of opinion, that the railroad company, upon accepting the amendment and extension of its charter upon the terms of the said act of assembly, became immediately invested with authority to execute

its bonds, and a deed of trust or mortgage upon its franchises and corporate rights, and upon the railroad track and road bed, and upon all its property, real and personal, to secure the payment of said bonds, principal and interest; but subject to its liability to the forfeiture of its said franchises and corporate rights, and its entire property, if the railroad was not completed from Fredericksburg to Orange Courthouse on or before the 1st of May 1873, as prescribed by the 5th section of the act. Though the authority to execute the bonds and the mortgage, in favor of the company, and the condition of forfeiture in favor of the state, are contained in different sections, they are both parts of the same act, and in fact constitute one contract; and must be taken and construed together as parts of a whole, so that, if possible, effect be given to the whole and to every part.

If the act should be construed as investing the company with the right to a lien or 127 mortgage all its franchises, *rights and property, free from the right of the state to a forfeiture of the same, if the road was not completed within the prescribed time, the 5th section would be wholly inoperative. It gives no security to the state that the money authorized to be borrowed would be faithfully applied to the completion of the road, or that the road would be completed within the time limited, which seems to have been the cardinal object of the legislature in confirming the charter of this company and in extending and enlarging its franchises. What assurance could it give? The very property which is to be forfeited to the state, by the company on its failure to comply with the condition, becomes vested in others by the mortgage, and leaves nothing for the state. For it is very evident that the foreclosure of the mortgage by sale would leave nothing for the equity of redemption upon which the forfeiture could operate. But the idea that only the equity of redemption was to be subject to forfeiture is repugnant to the very terms of the act, which require the forfeiture, not of the equity of redemption, but of the identical subject which the 2nd section authorized to be conveyed in trust or mortgage. Such an idea is also incompatible with the last clause of the section, which provides that upon such forfeiture the State of Virginia shall have right to enter upon and take possession of said railroad track, road bed, &c., and hold the same as a trustee for the benefit of herself, the corporation of Fredericksburg, and the other private stockholders; which she could not do if the forfeiture was subject to the mortgage, and the railroad track, road bed, and all the property had been conveyed to others, and were liable any hour to be sold toward satisfying the mortgage. Taking both sections together, they must be construed 128 to give *to the company the right to mortgage the property, subject to the state's right of forfeiture, in case the road is not completed by the time specified. It is evident that the company so understood

it. No further evidence is needed, that it was so understood by both the company and the legislature, than the terms of the act of assembly of 26 March 1873, extending the time for the completion of the road, and the acceptance of that act by the company.

This construction gives effect to both sections; not to 2nd section as fully and effectually as it would by the omission of the 5th section. But that was not intended. The legislature did not intend to grant the privilege, except with this restriction. If the company did not regard it as beneficial they were under no constraint to take it. They must have regarded it as conferring a benefit, or they would not have accepted it. It is true the restriction if it were known (and the company was bound in common honesty to make it known) would embarrass the sale of the bonds. They could not be sold at all perhaps if thrown upon the market. No one could be induced to purchase who could not repose a personal confidence in the company that every dollar so raised would be strictly applied to the completion of the railroad in compliance with the terms of the charter, and thus save the forfeiture. If the bonds could be sold, and the money faithfully and honestly so applied, the security would be greatly strengthened, and the property and franchises saved from forfeiture, and the loan would be amply secure. A loan upon such security could only be effected through the personal confidence reposed in the company by the lender, or the purchaser of the bonds, that the money would be faithfully and honestly applied. And it may be that

129 the company in accepting the act, calculated that they would be able to raise the money from those who knew them, and who would confide in them, that they would honestly apply the money so raised as required by the law which authorized them to make the loan, and in a way that would give ample security to the holder of the bonds. They could not have expected to raise the money by throwing the bonds upon the general market.

It would seem that they have not done so. The bill alleges that bonds to the amount of about \$480,000 were issued, of which they the plaintiffs are the owners and purchasers of \$323,000. No claim is asserted to the residue. They do not say that they are purchasers for value. It does not appear that they were. If they were, what has become of the money. It does not appear that any part of it was expended upon the work on the railroad. The bill alleges that even the interest, although demanded, has not been paid, not a dollar of it, to save the road and all the corporate property of the company and its franchises from sale under the mortgage. Could that be if there had been a bona fide sale of those bonds, for value—for money? Mr. Silliman, who claims to be the owner and purchaser individually of \$139,000 of these bonds, is the president of the railroad company. And he and Z. P. Boyer, who is one of the parties to whom the act of 21st of February 1872 was granted,

claim to be the joint-owners of \$23,000 more. The Miners Trust Company Bank and said Boyer claim to own together \$93,500, and the Miners & Trust Company Bank claim to own, the appellees counsel say, \$68,000. The amount does not clearly appear from the exhibit filed with the bill. But according to the statement of the bill it would be less. They are the plaintiffs in this

130 *suit, and from their relations to this company and to each other, are chargeable with notice of the terms of the act of assembly which authorized the execution of the mortgage or deed of trust, under which they claim. They are the holders of all the bonds to which any claim has been asserted in this suit. And if any money was received upon the sale of those bonds, the company being bound in all fidelity to apply it to the construction of the railroad and to the payment of the accruing interest on their debt, and it not appearing that one dollar from such source has been applied for the benefit of the railroad or the payment of interest, it raises a strong presumption, when we consider the relation of those who claim to be the owners and purchasers of the bonds to the railroad company and to one another, that the company has not received any money for said bonds.

The court is therefore of opinion that the appellants are not innocent purchasers for value, and holders of said bonds without notice of the provisions of the act of assembly by which the said company derived their authority to execute a mortgage to secure their payment, which was subject to forfeiture, if they failed to complete the road as far as Orange Courthouse, &c., by the time specified in the act. They may be presumed to have had actual notice of said restriction on the power of executing a mortgage. If they had not such notice it was their own fault. Persons dealing with corporations must take notice of whatever is contained in the law of their organization, and they must be presumed to be informed as to the restrictions or conditions annexed to the grant of power, by the law by which the corporation is authorized to act. *Pearce v. Madison & Ind. R. R. Co.*, 2 How. U. S. R. 441; *Zabriskie v. Cleveland R. R. Co.*, 23 How. U. S. R. 381.

131 In every instance (Mr. Justice Miller said, in delivering the opinion in which a majority of the court concurred, in the *Floyd Acceptances* case, 7 Wall. U. S. R. 680), a person making a contract with the government, through its officers or agents, must look to the statute under authority of which the agent or officer professes to act, and see for himself that his contract comes within the terms of the law. The same rule would apply, a fortiori, to persons making contracts with the agents or officers of bodies corporate. Mr. J. Miller further holds, in the above case, that the contract by bill of exchange stands on no different footing, with reference to the authority of the officer to bind the government. And again, "one who takes a negotiable note or bill of exchange purporting to be

made by an agent, is bound to inquire as to the power of the agent." (See also 31 Illinois R. 192; 42 Id. 273; 23 Barb. 10). In *Clark v. City of Des Moines*, 19 Iowa R. 209, the corporation is bound only when its agents keep within the limit of their authority. And again, "Negotiability will not validate obligations which are not binding for want of power to issue them. 23 N. Y. 464, 452; 1 A. L. Reg. (N. S.), 290.

Coupon bonds are put upon the footing of negotiable instruments, and are not liable, in the hands of an innocent holder, to the equities which attach to ordinary bonds. But their negotiability cannot enable the holder to subject property conveyed by deed of trust or mortgage for their security, which the grantor had no right to convey, or where he had a right to convey under restrictions, or conditions, no further than the restrictions or conditions will allow. Every purchaser of railroad bonds should look to the charter or statute, under authority of which they were issued and the mortgage was given to secure their payment.

132 *The court is of opinion, that no constitutional question is involved in this case with regard to the impairment of contracts. The construction given to the 5th section of the act, is a construction given to the contract itself; for it is a part of it, and a stipulation which is a part of a contract, though it may modify it, or make the contract different from what it would be without it, cannot be said to impair the obligation of the contract.

The court is also of opinion, that the company having failed to complete the railroad from Fredericksburg to Orange Courthouse, in the manner prescribed by the act of February 21st 1872, by the 1st of July 1873 (the extension of time allowed by the act of March 26, 1873), the forfeiture on that day became absolute and complete. And the state having entered and elected to hold to the forfeiture, "no inquisition, or judicial proceedings, or inquest, or finding of any kind, was required to consummate such forfeiture." *Staats v. Board*, 10 Gratt. 400; *Wild's lessee v. Serpell*, Id. 405; *Hale v. Branscum*, Id. 418.

Upon the whole, the court is of opinion, that there is no error in the decree of the Circuit court of Richmond, of the 2d day of July 1875, and that the same be affirmed.

Decree affirmed.

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VIII. Ratification.

IX. Questions of Evidence.

X. Termination of the Relation.

I. IN GENERAL.

a. **Kinds of Agencies—General and Special Agencies Defined.**—Agencies are commonly divided into two sorts—(1) a general agency; (2) special agency. A general agency properly exists where there is a delegation of authority to do all acts connected with a particular trade, business or employment. On the other hand, a special agency exists where the authority delegated is to do a single act. Thus, a person, who is authorized by his principal to execute all deeds, sign all contracts, or purchase all goods required in a particular trade, business or employment, is a general agent in that trade, business or employment. But a person, who is authorized by his principal to execute a particular deed, or to sign a particular contract, or to purchase a particular parcel of merchandise, is a special agent. *Davis v. Gordon*, 87 Va. 562, 18 S. E. Rep. 35.

b. **Liabilities of Principal in Each Kind Compared.**—In the case of a general agency, the principal will be bound by the acts of his agent within the scope of the general authority conferred on him, although he violates by those acts his private instructions and directions, which are given to him by the principal, limiting, qualifying, suspending, or prohibiting the exercise of such authority under particular circumstances. But, on the contrary, in the case of a special agency, if the agent exceeds the special and limited authority conferred on him, the principal is not bound by his acts, but they become mere nullities, so far as he is concerned; unless, indeed, he has held him out as possessing a more enlarged authority. *Davis v. Gordon*, 87 Va. 564, 18 S. E. Rep. 35.

c. **Ground of the Distinction.**—"The ground of this distinction, says Story, is the public policy of preventing frauds upon innocent persons, and the encouragement of confidence in dealing with agents. If a person is held out to third persons, or to the public at large, by the principal, as having a general authority to act for and to bind him in a particular business or employment, it would be the height of injustice, and lead to the grossest frauds, to allow him to set up his own secret and private instructions to the agent, limiting that authority; and thus to defeat his acts and transactions under the agency, when the party dealing with him had, and could have, no notice of such instructions. In such cases, good faith requires that the principal should be bound by the acts of the agent, within the scope of his general authority; for he has held him out to the public as competent to do his acts, and to bind him thereby. The maxim of natural justice here applies with its full force, that he who, without intentional fraud, has enabled any person to do an act, which must be injurious to himself, or to another innocent party, shall himself suffer the injury rather than the innocent party, who has placed confidence in him. The maxim is founded in the soundest ethics, and is enforced to a large extent by courts of equity. Of course, the maxim falls in its application, when the party dealing with the agent has a full knowledge of the private instructions of the agent, or that

he is exceeding his authority." *Davis v. Gordon*, 87 Va. 564, 18 S. E. Rep. 35.

d. **Reason of the Rule.**—"A different rule would not only deter men from ever delegating power to others, and so put a stop to factors and agencies in commerce, but also vest a most dangerous discretion in courts of justice to vary the agreements of parties." The court in *Stovall v. Commonwealth*, 84 Va. 246, 4 S. E. Rep. 379.

e. **How Created.**—An agency may be created by express words or acts of the principal, or it may be implied from his conduct and acquiescence. The nature and extent of an agency may be implied and inferred from circumstances. A common mode of appointment of an agent is by a written request or by implication from the recognition of the principal, or from his acquiescence. *Ruffner, Donnelly & Co. v. Hewitt, Kercheval & Co.*, 7 W. Va. 585.

f. **The Term "Agent" Defined.**—"Any one who undertakes to transact some business, or to manage some affair for another, by authority and on account of the latter, and to render an account of it, is designated an agent." *N. & W. R. Co. v. Cottrell*, 88 Va. 517, 3 S. E. Rep. 123.

g. **Whom It Includes.**—"The term agent is of very wide application, and includes a great many classes of persons to which distinctive appellations are given—as factors, brokers, attorneys, cashiers of banks, clerks, consignees, etc." *N. & W. R. Co. v. Cottrell*, 88 Va. 517, 3 S. E. Rep. 123.

h. **Delegation of Authority.**—"An agent who has a bare power or authority must execute it himself and cannot delegate his authority to another." *Smith v. Lowther*, 35 W. Va. 300, 13 S. E. Rep. 999. In this case the court held that a trustee in a deed of trust, when he sells must be present, and cannot delegate such authority to sell to another.

i. **City Councils Cannot Delegate Their Authority.**—Public powers or trusts devolved by law or charter upon the council or governing body of a municipal corporation, to be exercised by it when and in such manner as it shall deem best, cannot be delegated to a committee or others. *McCrowell v. City of Bristol*, 89 Va. 652, 16 S. E. Rep. 867, cited and followed in *Beal v. City of Roanoke*, 90 Va. 77, 17 S. E. Rep. 738.

a. **Attorneys at Law Cannot—Counsel or attorneys to the record have now large powers in conducting the suits, and often concluding the interests of their clients. They are selected by parties for what are regarded as their ability, learning, integrity and fidelity, which are qualities of a personal character, and their duties and powers are not of a nature to be delegated to others by the attorneys who are first entrusted therewith. Others may, indeed, be requested or appointed by them to act in their place, but such appointment must first be authorized, or subsequently ratified, by the client, to give it validity.** *Ellis v. Heptinstall*, 8 W. Va. 391.

1. **Burden of Proof upon Party Affirming the Relation.**—Where the maker of a note pays one not possessing the note, the burden of proving that such payee had authority to collect the money is on the debtor. *Wooding v. Bradley*, 76 Va. 614.

It is settled that in a case where plaintiff sues for specific execution of a purchase of land alleged to have been made by him from the agent of the owner, he must show, by evidence which is clear, competent, direct, and satisfactory, both the terms of the contract and the authority of the agent, or a ratification by the principal. *Blair v. Sheridan*, 86 Va. 327, 10 S. E. Rep. 414; *Simmons v. Kramer*, 88 Va. 411, 13 S. E. Rep. 902.

J. Where Governments of the Parties Are at War.—No agency can be created, where the governments of the respective parties are engaged in hostilities with each other. *Small v. Lumpkin*, 28 Gratt. 882. Yet where agencies existed prior to the hostilities, and are for a lawful purpose, and can be and are exercised without any intercourse or communication between the parties—such as agencies to collect and preserve, but not to transmit money or property—war between the respective governments of the parties will not affect the agency. *Small v. Lumpkin*, 28 Gratt. 882, citing and following *Manhattan L. Ins. Co. v. Warwick*, 20 Gratt. 614. See also, *King v. Hanson*, 4 Call 259; *Hale v. Wall*, 22 Gratt. 424.

II. NATURE AND EXTENT OF AUTHORITY.

a. Party Dealing with Agent Must Ascertain His Authority.—In all cases a party contracting with an agent must enquire into his authority: and either a state or corporation is bound only when its agents keep within the limits of their authority. *Silliman v. F. O. & C. R. R. Co.*, 27 Gratt. 119.

"Where a person deals with an agent, it is his duty to ascertain the extent of the agency; he deals with him at his own risk; the law presumes him to know the limit of the agent's power; and if the agent exceeds his authority the contract will not bind the principal, but the agent." *Curry v. Hale*, 15 W. Va. 876.

One dealing with an agent acting under written power is taken to deal with the power spread out before him, and must inspect it to see whether the agent's act is authorized by the power. And where the agent is authorized to sell land, he cannot receive the purchase money, or sell on credit, unless specially authorized to do so. *Dyer v. Duffy*, 30 W. Va. 148, 19 S. E. Rep. 540.

"It is equally well settled that a party dealing with an agent acting under a written authority, must take notice of the extent and limits of that authority. He is to be regarded as dealing with the power before him; and he must at his peril, observe that the act done by the agent is legally identical with the act authorized by the power." The court in *Stainback v. Read & Co.*, 11 Gratt. 286.

b. Presidents of Corporations—How Far Agents Ex Officio.—The president of a corporation is not *ex officio* the agent of the corporation to sell property which it may direct to be sold; and unless appointed the agent to sell, his representations are not binding on the corporation. *Crump v. U. S. Mining Co.*, 7 Gratt. 352.

The president of a bank has very little inherent power. But usage may confer upon him special functions. *Hodge v. First Nat. Bank*, 22 Gratt. 51.

The president of a bank has no authority, *virtute officii*, to make any admissions which will release the maker of a note to the bank from his legal responsibility created by such note. *Hodge v. First Nat. Bank*, 22 Gratt. 51.

A president of a bank may be authorized by the directors to do any act which they are authorized by their charter to do and such authority may be inferred from circumstances; such as that he was in the habit of doing acts of the same general character. The directors may ratify any unauthorized act of the president provided they could have by their charter authorized him to do it. The acceptance of the benefits of an unauthorized contract is such a ratification. *First Nat. Bank v. Kimberlands*, 16 W. Va. 555.

Presidents and cashiers of banks have only such powers as may be incident to their offices respectively, in their very nature, in the absence of anything in the charter to the contrary, and all other powers needful to the management of the concerns and business of the bank reside alone in the directory. *Hodge's Ex'or v. First Nat. Bank*, 22 Gratt. 51, cited and approved in *First Nat. Bank v. Kimberlands*, 16 W. Va. 578.

c. How Far Authority Goes.—Says the court in *Stainback v. Read & Co.*, 11 Gratt. 286, "It may be laid down as a rule of law, sanctioned alike by reason and authority, that a power of attorney given to an agent, to act in the name and on behalf of his principal, in the absence of anything to show a different intention, must be construed as giving authority to act only in the separate, individual business of the principal."

d. Holding out One as Agent.—If in consequence of a notorious agency, the agent is in the habit of drawing bills, which the principal has regularly paid, this is such an affirmation of his power to draw, that the principal will be bound to pay other bills, though the agent should misapply the money raised by such bills. *Hooe v. Oxley*, 1 Wash. 20.

Where an insurance company furnishes one with all needful papers and blanks, responds to his acts, approves permits of removal by him, and pays his rent, they thereby hold him out to the public as their agent, and are responsible for his acts. *Hardin v. Alexandria Ins. Co.*, 90 Va. 418, 18 S. E. Rep. 911. See also, *Deitz v. Prov. Wash. Ins. Co.*, 81 W. Va. 851, 8 S. E. Rep. 616; *Wytheville Ins. & Banking Co. v. Telger*, 90 Va. 277, 18 S. E. Rep. 195.

e. Certain Powers Incident to Authority.—Certain powers are necessarily incident to the authority of an agent, as an authority to sell land implies an authority to do every thing necessary to complete the sale and make it binding; as the signing of a contract for sale. *Smith v. Tate*, 82 Va. 665, citing and following *Yerby v. Grigsby*, 9 Leigh 390. Also a power of attorney by the owner of land appointing the attorney, "to protect all his interests in and title to the land," is sufficient authority for the attorney to redeem the land for the owner from the purchaser thereof at a sale for delinquent taxes. *Townshend v. Shaffer*, 30 W. Va. 176, 8 S. E. Rep. 588. But an agent appointed to rent property or sell it at a stipulated price has no authority to divide the land or to rearrange the boundaries thereto. *Fore v. Campbell*, 82 Va. 808, 1 S. E. Rep. 180.

Sale of Personal Property—Implied Authority.—A general agent to sell personal property is presumed to have power to make such warranties with reference to the property as are usual and customary in like sales in that locality. It is competent for the party relying upon such warranty to prove as a usage of trade, what warranties are usually demanded by the buyer and given by the agents of the seller in effecting sales of similar articles in that locality. A restriction upon the power of the agent to make the usual warranties in effecting like sales, of which the buyer has no notice or knowledge, is not binding on him. If there be evidence tending to prove what warranties are usually given by agents in effecting like sale, it is for the jury to determine whether, in the particular case, the agent was clothed with the requisite authority. *Reese v. Bates*, 94 Va. 321, 26 S. E. Rep. 865.

A general agent to sell is authorized to do whatever is usual in the market to carry out the object

of his agency. But it is for the jury to determine upon the evidence what is usual. It is not necessary for the principal to have notice of the course of business. If such agent, in accordance with the usage of trade of the place of sale, gives a warranty of the quality of the goods sold, which is not in itself unjust to his principal, the latter will be bound by it, although ignorant of such usage. *Reese v. Bates*, 94 Va. 321, 26 S. E. Rep. 865.

Sale of Land—Authority to Receive Purchase Money.

—When the owner of land authorizes another to sell the same, the authority of the agent to receive so much of the purchase money as is to be paid in hand, is a necessary incident to the power to sell. *Yerby v. Grigsby*, 9 Leigh 387. This case is severely criticised by GREEN, J., in *Mann v. Robinson*, 19 W. Va. 55, 42 Am. Rep. 771, which holds that where the owner of land authorizes an agent to make a contract for the sale thereof, and it is done by the agent, he has no authority as an incident to the authority conferred upon him to collect any portion of the purchase-money, which by the terms of the contract are to be paid at a future time. *Mann's Ex'rs v. Robinson*, 19 W. Va. 49, but says GREEN, J., in the same case, "If the property be personal, the authority to sell for cash would carry with it generally the power and authority to receive the purchase money."

Authority to Confess Judgment.—An agent authorized to confess judgment, may confess judgment with a stay of execution. *Calwells v. Shelds*, 2 Rob. 305. He may also do so before the action is brought. *Ins. Co. v. Barley*, 16 Gratt. 368. It is not necessary that such agent or attorney in fact, be an attorney at law. *Ins. Co. v. Barley*, 16 Gratt. 368.

1. Instances of Lack of Authority.—Under a power of attorney, authorizing the attorney to act in every species of business wherein the principal may be concerned or interested in the United States, *held*, notwithstanding the broad terms of the power, the attorney is not authorized to pledge the property of his principal, to secure the individual debt of the attorney. *Hewes v. Doddridge, etc.*, 1 Rob. 143.

A power of attorney to draw, endorse and accept bills, in the name of the principal, does not authorize the attorney to draw a bill in the joint names of himself and his principal. *Stainback v. Read*, 11 Gratt. 281. And also where authority is given to endorse for several jointly, the agent cannot bind the principals by endorsing severally. *U. S. Bank v. Beirne*, 1 Gratt. 234.

g. Powers, etc., of Real Estate Agents.—A real estate broker or agent is one who negotiates the sale of real estate. His business generally is to find a purchaser who is willing to buy on the terms fixed by the owner. He has no implied authority to bind his principal by signing a contract of sale. Nor has he such authority to fix terms of sale, time of possession, nor the covenants to be contained in the deed. Nor can he materially change terms of sale fixed by the principal without his consent. He is a special agent, and must pursue his instructions and act within the scope of his limited power; and those who deal with him, if he exceeds his authority, do so at their peril. *Halsey v. Monteiro*, 92 Va. 581, 24 S. E. Rep. 258.

h. Authority Necessary Generally—Sealed Instruments.—The authority of the agent must be commensurate with the act he performs. So if the act of the agent is the execution of an instrument under seal, his authority to do so must be under seal. *Preston v. Hull*, 23 Gratt. 604; *Penn v. Hamlett*, 27

Gratt. 337. But he may do any thing else that the principal could do for himself under a parol authority. *Piercy v. Hedrick*, 2 W. Va. 458.

Making Insertions in Bond.—If an agent make insertions in a deed or bond, his authority must be under seal, to bind the principal. *Preston v. Hull*, 23 Gratt. 600.

III. MANNER OF EXECUTING AUTHORITY.

a. Agent Must Follow Instructions of Principal.—It is a well established rule of law that the agent must follow the principal's instructions, so where the principal appoints an agent to buy grain, and the agent buys tobacco, the seller of the tobacco cannot recover of the principal. *Hopkins v. Blane*, 1 Call 362.

S gives G power of attorney to execute any bond, to the amount of \$25,000.00, which the county court may require S to give for the faithful discharge of his duties as treasurer of said county. The court requires bond of \$40,000.00 which G executes. *Held*, this is not the bond of S. *Stovall v. Commonwealth*, 84 Va. 246, 4 S. E. Rep. 379.

Agent Must Follow Principal's Instructions—Exception.—There are exceptions to the rule of law that the agent must follow the principal's instructions or else be liable to the principal for any damages that the principal may incur by such disobedience. "With regard to instructions, there are two qualifications which are naturally and necessarily implied in every case of mercantile agency. The one is that they are applicable only to the ordinary course of things. And the agent will be justified in cases of unforeseen emergency, in deviating from them." *ANDERSON, J.*, in *Bernard v. Maury*, 20 Gratt. 494.

b. Joint Power to Be Exercised Jointly.—A joint power to several persons must be jointly exercised. *Union Bank v. Beirne*, 1 Gratt. 226.

c. Manner of Entering into Contract—When Both Principal and Agent Liable.—"When a contract is made by an agent, the question whether the principal or agent, or both, are liable, is, generally, a question of intention. The principal alone is liable if the facts are all known, and there is no special reason for holding the agent liable, or an intention to make him liable is not plainly indicated by the form of the contract or otherwise. The contract is made for the principal's benefit, is in fact the principal's contract, by the procuration of the agent, and it is just and right that the principal, and not the agent, should bear the burthen directly as he must ultimately, unless there be some good reason for the contrary. The agent is never liable unless it appear to have been intended by the parties to the contract that he should be liable: always presuming of course that the agent has strictly pursued his authority; for if he has not, he is personally liable. When the contract is by parol, an intention to make the agent liable must appear from the facts and circumstances of the case, as they are shown in evidence. When the contract is in writing, an intention to make the agent liable, must appear on the face of the writing, or from the language therein used; and if such intention so appear, parol evidence to show the contrary is inadmissible; upon the familiar principle that parol evidence is inadmissible to vary or contradict a written contract." *MONCURE, J.*, in *Walker v. Christian*, 21 Gratt. 288.

Government Agents.—A public officer, contracting on the part of government, is not personally liable. *Syme v. Butler*, 1 Call 105, approved and followed in *Tutt v. Lewis*, 3 Call 233. See also, *Walker v. Christian*, 21 Gratt. 288.

"A very different rule, in general, prevails in regard to public agents; for in the ordinary course of things, an agent, contracting in behalf of the government, or of the public, is not personally bound by such a contract, even though he would be by the terms of the contract, if it were an agency of a private nature. The reason of the distinction is that it is not to be presumed, either that the public agent means to bind himself personally in acting as a functionary of the government, or, that the party dealing with him in his public character means to rely on his individual responsibility. On the contrary, the natural presumption in such cases is, that the contract was made on the credit and responsibility of the government itself, as possessing an entire ability to fulfill all its just contracts far beyond that of any private man; and that it is ready in good faith to fulfill them with punctilious promptitude, and in a spirit of liberal courtesy. Great public inconveniences would result from a different doctrine, considering the various public functionaries, which the government must employ, in order to transact its ordinary business and operations; and many persons would be deterred from accepting of many offices of trust under the government if they were held personally liable upon all their official contracts." The court by MONCURE, J., in *Walker v. Christian*, 21 Gratt. 297.

1. *Instances*.—In *Early v. Wilkinson*, 9 Gratt. 68, a note signed

"Robert H. Early,
[For Sam'l H. Early.]"

was held to be the note of Robert H. Early.

In *Exchange Bank v. Lewis County*, 28 W. Va. 273, the court held that a note signed "James Bennett, Agent for Lewis County," to be the individual note of James Bennett. The court going further says, "The best mode for an agent to sign a note for his principal, so that it may clearly appear he is the mere scribe of the principal, is as follows: 'A. B. by his attorney or agent C. D.,' or 'A. B. by C. D.'"

A deed for the conveyance of land, purporting to be made by A. attorney in fact for B. witnesses "that the said attorney in fact, A. for and in consideration etc., doth release and quitclaim etc.," and concludes "in testimony whereof the said B. hath hereunto set his hand and seal," but is signed with the name of A. (not styled attorney) a scroll being annexed to the signature.

CABELL, J., in holding that such deed was not the deed of B. says: "The legal title to land cannot pass from him who has it, but by his deed. Such deed may be executed by his attorney duly authorized for the purpose. But it must be so executed as to be the deed of the principal. It is not sufficient, therefore, that it shall be executed by the person who was authorized to make it; but it must be done by him as attorney. For this purpose it is necessary that the attorney shall either sign the name of the principal, with a seal annexed, stating it to be done by him as attorney for the principal; or he may sign his own name, with a seal annexed, stating it to be for the principal. In either of these forms, the deed becomes the deed of the principal; and if every thing else be correct, it conveys the title of the principal. But if the deed be signed and sealed by the attorney, neither in the name of the principal, nor in his own name as attorney for the principal, it is not the deed of the principal."

In *Rand & Minsker v. Hale*, 3 W. Va. 406, Hale was sued on a draft, drawn by Chas. F. Hale, Pres't, as president of the Forest Hill Mining & Manf.

Co. in payment of grain, etc., delivered to said company by the plaintiffs. BROWN, P., in holding Hale personally liable on the draft said: "The learned counsel for the defendant has argued with force and ingenuity to show that upon the case made, the Forest Hill Mining and Manufacturing Company was liable. However that may be, it is not necessary to the determination of this case, nor is it the inquiry we are called on to investigate. The true question is, whether or not the defendant is liable. And after a careful consideration of the subject and a review of the authorities cited in the argument, I am led to the conclusion, without hesitation or doubt, that the defendant was liable personally on the bill of exchange, which as between him and the holder is his own individual contract and undertaking; in other words, it purports on its face to be the order of the defendant and the addition of the word 'Pres't' to his signature does not shift the responsibilities from him to the company of which he was the president, so far as the plaintiffs are concerned."

M gives to J a power of attorney to sell her lands in the county of R. with power to J to appoint other agents or attorneys. J executes a power to C to sell the lands, but the power only authorizes C to act in the name of J, and it is signed by J in his own name, without any reference to his principal. This power does not authorize C to convey the land as attorney of M. *Stinchcomb v. Marsh*, 15 Gratt. 202.

While the courts should generally refuse to allow a recovery against one person on a negotiable instrument made by another, on proof that the latter was acting as his agent, yet a person may make the signature of another his own by using, or allowing it to be used as such in the course of his business, and that he will and should, under such circumstances when clearly proved, be as much bound as if his own name was affixed to the bill or other negotiable instrument in question. *Devendorf v. West Virginia Oil and Oil Land Company*, 17 W. Va. 136.

"A person owning land may by parol authorize another to make a contract for the sale thereof; and if a contract be made under such authority, the owner of the land may be charged by virtue of the contract, provided there be a memorandum thereof in writing signed by the person authorized to make it. The signing by the agent of his own name is sufficient. The statute does not make it indispensable, that he should sign the name of the party to be charged therewith." The court in *Conaway v. Sweeney*, 24 W. Va. 649, citing *Yerby v. Grigsby*, 9 Leigh 387.

"It is a sufficient execution of a deed by an attorney in fact for his principal, if he signs the name of the principal with a seal annexed, stating it to be done by him as attorney for the principal; or if he signs his own name with a seal annexed, stating it to be for the principal." The court in *Shanks v. Lancaster*, 5 Gratt. 110, 119.

The signing by the agent in his own name is sufficient. *Yerby v. Grigsby*, 9 Leigh 387.

IV. THE RELATION AS BETWEEN PRINCIPAL AND AGENT.

a. *Fiduciary Character of the Relation*.—The relations of principal and agent, attorney and client, come under the equitable doctrine that any person who occupies a fiduciary relation to another, is bound not to exercise to the benefit of himself and to the prejudice of the party, to whom he stands in such relation, any of the powers or rights, or any knowl-

edge or advantage of any description which he derives from such confidential position. *Newcomb et al. v. Brooks et al.*, 16 W. Va. 58, citing *Carter, et c.*, v. *Harris*, 4 Rand. 204; *Buckles v. Lafferty*, 2 Rob. 292; *Segar v. Edwards*, 11 Leigh 213.

b. Equity Will Compel an Account between.—Where the agency is of a fiduciary character, a bill in equity will lie on behalf of the principal to compel the agent to give an account. *Zetelle v. Myers*, 19 Gratt. 62, cited and followed in *Merchants' Bank v. Jeffries*, 21 W. Va. 504. See also, *Berkshire v. Evans*, 4 Leigh 223; *Coffman v. Sangston*, 21 Gratt. 263.

c. Personal Representative of Principal May Have an Account of Agency in Equity.—A bill in equity will lie, by an administrator of a principal, against the general agent of his intestate for a discovery and an account of the transactions of the latter with his principal. *Simmons v. Simmons*, 33 Gratt. 451, cited and followed in *Huff v. Thrash*, 75 Va. 546; *Vilwig v. B. & O. R. R. Co.*, 79 Va. 449.

d. Attorney Cannot Purchase Client's Property at Sale.—"If a client's property real or personal is sold in the process of a suit, his attorney cannot be permitted to purchase it without the express consent of the client." *GREEN, J.*, in *Newcomb et al. v. Brooks et al.*, 16 W. Va. 69.

And if he does so, such purchase will be properly set aside even if it is made at an auction sale, for full value, and by perfectly fair means. *Newcomb v. Brooks (supra)*.

An agent employed to look after and rent the land of another, who is a non-resident, cannot allow the property to be returned delinquent for taxes, and then buy the property himself at the tax sale. *Morris v. Joseph*, 1 W. Va. 256.

e. Instances That Show the Fiduciary Character of the Relation.—The following instances show how zealously the courts protect the interests of the principal, how they view the whole transaction, and set it aside, at the merest suspicion that the agent is using the agency for his own interests and not in furtherance of those of his principals.

Loyalty to his trust is the most important duty which an agent owes to his principal. The dealings of an agent with his principal are closely scrutinized, and the voidable acts of the agent will not be deemed to have been confirmed by the principal except after the fullest disclosure by the agent. Confirmation must be a solemn and deliberate act of the principal, after full disclosure by the agent. If the principal's right to impeach a transaction be concealed from him, or a free disclosure be not made to him of every circumstance which is material for him to know, or if confirmation takes place under pressure or constraint, or by the exercise of undue influence, or under the delusion that the original transaction is binding on him, or if it be merely a continuation of the original transaction, the confirmation amounts to nothing. *Francis v. Cline*, 96 Va. 201, 31 S. E. Rep. 10.

An agent to buy or sell, or to act in any other business, will not be permitted to make profits for himself out of the transaction. All profits or advantages made, or contracted for by him in the business, beyond the ordinary compensation to be paid by his principal, enure to the benefit of his principal. And this rule applies equally to promoters of a corporation who, like agents, occupy a fiduciary relation to the new corporation. *Central Land Co. v. Obenchain*, 92 Va. 130, 22 S. E. Rep. 876.

An agent to sell cannot become a purchaser, except after the fullest disclosure to his principal of all

facts which may affect his interest. The relation between the parties is one of trust and confidence, and the utmost good faith is exacted of the agent. He cannot sign a contract for the sale of the principal's land when he is himself interested as purchaser. If such contract be made by the agent the principal will not be held to a ratification thereof, except after full knowledge of all the material facts. If these be either suppressed or unknown, the ratification will be treated as invalid, because founded on fraud or mistake. *Halsey v. Monteiro*, 92 Va. 351, 24 S. E. Rep. 258.

An agent employed to buy cannot himself become the seller. See *Colbert et al. v. Shepherd*, 30 Va. 411, 16 S. E. Rep. 246.

An agent employed to sell cannot himself become the purchaser. *Colbert et al. v. Shepherd*, 30 Va. 411, 16 S. E. Rep. 246, citing *Lamar v. Hale*, 79 Va. 159, *Statham et als. v. Ferguson's Adm'r et als.*, 33 Gratt. 40.

In *Moseley's Heirs v. Buck et al.*, 3 Munf. 232, a sale to agents was rescinded where it was proven, that the agents assured their principal, the vendor, that the land would not bring more than a certain price per acre, when in fact the principal had been offered more, through his agents, who concealed such offer from him.

B was an agent for the sale of a tract of land, and concealed from his principal the knowledge which he had acquired as such agent respecting the price at which the land could be sold, and taking undue advantage of his position as agent purchased the land from the principal, who was then ignorant of material matters affecting the value thereof at that time, and sold it for a much larger sum. Held, that it was the duty of B to have disclosed to the principal his knowledge thus acquired before he made such purchase, and that he must account to the principal for the sum he received for the land, over and above the amount paid by him to the principal. *Bell v. Bell*, 8 W. Va. 183.

Where an attorney or agent undertakes the collection of a claim for his client or principal and, while such relation exists, buys the claim from his principal, whether false representations were made or not to induce the principal to sell his claim, or even if the claim was sold for an adequate price, the sale is voidable at the option of the principal. *Lane v. Black*, 21 W. Va. 618.

An agent authorized to purchase land for his principals, purchases in his own name, and takes a conveyance to himself. He is bound to convey the land to his principals, upon their complying with the terms of his contract of purchase, in the same plight and condition in which the same was conveyed to him. If the agent has disposed of a part of the land purchased, so that the principals cannot obtain that part, the agent will be held to account for the same at its true value at the time when it should have been conveyed to his principals. *Wellford et als. v. Chancellor*, 5 Gratt. 39.

An agent may deal directly with his principal, and sell to him property he was employed to buy for him, provided he makes fair and full disclosure to his principal of all the facts and circumstances within his knowledge in any way calculated to enable his principal to judge of the propriety of the transaction, and there is no deception or concealment on the part of the agent; and, in a controversy between a principal and his agent over the validity of such an agreement, the burden of proof is on the agent to show such disclosure, and the perfect fairness of the

transaction. *Jackson v. Pleasonton*, 95 Va. 654, 29 S. E. Rep. 680.

The general rule is that an agent may not act for both parties. Neither can he be both buyer and seller. See *Segar v. Edwards*, 11 Leigh 218.

A man cannot be the agent of both the buyer and the seller in the same transaction, without the intelligent consent of both parties; nor can an agent act for himself and his principal, nor for two principals on opposite sides in the same transaction, without like consent. All such transactions are voidable, and may be repudiated by the principal without proof or injury on his part. Nothing will defeat this right of the principal except his own confirmation after full knowledge of all the facts. The object of this principle is to remove all possible temptation from the agent. *Ferguson v. Gooch*, 94 Va. 1, 26 S. E. Rep. 397.

f. Compromises between Principal and Agent.—It is competent for a principal and agent to compromise a controversy between them; and such compromise, if fairly made with a full knowledge of all the facts, and where no undue influence is exerted, or improper advantage of the situation of the principal is taken, is binding on the principal, though he may by such compromise, yield a portion of his rights. But if the agent misrepresents a material fact, the compromise will be vacated; and this especially, where advantage is taken of the circumstances of the principal. *Wellford et al. v. Chancellor*, 5 Gratt. 39.

g. Agent Liable to Principal for Damages Where He is Disobedient.—If an agent having sold goods belonging to his principal, be ordered by him while they are yet *in transitu*, not to deliver them to the buyer, whose solvency he doubts, and the agent nevertheless delivers the goods, without demanding indemnity, he is liable to the principal for any loss that the principal may incur by reason of such delivery. *Howatt v. Davis*, 5 Munf. 34; *Ruffner, etc., Co. v. Hewitt, etc., Co.*, 7 W. Va. 585.

If the agent unnecessarily exceeds his commission, or risks the property of his principal, he thereby renders himself responsible to his principal for all losses and damage which are the natural consequences of his act. *Ruffner, Donnally & Co. v. Hewitt, Kercheval & Co.*, 7 W. Va. 586.

h. Conversion by Agent of Principal's Goods.—In *McVeigh v. Bank, etc.*, 26 Gratt. 188, the president of a bank, which had suspended operations owing to the war, collects money owing the bank, tries to lend it out for the bank, but fails, invests it with some of his own in tobacco, which speculation turns out bad. *Held*, he is regarded as a borrower of the amount, and must make it good, although as the court says, "We see no reason to impute any blame to the defendant. He seems to have acted throughout with a conscientious regard for what he considered the best interest of the bank. But his motives, however conscientious, cannot exonerate him from liability for the collection and appropriations of money belonging to the plaintiff."

i. Care Required by Agent without Reward.—An agent without reward will not be required to use more diligence than would be used by a prudent man in the management of his own affairs. *Pate v. McClure*, 4 Rand. 164.

j. What Agent to Receive Payment of Debt Due Principal in.—An agent authorized to collect a debt can receive payment thereof in money only, and he has no right to accept anything else in satisfaction without express authority from his principal, and if he does, it will be no payment, unless ratified or assented to

by the principal. *Mann's Ex'rs v. Robinson*, 19 W. Va. 49, citing and following *Wilkinson v. Holloway*, 7 Leigh 284; *Wiley v. Mahood*, 10 W. Va. 221.

Confederate States treasury notes were not such money as an attorney could receive in payment of his client's note, the principal being a citizen of the United States at the time. *Harper v. Harvey*, 4 W. Va. 539.

It may be conclusively inferred from facts and circumstances shown in evidence, that an attorney during the late civil war, was authorized by his client, to receive payment on a claim in his hands, in Confederate money, all the parties being and residing at the time within the Confederate lines. *Ellis v. Heptinstall*, 8 W. Va. 338.

A was attorney for C, in West Virginia, before the late war. At the beginning of the war A joined the Confederate army. *Held*, the relation of agency ceased. *Harper v. Harvey*, 4 W. Va. 539.

An attorney at law employed to collect a debt may receive payment in money, but has no right to accept anything else in satisfaction, without express authority. *Wilkinson & Co. v. Holloway*, 7 Leigh 277; *Smock v. Dade*, 5 Rand. 639; *Smith's Adm'r v. Lamberts*, 7 Gratt. 138; *Harper, Adm'r. v. Harvey et al.*, 4 W. Va. 539; *Wiley v. Mahood et al.*, 10 W. Va. 221; *Spence v. Rose*, 28 W. Va. 333.

An agent, with authority to collect a note of his principal which is payable in money, has no authority to receive in payment of such note anything but money. If in such case the agent receives from the debtor notes or claims on a third party in payment of such note, that will not constitute a payment unless the claims so received are actually collected by the agent. *Spence v. Rose*, 28 W. Va. 333.

k. Principal Liable to Agent for Damages and Expenses Incurred in the Agency.—If an agent has, without his own default, incurred losses or damages in the course of transacting the business of his agency, or in following the instructions of his principal, he will be entitled to full compensation. *Ruffner, Donnally & Co. v. Hewitt, Kercheval & Co.*, 7 W. Va. 586.

Generally, it is the right of an agent to be reimbursed for all his advances, expenses, and disbursements, made in the course of his agency, on account of or for the benefit of his principal, when the advances, expenses and disbursements have been properly incurred and reasonably and in good faith paid, without any default on the part of the agent. *Ruffner, Donnally & Co. v. Hewitt, Kercheval & Co.*, 7 W. Va. 585.

l. Agent Has Lien on Property of Principal in His Possession for Advances, Labor, Expenses, etc.—An agent with unrestricted management of a mercantile farming and general trading business, carried on in his name, with the right to buy, sell, and exchange, has a lien on all the property accumulated in such business, and in his possession, for all advancements made, expenses and liabilities incurred, proper, necessary, or incident to such business, which is superior in right to any lien which may be created on such property by the reputed owner thereof; and while he may not, without the consent of those interested, transfer or assign such lien to another, yet he has the right to sell a sufficient amount of such property to satisfy such liabilities, or may transfer the possession thereof to a trustee, to be held by him until such liabilities are fully discharged, and the lien thereby extinguished.

The possession of the trustee under such circum-

stances is the possession of the agent, and the lien is not released or waived.

Such trustee, with the consent of the interested parties, may sell the property and extinguish the lien. *Dewing et al. v. Hutton et al.*, 21 S. E. Rep. 780, 40 W. Va. 521.

m. Agent Not Responsible Where Goods Are Lost Not through His Fault.—Money received by an executor during the war, belonging to a citizen of Indiana, was confiscated by the Confederate government. *Held*, the Confederate government in the exercise of her belligerent rights, had authority to confiscate the property of alien enemies, and the executor is not responsible for the money confiscated. *Newton's Ex'or v. Bushong et al.*, 22 Gratt. 623, 12 Am. Rep. 558.

If the person with whom bonds are left for collection puts them into the hands of a lawyer to collect, he is not further responsible, except for moneys received from the lawyer. *Hawkins v. Minor*, 5 Call 118.

n. Where Agent Is Unjustly Dismissed.—As to the remedies of a servant or agent unjustly dismissed, see 1 *Minor's Inst.* (4th Ed.) 212 *et seq.*, but this subject comes more properly under the law of master and servant. W contracts with T to hire his services for a year for a fixed sum. In the course of the year W dismisses T from his employment without sufficient cause for the dismissal. It is error to hold that T, if entitled to recover at all upon the contract, is entitled to recover the hire or wages for the whole year. His right of recovery, in case of a discharge without cause, should be limited to the amount of damages actually sustained by such illegal discharge. *Willoughby v. Thomas*, 24 Gratt. 521, cited and approved in *Crescent Horse-Shoe Co. v. Eynon*, 95 Va. 160, 27 S. E. Rep. 935.

In estimating the damages incurred by the servant, by reason of his wrongful discharge, it is error to take into consideration other elements of damage than those which were caused by his dismissal. *Crescent Horse-Shoe Co. v. Eynon*, 95 Va. 151, 27 S. E. Rep. 935.

In order to recover special damages the agent must allege them; he cannot recover special damages under a general count or *ad damnum* claim of damages. *Lee v. Hill*, 84 Va. 919, 6 S. E. Rep. 473.

That the servant does not do his work in a reasonably skillful manner is sufficient cause for dismissal. But reasonable skill is all that is required, unless the servant holds himself out as having a higher degree of skill. *Crescent Horse-Shoe Co. v. Eynon*, 95 Va. 151, 27 S. E. Rep. 935.

o. Agent Should Keep and Render Account of the Agency.—It is, ordinarily, the duty of an agent where the business in which he is employed admits of it, or requires it, to keep an account of all his transactions on behalf of his principal, not only of his payments and disbursements, but also of his receipts; and render such accounts to his principal, at all reasonable times, without any suppression, concealment or overcharge. *Ruffner, Donnelly & Co. v. Hewitt, Kercheval & Co.*, 7 W. Va. 586.

p. Agent Loses Right to Compensation by Neglecting the Agency.—Says the court in *Segar v. Parrish*, 20 Gratt. 661, "However solvent agents and trustees may be, or however honest may be their intentions, if they deliberately retain trust funds in their own hands, appropriate them to their own private use, and refuse or fail for years to render any account to their principals, they should be held to forfeit all claim for compensation. Any other rule is a pre-

mium for negligence and an encouragement to persons occupying relations of trust and confidence to retain money not their own."

V. RIGHT AND LIABILITIES BETWEEN THE PRINCIPAL AND THIRD PARTIES.

a. Special Agencies.—The principal is not generally responsible if the agent goes beyond his power in a special agency. *Stovall v. Com.*, 84 Va. 266, 4 S. E. Rep. 379; *Hopkins v. Blane*, 1 Call 362; *Davis v. Gordon*, 87 Va. 559, 13 S. E. Rep. 35; *Fore v. Campbell*, 2 Va. 808, 1 S. E. Rep. 180.

b. Principal Liable for Agent's Contracts within the Scope of His Authority.—The general rule is that the principal is liable for the contracts of the agent made within the scope of his authority. *Yerby v. Grigsby*, 9 Leigh 387; *Hopkins v. Blane*, 1 Call 362; *Spence v. Rose*, 23 W. Va. 333.

c. Principal Liable for Negligence of Agent.—Where an agent acts negligently in the regular course of his employment, the law is well settled, that the principal must bear the consequences of his agent's negligence, as between himself and an innocent third person, even though the act or omission of the agent, which constitutes the negligence, was wholly unauthorized by the principal or even positively forbidden by him. *De Voss et al. v. City of Richmond*, 18 Gratt. 338, 359.

Never Liable Criminally.—The principal will not generally be liable criminally for the negligence or acts of the agent. *Lewis v. Commonwealth*, 4 Leigh 664. In which case it was held that a sheriff was not criminally responsible for the act of his deputy in allowing a prisoner to escape.

Public Officers Not Liable for Subordinate's Default.—A public officer is not responsible to third persons for the negligence or default of his official subordinates. *Sawyer v. Corse*, 17 Gratt. 230. It is otherwise if such subordinate is not an official, but a private agent. *Sawyer v. Corse*, 17 Gratt. 230.

Insurance Companies.—An insurance company establishing a local agency, must be held responsible to the parties with whom they transact business, for the acts and declarations of the agent, within the scope of his employment, as if they proceeded from the principal. *Cont. Ins. Co. v. Kasey*, 25 Gratt. 383.

Instance.—If A give a power of attorney, in the form, to B, authorizing him "to draw checks, indorse notes, and generally to do all and every act and deed, towards the execution of his business at a certain bank;" and deposit the said power in the bank, to be inspected, when called for, by any person interested in matters relating thereto; he is bound to make good, to a *bona fide* purchaser for valuable consideration, any indorsement of a note negotiable at the said bank, which B may make in his name as his attorney; notwithstanding the real object of the said power, verbally declared at the time of its execution, was to authorize B to renew certain accommodation paper then in bank, and not to indorse any other paper. *Mann v. King*, 6 Munf. 423.

d. Principal's Goods Not Liable for Agent's Debts.—May Trace His Property in Agent's Hands.—A party whose entire business consists in selling agricultural implements, wagons, etc., as agent for the manufacturer thereof, receiving a commission for his services in disposing of the same, cannot be regarded either as a trader or a commission merchant; and although his name, with the addition of the words "Mf'rs Agent," be on a sign nailed on the outside of the building in which he does business, in a conspicuous place, farming implements which he

has on sale as an agent for the manufacturer are not liable to execution and sale as his property, under the provisions of section 18 of chapter 100 of the Code of West Virginia. *Brown Manuf'g Co. v. William Deering & Co.*, 13 S. E. Rep. 333, 35 W. Va. 255.

Says the court in *Overseers of the Poor v. Bank of Va. et al.*, 2 Gratt. 548, "The well-settled principles of law entitle a principal, in all cases where he can trace his property, whether it be in the hands of the agent, or of his representatives, or assignees, to reclaim it, unless it has been transferred *bona fide* to a purchaser of it, or assignee for value, without notice. In such cases, it is wholly immaterial whether the property be in its original state, or has been converted into money, securities, negotiable instruments or other property; if it be distinguishable, and separable from the other property or assets; and has an earmark, or other appropriate identity. The product, or substitute of the original thing, has the nature of the original thing itself imparted to it, as long as it can be ascertained to be such product, or substitute; and the right of the principal thereto ceases only when the means of ascertainment fail; and this is the case when the subject is turned into money, and is mixed and confounded in a general mass of the same description, and becomes incapable of being distinguished from the mass of the moneys of the agent."

c. Principal Not Responsible Where Credit Is Given to Agent.—C, president of a railroad company, and A, agent of the company, borrow money from H, and give their own bond for it. The money is borrowed for the use of the company, which is itself without credit, and it is immediately turned over to the company. C and A become insolvent. *Held*, the money having been loaned to C and A individually, with the knowledge that it was for the use of the company, and H having chosen to take the responsibility of C and A, cannot afterwards make the company his debtor. *Strider v. Winch. & Pot. R. R. Co.*, 21 Gratt. 440.

f. Notice to Agent Notice to Principal.—When.—It may be stated as a general rule that notice to the agent while acting in the scope of his authority is notice to the principal. *Hart et al. v. Sandy et al.*, 30 W. Va. 644, 20 S. E. Rep. 665, citing *French v. Loyal Co.*, 5 Leigh 680, 715; *Newlin v. Beard et al.*, 6 W. Va. 111, and *Fidelity Ins., etc., Co. v. Shenandoah Val. R. Co.*, 32 W. Va. 244, 9 S. E. Rep. 180; *Simmons v. Ins. Co.*, 8 W. Va. 474.

But such notice must have reference to that business of the principal, in which the agent is engaged. *Hart v. Sandy*, 30 W. Va. 644, 20 S. E. Rep. 665.

g. Agents Dismissing Suit without Authority Does Not Affect Principal's Right against Debtor.—A special agent who is authorized to dismiss the suit of his principal only on special terms designated in writing transgresses his authority in dismissing the suit on any other terms, without the knowledge of his principal, and the right of the principal to prosecute a new suit for the same debt, and to recover judgment therefor against principal and surety is unaffected by such dismissal. *Winfree v. First Nat. Bk. of Lexington*, 97 Va. 83, 33 S. E. Rep. 375.

h. Admissions and Declarations of Agent Bind Principal.—When.—The admissions of an agent bind the principal only while the transaction is going on. They must be made *dum seruet opus*, if made afterwards they are mere hearsay. *Lake v. Tyree*, 90 Va. 719, 19 S. E. Rep. 787.

Must Be within Scope of His Authority.—An insurer is responsible not only for the acts and declarations of its general agents, within the scope of their authority, but also for the acts and declarations of the clerks and employees of such agents, to whom the latter delegate authority to discharge their functions, within the scope of the agent's authority, and while engaged about the business of the principal. *Goode v. Georgia Home Ins. Co.*, 92 Va. 392, 23 S. E. Rep. 744.

i. Enforcing Contract Made by Agent Where Third Person is Party to Agent's Fraud.—A purchaser from an agent empowered to sell real property, cannot insist on the validity of such sale, if he had knowledge of any fraud or breach of trust in the agent. *Morris v. Terrell*, 2 Rand. 6.

VI. RIGHT AND LIABILITIES BETWEEN AGENT AND THIRD PARTIES.

a. Agent Not Generally Liable for Contracts Made on Principal's Behalf.—An agent who fully discloses his agency and the name of the principal, and contracts only as the agent of his principal, incurs no personal responsibility. While he may bind himself personally, the presumption is otherwise, and the burden of proof is on him who undertakes to establish the agent's personal liability. In the case at bar, it is clear that the agent contracted for a disclosed principal, and that credit was extended to the principal. The benefits of the contract were accepted by the principal, and there is no personal liability on the agent. The mere fact that the plaintiff instituted a suit on the contract against the agent, which suit has never been prosecuted, cannot relieve the principal from liability on the contract. In this case there were not "two concurrent debtors for the same debt." *Richmond, etc., Ry. Co. v. N. Y., etc., Ry. Co.*, 95 Va. 386, 28 S. E. Rep. 573.

b. Agent Liable Personally for Torts Committed at Principal's Command.—When.—"The command of the principal will not justify the agent in committing a trespass, nor even an apparent wrong; in such a case, both the principal and agent are liable to the party injured. But where the conduct of the agent is within the limits of the authority confided to him, is fair, and unattended by circumstances sufficient to apprise him that he is acting wrongfully in relation to others; or, in other words, where he does not commit an apparent wrong, the principal and not the agent is responsible for the act." *CABELL, J.*, in *Travis v. Claiborne*, 5 Munf. 438.

The agent may recover of the principal any damages he may incur, by reason of the commission of a tortious act, by the principal's direction, provided that the agent acted in good faith and the honest belief that it was lawful for him to do such act. See cases gathered in *Lile's Notes to 1 Minor's Inst.* (4th Ed.) p. 81.

In *Travis v. Claiborne*, 4 Munf. 435, the agent was not responsible to the trustee for the conversion of a slave, held by his principal under a deed of trust, where the agent had no notice of such deed.

c. Agent Cannot Maintain Suit in His Own Name.—An agent or attorney in fact cannot maintain a suit in his own name, not even in a court of equity. *Jones v. Hart*, 1 H. & M. 471.

VII. WHERE THE PRINCIPAL IS NOT DISCLOSED BY AGENT.

Generally.—"When one contracts as agent, without naming a principal, his acts enure to the benefit of the party, although at the time uncertain and unknown,

for whom it shall turn out that he intended to act, provided the party thus entitled to be principal ratify the contract. And where the credit is given solely to the servant, if it be in ignorance of who the principal is, although with knowledge that the servant is acting on behalf of another, and much more if without such knowledge, the principal, when discovered, is liable. And parol evidence is admissible to show who is the principal when he is undisclosed by the contract in order to have the benefit thereof or to be charged therewith; and in such case the principal is bound in addition to the agent, for the agent is bound also by the terms of the contract." The court in *Waddill v. Sebrée*, 88 Va. 1015, 14 S. E. Rep. 849.

Party May Abandon Right against Agent and Look to Principal.—Where a person dealing with another, finds out that such party is not dealing for himself, but merely as agent for another, he may abandon his right against the agent and look to the principal. *Poole & Co. v. Rice*, 9 W. Va. 73.

Agent Always Responsible.—"It is well settled that a person contracting as agent will be personally responsible, where, if at the time of making the contract, he does not disclose the fact of his agency." *GREEN, J.*, in *Poole & Co. v. Rice*, 9 W. Va. 73. In such a case the principal is also liable.

Contract Not under Seal—Both Principal or Agent May Sue on It.—Where a contract, not under seal, is made by an agent in his own name, for an undisclosed principal, either the agent or the principal may sue upon it, and parol evidence is admissible to enable the principal to show that he is the real contracting party. *Deltz v. Prov. Wash. Ins. Co.*, 31 W. Va. 851, 8 S. E. Rep. 616, cited and approved in *Murdock v. Franklin Ins. Co.*, 33 W. Va. 407, 10 S. E. Rep. 773.

Evidence Always Admissible to Disclose Principal.—In cases of undisclosed principals, parol evidence is always admissible to show who is the principal, that he may either take the benefits or the responsibilities of the agent's act. *Waddill v. Sebrée*, 88 Va. 1012, 14 S. E. Rep. 849; *Deltz v. Prov. Ins. Co.*, 31 W. Va. 851, 8 S. E. Rep. 616; *Murdock v. Franklin Ins. Co.*, 33 W. Va. 407, 10 S. E. Rep. 773.

VIII. RATIFICATION.

Generally.—When the agent exceeds his authority, the act may be ratified by the principal; and it is not necessary that there should be any positive or direct confirmation. Where, with a knowledge of the facts, the principal acquiesces in the acts of the agent, under such circumstances as would make it his duty to repudiate such acts if he would avoid them, such acquiescence is a confirmation of the acts of the agent. It is not necessary that such knowledge shall be shown by positive evidence; it may be deduced, or inferred from the circumstances and facts of the case. *Curry v. Hale et al.*, 15 W. Va. 397. See also, *Richmond, etc., Ry. Co. v. N. Y., etc., Ry. Co.*, 95 Va. 386, 28 S. E. Rep. 573; *Owens v. Boyd Land Co.*, 95 Va. 560, 28 S. E. Rep. 950; *Ruffner, etc., Co. v. Hewitt, etc., Co.*, 7 W. Va. 585.

Instances.—A. by letter of attorney authorizes B. to put his name to or upon any negotiable note, as maker or indorser, for the purpose of getting the same discounted at one or other of certain specified banks, to the amount of \$3,000 and then for renewal of such note at bank, from time to time, so as the amount shall at no one time exceed \$3,000; B. makes a note for \$3,000 accordingly, which is discounted at bank, and renewed from time to time.

but at length reduced to \$1,000; and then, B. purchases groceries of C. and for the price thereof, gives him a note made by A. by B. his attorney, negotiable at one of the specified banks, which the bank refuses to discount. *Held*, this note for the prices of the groceries, is not within the authority conferred on B. by A.'s letter of attorney, and is not binding on A. A. being informed of the making of the note by B. and of all the circumstances, makes no complaint, and afterwards procures indemnity from a third person against loss by reason of the note. *Held*, this does not amount to confirmation of B.'s unauthorized act in making the note. *Hortons & Hutton v. W. & E. Townes*, 6 Leigh 47.

Must Ratify in Whole—Cannot Ratify Part Only of Agent's Act.—Where an agent buys a claim for his principal, and in order to induce the seller to part with it makes false and fraudulent misrepresentations in reference thereto, and the principal accepts the purchase and takes the benefit thereof, he cannot while claiming the benefit of the purchase and retaining the claim repudiate said representations of his agent, on the ground that they were not authorized by him and were not within the scope of his authority. *Lane v. Black*, 21 W. Va. 617. See also, *Day v. Building Assoc.*, 96 Va. 484, 31 S. E. Rep. 902; *Ruffner, etc., Co. v. Hewitt, etc., Co.*, 7 W. Va. 585.

Principal Must Disaffirm.—When informed by his agent of what he had done, if the principal did not choose to affirm the act, it was his duty to give immediate information of his repudiation. He cannot, by holding his peace and apparent acquiescence, have the benefit of the contract if it should turn out to be profitable, and retain a right to repudiate it if otherwise. The principal must, therefore, when informed, reject within a reasonable time, or be deemed to adopt by acquiescence. *Johnson v. Gibbons*, 27 Gratt. 636; *Coffman v. Bruffy*, 26 Gratt. 698; *Higginbotham v. May et al.*, 90 Va. 230, 17 S. E. Rep. 941, and having once affirmed he is bound by the agent's act or contract. *Anderson v. Creston Land Co.*, 95 Va. 267, 31 S. E. Rep. 82. See also, *Ruffner, etc., Co. v. Hewitt, etc., Co.*, 7 W. Va. 585.

The conduct and acts of the principal, tending to imply a ratification of the agent's unauthorized acts, are construed liberally in favor of the agent. *Ruffner, etc., Co. v. Hewitt, etc., Co.*, 7 W. Va. 585.

Effect of Ratification.—Ratification has a complete retroactive efficiency, relating back to the very inception of the contract or act. *Ruffner, etc., Co. v. Hewitt, etc., Co.*, 7 W. Va. 585.

Applies to Torts.—Ratification applies as well to a tort as to a contract. The rule is well expressed by *BURKS, J.*, in *Forbes & Allers v. Hagman and Gravier*, 75 Va. 168, "This was a virtual ratification and adoption of what had been done by the agent on the principle *omnis ratihabito retrotrahitur et mandatis priori aequiparatur*, which applies as well to a tort, when done to the use or for the benefit of him who subsequently adopts it, as to a matter of contract." The learned judge has gathered all the authorities on this subject in his elaborate opinion.

IX. QUESTIONS OF EVIDENCE.

Where it does not distinctly appear from the terms of the paper, whether credit was given to the agent or the principal, parol evidence is admissible to remove the doubt. *Early v. Wilkinson*, 9 Gratt. 65; *E. F. & P. R. Co. v. Snead*, 19 Gratt. 354; *Walker v. Christian*, 21 Gratt. 293.

Where the record does not show whether the

defendant confessed judgment by an attorney at law or an attorney in fact, evidence *aliunde* is admissible to show that such attorney was an attorney in fact, and to show the authority under which he acted. *Calwells v. Shelds*, 2 Rob. 305.

An agent is a competent witness to prove his own parol authority. *Piercy v. Hedrick*, 2 W. Va. 458.

Declarations or acts of an alleged agent cannot be accepted to prove his agency. That fact must be proved by other evidence, and must be first established before his declarations or acts are admissible as evidence. But declarations and acts tending to establish the agency, said or done by the alleged agent in the presence of the principal, and not repudiated by him, are admissible in evidence as tending to prove the agency. *Hoge v. Turner*, 96 Va. 624, 32 S. E. Rep. 291.

An alleged agency which is denied cannot be established by proof of the admissions or statements of the alleged agent, but the fact must be proved by other evidence. If it is desired to establish it by the alleged agent himself he must be called as a witness. *Fisher v. White*, 94 Va. 236, 26 S. E. Rep. 578.

To prove the authority of an agent, the parol directions of the principal to him may be given in evidence. *Lunsford v. Smith*, 12 Gratt. 564.

X. TERMINATION OF THE RELATION.

The death of either party terminates the agency, and after the death of the principal no act of the agent can bind the estate of the principal. *Huston v. Cantril*, 11 Leigh 186.

The agency can also be terminated by either party at any time, but where the principal revokes the agent's authority, he must give third persons, who have dealt with the agent, as his agent, notice, else he will be liable for any loss they may incur, though not having received such notice. *Spencer v. Wilson*, 4 Munf. 130.

133 *McDougal v. Guigon, Judge.

January Term, 1876, Richmond.

a. County and Corporation Courts—Authority to Remove Judges of Election.—The County and Corporation courts have authority to remove a judge of elections for malfeasance in office or gross neglect of duty, though he has not been convicted by the verdict of a jury of any offence.

In December 1875 the judge of the Hastings court of the city of Richmond made a rule on James McDougal, John Marxhausen and E. J. Vaiden, judges of election of the first precinct of Jefferson ward of said city, to show cause why they should not be removed from their said offices as judges of election for the said precinct. The rule was made returnable to the first day of the next term.

In January 1876 James McDougal presented his petition to the Supreme Court of Appeals, in which he states that on the 20th of October 1875 he was appointed by the judge of the Hastings court of the city of Richmond, a judge of election for the first precinct of Jefferson ward in said city; and he insists that this appointment vested in him the right,

***County and Corporation Courts—Authority to Remove Judges of Election.**—The principal case is cited in *Lewis v. Whittle*, 77 Va. 422, and in *Nelms v. Vaughan*, 84 Va. 698, 5 S. E. Rep. 704.

and made it his duty, to hold said office for the space of one year, and placed it beyond the power of any tribunal to remove him from his said office, except upon conviction by the verdict of a jury of willful neglect of his duty as judge of election, or of some corrupt conduct in the exercise of the same.

The petitioner further says he was 134 tried in the *Hustings court of the city in the month of December 1875, upon two indictments: one charging that he had fraudulently put ballots in the ballot box at the election held in the city of Richmond on the 2d of November 1875; the other charging in one count that he was guilty of willful neglect of duty as said judge at said election, by knowingly allowing ballots to be put into said box, which should not have been put there; and in another count in allowing ballots to be taken from it, which ought not to have been taken from it; and he was found "not guilty" on both indictments. And referring to the rule which had been made upon him, he prays for a writ of prohibition to the said judge, prohibiting and restraining him from proceeding further upon said rule.

Judge Guigon appeared, and waiving the service of a rule upon him, and all technical or formal objections to the petition or the proceedings thereunder, for answer thereto says: That evidence has been adduced before him tending to show that the petitioner, whilst acting as judge of election, under his said appointment, had been guilty of malfeasance in office, and gross neglect of duty. That, upon said evidence, respondent had made the rule upon the petitioner. And he submits to the court whether in this he is warranted by the law of the land.

Royall, Stiles and Ould, for the petitioner.

Staples, J., delivered the opinion of the court.

This is an application for a writ of prohibition. The object is to restrain the judge of the Hastings court of the city of Richmond from removing the petitioner from the office to which he was appointed on the 20th October 1875, as a judge of elections for

135 *the first precinct of Jefferson ward in said city. The petitioner avers, that the appointment vested in him the right, and made it his duty under the law, to hold said office for the space of one year; and placed it beyond the power of any tribunal to remove him therefrom, except upon conviction by a jury, of willful neglect of his duty, or of some corrupt conduct in the execution of his office.

It is as to the correctness of this view, we are now to speak.

Under one of the provisions of the general law in regard to elections, it is made the duty of the County and Corporation courts, annually at the April terms, to appoint three competent male citizens for each voting district in their respective counties or corporations, for each voting place therein, who shall constitute judges of elections, for all elections to be held in their respective districts, for the period of one year dating from their appoint-

ment. Each person so appointed, before entering upon the duties of his office, is to take an oath that he will perform the duties of judge of election, according to law, and to the best of his ability; and that he will studiously endeavor to prevent fraud, deceit and abuse in conducting the election. Section 8, chap. 8, Code of 1873, page 155.

This is the only provision found in our laws, relating to the qualification and appointment of judges of election, as they are termed. No provision is anywhere made for their removal, except that which is contained in the 43d section of chap. 8, Code of 1873. That section declares, that if any officer, or other person on whom an election duty is cast, shall be guilty of any willful neglect of such duty, or of any corrupt conduct in the execution of the same, he shall upon conviction, be deemed guilty of misdemeanor, 136 *shall be punished by fine and imprisonment, and be removed from office.

The council for the petitioner, in constructing these statutes, have argued that the tenure of a judge of election being fixed by law for one year, and no provision being made for his removal, except in cases of conviction, as provided in the 43d section, he cannot be removed from office except in the mode and upon the terms prescribed by that section.

We do not propose to enter into a discussion of the much controverted proposition, that the power of removal, as a general rule, is a mere incident to the power of appointment. That question has, at various periods of our history, given rise to the most animated discussions. It has by terms engaged the attention of the executive, legislature and judicial departments of the government. It is discussed in the *Federalist*; in the celebrated case of *Marbury v. Madison*, 1 Cranch's R. 137; in *Ex parte Hennin*, 13 Peters' R. 230; and in many of the appellate courts of the United States. *Lehman v. Sutherland*, 3 Serg. & Rawle 145; *Hoke v. Henderson*, 4 Dev. R. 1; *People v. Hill*, Cal. R. 97.

The question was also most carefully considered and discussed in *Ex parte Bouldin*, 6 Leigh 639. In that case Mr. Louis C. Bouldin was removed by the judge of the Circuit court from his office of commonwealth's attorney without notice or any legal proceeding against him. Upon an application to the General court for a mandamus, that court unanimously held that the Circuit court having the power of appointing the commonwealth's attorneys, had, as incident thereto, the power of removing them. It is proper to say, however, that the decision of the General court was based mainly upon the ground, that as the law then stood, the commonwealth's attorneys did not hold their 137 offices *for life, or even for years, but during the pleasure of the Circuit courts; and they might be removed by those courts without restriction or limitation.

Conceding for the present that this rule does not apply where the tenure of the office is fixed by law; that, in such case, the power of removal from office is not an incident to that of appointment, we think that the County and Corporation courts are clothed

with the power of removing the judges of election with or without conviction, whenever they may deem such removal demanded by the public interests. We think that it was the purpose of the legislature to invest them with such power. Although that purpose is not expressed in so many words, yet it is manifest from a careful survey of the various statutes, past and present, relating to the subject of elections.

The statute already cited declares that the persons selected shall constitute judges of election for all elections to be held in their respective districts for the period of one year. Now it is very obvious, that if they can be removed from office only upon conviction of the offences mentioned in the 43rd section of chapter 8, Code of 1873, in a large majority of cases, the term of office will have expired long before such conviction can be had. The incumbent may be notoriously guilty of one or both the offences in that section mentioned; he may have been tried and convicted by the verdict of a jury, and yet judgment and execution of sentence may be delayed by courts of error and appeal, until the term of office is ended, and a removal therefrom has ceased to be of any practical interest. During all this time of the pendency of the prosecution against him, the incumbent may insist upon exercising the functions of his office, and there is no authority that can arrest or interfere with him.

138 *It will be seen that the 43d section refers only to cases of willful neglect and corruption in office. It makes no provision for cases of gross negligence, of incapacity arising from mental or physical causes. Now if the view of the counsel be correct, however incompetent the incumbent may be, however degraded in his conduct and habits, the government is powerless to disturb him. Even if he is guilty of the gravest criminal offences, there is no mode of closing his official career, except through the tedious instrumentalities of information or indictment, trial, conviction by a jury, and judgment of a motion from office. It is difficult to believe, that the legislature ever anticipated or designed such a state of things in regard to an official whose term of office is so brief, and yet where good conduct, competency, and integrity, are so essential to the freedom and purity of elections.

The provision authorizing the County and Corporation courts to appoint judges of election, was adopted 11th May 1870. At the same time, and as a part of the same general law, the 60th section was also adopted. That section confers upon the same courts the power to remove from office all county, city and township officers elected under that act, in their counties and corporations respectively, for malfeasance, misfeasance, or gross neglect of official duty. The proceedings to be by order of, or on motion before, the proper court, upon reasonable notice to the party to be affected thereby. See Acts of 1869 and 1870, page 78, sec. 24, and sec. 60.

This would of course include sheriffs, attorneys for the commonwealth, county treasurers, and superintendents of the poor,

clerks of the County and Hustings courts, supervisors, assessors, collectors, commissioners of roads, justices of the peace and constables—officers *whose terms run from one to four years; who are elected by the people, and whose tenure is in some instances fixed by express constitutional provision.

Each and all of these officials, it is agreed, may be removed upon notice and motion; but a judge of election can only be reached by indictment, trial, and conviction by a jury. The legislature, we are told, has invested the County and Corporation courts with full control of all the county and township officers elected by the people; but has denied the same tribunals the power of removing one of their own appointees, although such removal may be imperatively required by the public interests. It is impossible to believe that a distinction so absurd, so opposed to sound policy, could ever have been intended by the legislature.

It may be asked then, why was no provision made for the removal of the judges of election, as was done with reference to the county officers. The omission to do so was certainly not accidental. As already stated, the section authorizing the appointment of judges of election, and the section authorizing the removal of county officers elected by the people, were parts of the same act; no doubt considered together and adopted at the same time. It is therefore manifest that the failure to provide, in express terms, for the removal of the judges of election, was intentional. The most reasonable inference is that no such provision was regarded as necessary. The legislature, no doubt, considered that from the character of the office and the nature of the appointment, the County or Corporation courts would respectively have the power of removing these incumbents, whenever it appeared their longer continuance was incompatible with the public interests.

These judges of election, as they are termed, are substantially *the same as the commissioners of election under the former constitution and laws. The latter were also appointed by the County and Corporation courts. Before entering upon the discharge of their duties, they were required to take the same oath as the judges of election now take; and they performed nearly the same duties, with certain modifications and alterations adapted to the new system of voting by ballot.

Was it ever supposed that the County and Corporation courts could not, at their pleasure, remove all or any one of these commissioners, and substitute others in their place. It is very true that the present appointees constitute judges for all elections to be held during the year; whereas the commissioners were appointed merely for the general election day and the subsequent examination and certification of the results. But by the very terms of the appointment the commissioners had as valid a claim to hold on to that appointment till the general election day, and afterwards, till the result

was certified, as the present judges have for all the elections during the year. The difference between the two is simply in the duration of the tenure or time of holding, and not in the duties to be performed, or the right to discharge them. No law was ever passed for the removal of these commissioners; none was ever considered necessary. Like jurors, surveyors of highways and the like, they were regarded as most unfortunate, upon whom a public burden was cast, which any citizen might be required at any time to bear, as the price of his security and tranquility, under the government to which he belongs. Such appointments confer no special privileges: they do not invest the individual with the title to an office in the usual acceptance of that term.

141 *The legislature in passing a system of laws, adapted to the provisions of the present constitution, deemed it more convenient that these commissioners of election, now styled judges, instead of being appointed biennially for each general election, should be appointed annually for all elections to be held during the year. And as no provision for the removal of the commissioners was considered necessary, it is fair to infer that none was deemed necessary for those substituted in their place.

It will be observed that the judges of election do not take any general oath of office; but at each election, before entering upon their duties, they take the oath prescribed. If one of them fails to attend the place of voting, the others may associate with them a citizen. If none of them attend, a justice of the peace or mayor may select three citizens possessed of the requisite qualifications, and the persons thus selected have all the powers, and perform the duties of judges of election. These provisions give strength to the idea, that in the view of the legislature these judges were not officers in the ordinary acceptance of the term; but mere appointees required to perform certain duties as the occasion arose for their performance, subject to removal by the power which appointed them whenever the public interests require it.

It was argued here, that this is a dangerous power to rest in a County court; a power which may be wielded by a partisan judge for evil purposes, on the eve of an important election. The argument proves too much. It goes to show that these tribunals ought not, in the first instance, to have been clothed with the power of appointing judges of election. There is manifestly more danger

142 of the gratification of personal *and political preferences in the appointment of all the judges of a large election district, than in the occasional removal of one of them. The occasions will be very rare upon which a County or Corporation judge will incur the hazards of public observation and censure by the removal of a competent and faithful officer, upon mere personal or political grounds. Surely a tribunal fit to be clothed with the power of removing at will any county officer elected by the people, can be safely trusted with that of removing its own appointee, the incumbent

of a suboreinate position. And lastly, if there is any weight in the argument, it should be addressed to the legislature, and not to the courts.

The learned counsel in this case have relied much upon the ground that the incumbent is to be removed for an alleged offence, of which he has been tried and acquitted by the verdict of a jury. According to the statement made in the petition, this acquittal was upon an indictment or indictments, charging petitioner first with fraudulently putting ballots into the ballot box; second, with willful neglect of duty, by knowingly allowing ballots to be put in the box, which should not have been put there, and with allowing others to be taken out, which ought not to have been taken out.

Now the petitioner may be guiltless of each of the offences charged, and yet, as alleged by the Hustings judge, he may have been guilty of gross neglect in regard to those very ballots.

The evidence adduced on the trial may have been legally insufficient to establish the offences averred in the indictment, and yet it may have satisfied the honorable judge of the Hustings court that the petitioner is not a fit and proper person to be invested with
143 the important *powers and privileges appertaining to such a position.

We know nothing of the merits of the case. We are not to be understood as expressing any opinion in regard to the conduct of the petitioner—that is a subject exclusively for the consideration of the Hustings court. That court being clothed with the power of removal, its decision is not the subject of review in this court.

For these reasons we think the rule of prohibition should be refused.

Prohibition refused.

144 *Bunting v. Willis, Judge.

[21 Am. Rep. 388.]

January Term, 1876, Richmond.

I. **Officer.**—*Quære*: Whether a person holding an office of profit &c. under the United States government, is eligible to an office of profit &c. under the state government.

II. **Same—Sheriff—Holding Another Office.**—The office of sheriff commences on the 1st of July. If a person holding an office of profit under the government of the United States, is elected to the office of sheriff, which is an office of profit under the state government, and holds his office under the former government until any time during the 1st of July, he thereby vacates his election as sheriff and is not entitled to qualify as such.

III. **Same—Same—Same.**—In May 1875 B. a deputy collector of customs at Fortress Monroe, was elected sheriff of E county. On the 19th of June he sent in his resignation of his office of deputy collector to his principal at Norfolk, to take effect on the 30th of June. It does not appear that his resignation was accepted, or that any official action was

taken upon it until the 2d of July, when he was relieved by another officer of customs from Norfolk. On the 28th of June the papers of the American brig K were placed in B's hands for clearance; and nearly all the papers were completed on the 29th, and on the morning of the 1st of July, he completed the said clearing, before he attempted to do any act as sheriff. **Held**:

1. **Same—Same—Same—Resignation.**—B had the absolute right to resign his office of deputy collector. After such resignation becomes complete it cannot be withdrawn even with the consent of the government; though he may receive a new appointment, which may, perhaps, be given to him in the form of withdrawal by consent of his resignation of the office.

2. **Same—Same—Same—Same—Acceptance of.**—But a prospective resignation may be withdrawn at any time before it is accepted; and after it is accepted, it may be withdrawn by the consent of the authority accepting, where no new rights have intervened.

145 *3. **Same—Same—Same—Same—Withdrawal of.**—The act of B in clearing the brig K on the 1st of July, could only have been done by withdrawing his resignation so long as it was necessary for that purpose; and he in fact was not relieved until July 2d. He was therefore disqualified from holding the office of sheriff under his election in the month of May.

IV. **Same—Same—Orders of Court—Amendments during Term.**—On the 25th of June B qualified as sheriff of E, by taking the oaths of office and entering into bond with sureties, before the County court. At the same term of the court, T claiming to be sheriff of E, moved the court to set aside the order qualifying B as sheriff; and B appearing, after hearing, the court set aside the order and the bond of B, and admitted T, who was sheriff the previous year, to qualify as sheriff. B thereupon applied to the judge of the Circuit court for a *mandamus* to the judge of the County court, to restore him to the office. **Held**:

1. **Same—Same—Same—Same.**—It was competent for the County court of E, at the same term, to set aside the order admitting B to qualify as sheriff and his bond.

2. **Same—Same—Holding One Office Disqualifies for Another.**—It was competent for the County court to refuse to admit B to qualify as sheriff when he held a lucrative office under the government of the United States.

3. **Same—Same—Same—Restoration.**—If B is not, and was not when he obtained the rule for a

***Same—Resignation.**—That the resignation of an officer does not become complete until it is accepted. see *Coleman v. Sands*, 87 Va. 689, 13 S. E. Rep. 148. In this case **PRESIDENT LEWIS** commenting on the principal case in regard to the dictum—"he had a right to resign his federal office, and that such right does not depend upon the consent or acceptance of the government,"—said: "It is observable, moreover, that notwithstanding this broad language, the decision of the case, if we correctly understand it, proceeded on the ground that not until acceptance did the resignation become complete." But see the dissenting opinion of **JUDGE LACY** in the same case.

†**Amendments of Record during Term.**—See full collection of cases on this subject in *note to Price v. Com.*, 83 Gratt. 819.

***Officer Holding Office under United States Government Disqualified to Hold under State Government.**—See Va. Code, § 168.

writ of *mandamus*, entitled to the office of sheriff, he cannot be admitted or restored to it on such writ, even though the County court had no authority to annul the order admitting him to qualify as sheriff, or to have refused originally to admit him.

This was an application to the judge of the circuit court of Elizabeth City county, by R. Paul Bunting, for a *mandamus* to W. R. Willis, judge of the County court of said county, to compel him to restore the said Bunting to the office of sheriff. The Circuit court refused the application; and Bunting applied to this court for a writ of error; which was awarded. The case is fully stated by Judge Moncure in his opinion.

Godwin & Crocker, for the appellant.

Peek, for the appellee.

146 *Moncure, P., delivered the opinion of the court.

This is a writ of error to a judgment of the Circuit court of the county of Elizabeth City, discharging a rule in the nature of a *mandamus nisi*, which had been awarded by said court on the petition of the plaintiff in error, R. P. Bunting, against the Hon. W. R. Willis, judge of the County court of said county, and Jerome Titlow, defendants in error, to show cause why a peremptory *mandamus* should not be awarded to the said plaintiff, commanding the said judge to admit or restore said plaintiff to his office of sheriff of said county, then held by the defendant Titlow.

Bunting having received the highest number of votes at the general election held May 27th, 1875, was elected sheriff of the county of Elizabeth city. On the 25th day of June 1875 he qualified as such before the said County court by taking the necessary oath, and giving bond, with approved security, as required by law, and on the 1st day of July 1875 he entered upon the duties of the office.

Afterwards, and during the same term of the said County court, to wit: on the 3d day of July 1875 the said Titlow, claiming to be sheriff of said county, moved the said court to set aside the order qualifying the said Bunting as such sheriff, entered into on the second day of the said term, and to declare the same null and void, together with the bond entered into by the said Bunting and his sureties, upon his qualifications as said sheriff, upon the ground that he was at the time of said qualification, and was then incapable of holding the said office under the second section of chapter 11 of the Code of 1873. And the said Bunting appearing, and the said motion having been continued from time to time, afterwards during the same term,

147 to wit: on the 8th day of July 1875 the said County court, on full consideration of the case, being of opinion that the said order entered on the second day of the said term, was erroneously entered, and that the said Bunting was improperly and illegally admitted to qualify as sheriff of said county as aforesaid, and was not capable of hold-

ing said office of sheriff by reason of his holding an office of trust and emolument under the United States government, ordered that the order entered on the second day of the term as aforesaid should be set aside and annulled. And the said County court being further of opinion that said Jerome Titlow, as sheriff of the county, held over until his successor should legally qualify, ordered that the said Titlow should be recognized as such sheriff until his successor should qualify as aforesaid. To which ruling of the court the said Bunting excepted, and asked leave to file his bill of exceptions, which leave the court refused, upon the ground that his proper remedy was not by writ of error, but by *mandamus* or *quo warranto*.

Accordingly, the said Bunting applied to the judge of the Circuit court of said county for a rule in the nature of a *mandamus nisi*, which was awarded as aforesaid, and executed upon the defendants. After which, to wit: on the 30th of July 1875, the defendants filed the answer of Judge Willis to the said rule, to which answer the plaintiff, Bunting, filed a demurrer, and entered a plea, in which demurrer the defendants thereupon joined. The plea was, that the "part of the return to the *mandamus nisi* that alleges that the plaintiff held a United States office, to wit: the office of Deputy Inspector of Customs at Fortress Monroe, Virginia, an office of profit, trust and emolument, on the 2nd day of July

1875, or after he, the said plaintiff, 148 *had entered upon the discharge of the duties of sheriff of Elizabeth City county, is not true."

Afterwards, to wit: on the 4th day of August 1875, the said Circuit court having fully considered the matters of law arising upon the plaintiff's demurrer, was of opinion that said answer was sufficient, and overruled the demurrer thereto; and the plaintiff admitting the allegations of said answer not traversed by his said plea, issue was thereupon joined on said plea; and neither party requiring a jury, but submitting the matters of law and fact arising from the evidence and argument of counsel to the court, judgment was thereupon rendered against the plaintiff, discharging the said rule, and for the defendant's costs; to which judgment the plaintiff excepted.

On motion of the plaintiff, and by consent of parties, a rehearing of the cause was granted; after which, to wit: on the 21st day of August 1875, the cause having in the meantime been further heard, and the court having taken time to consider, the court, on full reconsideration of the matters of law and fact arising in the case, and the arguments of counsel, confirmed the judgment entered in the cause on the 4th day of the same month.

In the bill of exceptions which was taken in the case by the plaintiff, the facts, or evidence proved on the trial, were certified.

The respondents (Judge W. R. Willis and Jerome Titlow), to maintain the issue on their parts, proved the following facts, to wit: "That on the 25th day of June 1875,

and for some time prior thereto, R. Paul Bunting held the office of Deputy Collector and Inspector of Customs at Fortress Monroe, Virginia; that the said office was and is an office of profit, trust and emolument, under the government of the United

149 *States, paying to the incumbent thereof an income of four dollars per day as a salary; that on the 19th day of June 1875, the said Bunting sent in his resignation of said office, to take effect on the 30th of June 1875; that the said resignation was not accepted, or any official action indicating its acceptance taken, until the 2nd day of July 1875; that on the 2nd day of July 1875, about five o'clock in the afternoon of that day, William Webb, an employee of the United States Custom House at Norfolk, Virginia, under instructions of Luther Lee, Jr., Collector of Customs, relieved the said Bunting as United States Deputy Inspector and Collector of Customs at Fortress Monroe; that on the first day of July 1875, about 9 o'clock in the morning, the said Bunting, in the discharge of the said duties of the said office of deputy inspector and collector, cleared the American brig 'Katahdin,' and issued to her clearance papers over his signature and in the capacity of deputy inspector and collector of customs as aforesaid, having two days before commenced the papers of the clearance of said vessel."

And the said R. P. Bunting, to maintain the issue on his part, proved the following facts by both oral and record testimony, to-wit: "That on the 27th day of May 1875, he was duly elected sheriff of the county of Elizabeth City, and state of Virginia;" and here is inserted the certificate of said election. "That on the 25th day of June 1875, he duly qualified as sheriff of said county, before the County court of said county, then in session, presided over by Judge W. R. Willis, the judge of said court, by taking the necessary oath, and giving the bond with approved security;" and here follows the order of qualification. "That on the 1st day of July 1875, about the hour of 12 o'clock

A. M., he took formal possession of 150 the said office of *sheriff, and continued in the said office, performing the duties thereof, until the 8th day of July 1875; that on that day one Jerome Titlow moved the said judge of the said court, through his counsel, to revoke the order of the 25th day of June 1875, qualifying the said R. P. Bunting as sheriff aforesaid; that upon argument and consideration the said judge of said court did revoke said order of qualification, and did dispossess him the said Bunting of the said office of sheriff;" and here follows the order of revocation. "That prior to, and at the time of his qualification as sheriff aforesaid, to-wit, on the 25th day of June 1875, he held the office of deputy inspector and collector of customs at Fortress Monroe, Virginia; that after his election to-wit, on the 19th day of June 1875, he resigned the office of United States deputy inspector and collector, to take effect on the 30th day of

June 1875;" and here follows the letter of resignation in these words:

"Custom House, Fort Monroe, Va.,
Collector's Office, June 19th, 1875.
Hon. Luther Lee, Jr.,
Collector of Customs, Norfolk, Va.:

My Dear Sir:—After five years of continued service as an inspector of the customs for the port of Norfolk, and under your personal supervision, I beg leave to hand my resignation, to take effect June 30th 1875.

Being one of the first to receive an appointment at your hands, on your assuming the position of the collectorship of the port above stated, it gives me pleasure to say, that the past five years have been as pleasantly and agreeably spent as any of my past life, and I assure you it is with much 151 regret that I am *forced to hand you my resignation; but business of a private nature demands my immediate and personal attention, and I therefore beg you will be pleased to accept it in the same good feeling in which it was written.

You will be pleased to permit me to extend to you and the officers under you my sincere and hearty thanks for the many courtesies extended to me since my connection with you, both officially and socially.

With best wishes for your future prosperity, I beg leave to remain your sincere friend and ob't servant,

R. Paul Bunting."

Under which letter is a certificate, under the hand and official seal of the collector, dated July 5th 1875, that said letter is a true copy of the original on file in his office.

"That on the 28th or 29th day of June 1875, the papers of the American brig 'Katahdin' were placed in his the said Bunting's hands for clearance. That all the necessary papers, except the hospital returns and his signature as deputy collector, were made out and completed on the said 28th or 29th day of June 1875; that on the first day of July 1875, having two or three days previously commenced the clearing of the said brig 'Katahdin,' he completed the said clearing; that this was about 9 o'clock A. M., and before he had done any act in the office of sheriff aforesaid; that on the 2nd day of July 1875, W. T. Webb took charge of the said office of United States deputy collector and inspector of customs, and continued to act as said officer until the 8th day of July 1875, when the said office was filled by H. Libby, duly appointed, and who holds the said office to this date." And the said Bunting in his evidence states, "that from and 152 *after nine o'clock A. M. of the 1st day of July 1875, he ceased entirely to have anything to do with the said office of deputy inspector and collector of customs at Fort Monroe, and that his damages, including his attorney's fee in this case, amount to about \$300."

Whereupon the court, being of opinion that the said Bunting was not entitled to recover the said office, gave judgment for

the respondents; to which opinion the said Bunting excepted.

The Code, chapter 11, section 2, page 174, declares that "no person shall be capable of holding any" post of profit, trust or emolument, civil or military, legislative, executive or judicial, under the government of this commonwealth, "who holds any post of profit, trust or emolument, civil or military, legislative, executive or judicial, under the government of the United States, or who receives in any way from the United States any emolument whatever."

It is not denied, and there can be no question, but that, first, the office of sheriff is a post of profit, trust and emolument, under the government of this commonwealth; and, secondly, the office of deputy inspector and collector of customs at Fortress Monroe, Virginia, which was held by the plaintiff Bunting at the time of his election as sheriff of the county of Elizabeth City on the 27th day of May 1875, was a post of profit, trust and emolument, under the government of the United States; within the true intent and meaning, and indeed the express terms, of the said provision of the Code.

There is also a provision of the constitution of the State (article 7, section 6, Code p. 92), which declares that "sheriffs shall hold no other office." This provision is no further material to this case, than to show the intent of the framers, as well of 153 the constitution *as of the law of the state, that a sheriff shall hold no other lucrative office, whether under the state or federal government. We will therefore not notice any further the constitutional provision aforesaid.

When the plaintiff was a candidate for the office of sheriff under the state government he certainly held the office of deputy inspector and collector of customs under the federal government; and it does not appear that he had then any idea of resigning the latter office, at least unless he should be elected to the state office; in which event he may have intended to tender his resignation of his federal office, to take effect when he would have to enter on the duties of the state office. A question might well be raised, whether a person who holds a lucrative office under the federal government, is eligible to the office of sheriff under the state law. To be sure that law does not expressly declare that he shall not be eligible to, but only that he shall not be capable of holding, any such post, &c. We can see some reason for using the latter rather than the former language, as it may have been intended to have the effect of preventing, not only a federal officer from being elected to a state office, but also a state officer from receiving a federal office without ipso facto vacating his state office. It may seem strange, that a person should be eligible to a state office, which he is incapable of holding after being elected. The law says nothing about his resigning before entering on the duties of his state office, any federal office which he may hold

at the time of his election. It is at least optional with him, whether he will resign his federal office or not; and whether his election to the state office would be effectual or not, would depend on the continuation of his future *resignation in time to enter on the duties of the state office.

The federal office might be held by fraud contemporaneously with the state office. We do not mean to say that such was the case here; but there is danger in such a case. And the best way to guard against it would seem to be that the federal officer should not be eligible to the state office, until he has clearly and entirely rid himself of the federal office. Otherwise there will be a painful uncertainty after the election who the state officer is, until some unmistakable act of resignation shall have been executed. There is a manifest difference between offices held under the same government, and offices held under a different government, as under the state and federal. In the former case, the whole matter is under the control of one and the same government, and the acceptance of one office is ipso facto a vacation of another, incompatible therewith, and previously received. But, in the latter case, an acceptance of a state office does not vacate a previously received federal office, however incompatible they may be. In the cases referred to in the argument, in which it has been held that a person holding one office may, while he holds it, be elected to another and incompatible one, seem to be all cases in which the offices were held under the same government.

But without expressing any opinion upon that question, and conceding, at least for the purposes of this case, that the plaintiff was eligible to the office of sheriff, though at the time of the election, and for some time thereafter, he held the federal office, then the question arises, whether he was completely divested of the federal office before he was invested with the state office; in other words, whether he held both offices

at one and the same time, however 155 short may have been the time *of such holding. The law prescribes no limitation as to the time of holding. "No person shall be capable of holding" for an instant any more than for a year. The instant he holds a federal office he must cease to hold his state office.

The office of sheriff commenced on the first day of July 1875. Did the federal office cease before that day? Did he perform any duty of the latter office after or on that day? This is the question we now have to consider and decide.

The plaintiff was elected to the office of sheriff on the 27th of May, and he tendered his resignation on the 19th of June thereafter. But it was not to take effect immediately. It was to take effect on the 30th of June 1875, the day before the term of the office of sheriff legally commenced. But did it then take effect? or was it held longer? If it was held any longer, no

matter how short the period, he was incapable of holding the office of sheriff.

That he had a right to resign his federal office, and that such right does not depend upon the consent or acceptance of the government or its agents, seems to be very well settled. That after such a resignation becomes complete it cannot be withdrawn by the officer, even with the consent of the government, seems also to be settled, though he may receive a new appointment, which may perhaps be given to him in the form of a withdrawal by consent of his resignation of his former office.

But a prospective resignation may be withdrawn at any time before it is accepted; and after it is accepted it may be withdrawn by the consent of the authority accepting, where no new rights have intervened. This was held by the Supreme court of Indiana,

in *Biddle v. Willard*, 10 Ind. R. 62, 156 and seems to be a reasonable *principle. We have seen no case to the contrary, while there are other cases which tend to sustain it. 43 Id. 105, *The State v. Hauss*; 6 Cal. R. 26, *The People v. Porter*; 56 Missouri R. 17, *State v. Boecker*.

The resignation of the office of deputy inspector and collector in this case was prospective; to take effect June 30th, 1875. It was not accepted by the collector until after that time. There can be no doubt but that until that time it was competent for the plaintiff, at least with the consent of the collector, to withdraw his resignation, either entirely or for a limited period. From the terms of the letter of resignation, it is plain that the plaintiff would have consented to withdraw his resignation for a limited period or purpose, if the exigencies of the public service required it, especially if he supposed that he would not thereby lose his office of sheriff.

It clearly appears in this case that the plaintiff acted as deputy inspector and collector after the 30th of June, to wit: on the 1st of July 1875; and so acted with the consent of the collector. It is certified as a fact proved in the cause, "that on the first day of July 1875, about 9 o'clock in the morning the said Bunting, in the discharge of the said duties of the said office of deputy inspector and collector, cleared the American brig 'Katahdin,' and issued to her clearance papers over his signature, and in the capacity of deputy inspector and collector of customs as aforesaid, having two days before commenced the papers of the clearance of said vessel." This act could only have been done by withdrawing the resignation so long as was necessary for the purpose. In fact, the plaintiff did not go out of office before the 2d day of July 1875, it being certified as a fact proved on the trial, that "about 5 o'clock in the afternoon of that day, William Webb, 157 *an employee in the United States custom-house at Norfolk, Virginia, under instructions of Luther Lee, Jr., collector of customs, relieved the said Bunting as United States deputy inspector and collector of customs at Fortress Monroe."

Thus it appears that Bunting went out, and Webb came into this office about 5 o'clock P. M., on the 2d of July 1875, after the term of the sheriffalty for which Bunting had been elected commenced. It seems to be supposed that the facts certified, as proved by Bunting, are more favorable to him than those proved on the other side. But there is not any conflict between them, and if there were we would have to prefer that view of the facts which tends to sustain the judgment to that which tends to the contrary.

When was Bunting's letter of resignation of the 19th of June 1875 received by Lee? Was any answer made to it? And if so, what was the answer? On none of these subjects does the record give any information. If Lee had answered the letter of Bunting, accepting the resignation as it was tendered, or containing anything else at all favorable to Bunting, it would have been produced by him. We may infer, therefore, from the non-production of such an answer, that it was not written or was not favorable. It does not appear that the letter of resignation was filed or received by Lee until the 5th of July 1875, the date of his certificate, which was after the controversy in the County court for the office of sheriff between these parties had commenced, which was on the 3d of July. It is not stated by Bunting when his letter of resignation was actually written; and even the date of his resignation is stated under a scilicet, as on the 19th of June 1875. If Bunting received no answer from Lee stating that his letter of resignation was

158 received and *filed, he could not have considered his resignation as accepted and complete. It does not appear that he received any such answer until after the 2d of July, on which day, about 5 o'clock in the afternoon, Bunting was relieved by Webb. Continuity of the office seems to be required by public necessity. Even the short period of six days between the 2d and the 8th of July was filled up by the temporary appointment of Webb, an employee in the custom-house, and on the 8th the office was permanently filled by the appointment of Libby.

In this case, the most we can say for Bunting, even if we can say that, is that the case is a doubtful one upon the merits. So considering it, we would have to affirm the judgment, in conformity with the opinion of the County court and of the Circuit court, both of which courts saw and heard the witnesses, and the latter of which stood in the place of a jury by agreement of the parties, and after giving judgment for the respondents, on full argument and consideration, granted a rehearing, and then upon reargument and reconsideration affirmed the former judgment.

Upon every principle therefore, we must affirm the judgment of the Circuit court upon the merits.

But there are a few other questions, besides the merits, yet to be noticed, but little need be said of them—as,

1st. Was it competent for the County court, after Bunting had qualified and given bond as sheriff, during the same term, to set aside and annul his qualification and bond?

We think that it was. "The rule at common law is that during the term, whenever any judicial act is done, the record remains in the breast of the judges of the court and in their remembrance, and therefore 159 the *roll is alterable during that term, as the judges shall direct; but when the term is past, then the record is in the roll, and admits of no alteration, averment or proof to the contrary." 3 Tho. Co. Lit. 323.

Thus the rule on this subject, as taken from Coke, is laid down in 1 Rob. Pr. old ed. p. 638. In Cawoods case, 2 Va. Ca. 527, 545, the rule is more broadly laid down thus: "During the term, the records are in the breast of the court, and amendments may be made in the proceedings of the court; but after the term has passed, no amendments can be made, except of mere clerical misprisions." The question we are now considering is governed by this rule.

2d. Was it competent for the County court to refuse to admit Bunting to qualify as sheriff when he held a lucrative office under the government of the United States?

We think that it was, at least before he resigned his office under the United States; if indeed he was eligible while he held that office to the office of sheriff under the state government—a question which it is unnecessary now to decide. Certainly, after the court had been informed and satisfied that Bunting, having been elected as sheriff while he held a lucrative federal office, was actually engaged in performing its duties after the term of the sheriffalty had commenced, the court was well warranted in setting aside the order made at the same term of the court, admitting him to qualify as sheriff, and would then, at least, have been warranted in refusing to permit him to qualify. Surely the court has power and ought to refuse to permit a person to qualify therein to an office which he is incapable of holding. This is expressly recognized by a recent act of assembly approved March 29, 1875, Session Acts 1874-'5, ch. 269,

160 *section 5, p. 342, which declares that if any person shall be elected to two or more of the offices enumerated in the section (one of which is that of sheriff), "his qualification in one shall be a bar to his qualification in any other, and they shall be filled as other vacancies." Having qualified to one, of course the court in which the qualification would have to be made would refuse to permit him to qualify in the other. But, without considering this question any further, it is sufficient to say that the solution of the next seems to render it immaterial.

3. Whether the County court could properly have refused, or not, to permit Bunting to qualify as sheriff; or, having permitted him so to qualify, could, afterwards, during the same term, properly set aside the quali-

fication or not; it is very well settled, that if Bunting is not now, and was not when he obtained a rule for a writ of mandamus, entitled to the office of sheriff, he cannot be admitted or restored to it on such writ.

In *Chew v. The Justices of Spotsylvania*, 2 Va. Cas. 208, it was held that the removal of a justice of the peace with all his family from his county to another, and remaining there for several years (although he afterwards returned), is either an abandonment, virtual resignation, or forfeiture of his office; and whether void, or only voidable by a judicial proceeding eventuating in a judgment of a motion, no mandamus ought to issue, to invest the applicant with an office not belonging to him, if void, or which might be taken from him, if voidable.

In *Amory v. The Justices of Gloucester*, Id. 523, it was held that the offices of deputy clerk of a County court and of a justice of the peace of the same county are incompatible offices, so that they cannot 161 both be *held at the same time; and whether the acceptance of the office of deputy clerk vacates the office of a justice of the peace, or not, the Superior court will not grant a mandamus to compel the County court to admit the applicant to an office not belonging to him, if void, or which might be taken from him, if voidable.

In *Poulson v. The Justices of Accomac*, 2 Leigh 743, it was held that a justice of the peace of the county of Accomac, who left this state with intent to establish his residence in another, and remained there nine months, but did not establish his permanent residence there, and then returned and resumed his former residence in Accomac, had no right to resume the exercise of his office of justice of the peace of Accomac. Upshur, J., delivered the resolution of the court, that the case was not distinguishable in principle from the case of *Chew v. The Justices of Spotsylvania*, supra, and upon the authority of that case, the court was unanimously of opinion that the mandamus ought not to be awarded.

4. The remedy by mandamus seems to be a proper remedy in cases of this kind, and has been the one usually pursued, no doubt because, if not the only specific legal remedy, it was, at least, the most convenient and complete, in which cases the court exercises a sound discretion in granting or refusing the writ.

We think, therefore, the Circuit court did not err in discharging the rule for a writ of mandamus and refusing to award the said writ.

But one more observation occurs to us as proper to be made in this case; and that is, that Bunting having become incapable of holding the office of sheriff, at least by acting in his federal office after the term of his sheriffalty had commenced, he thenceforward at least ceased to be sheriff, and no act of his afterwards in throwing off the 162 federal office, could restore him to *the state office, nothing could do so but a reelection and requalification to the latter. If it be necessary to cite authority in sup-

port of that principle, it may be found in the *Commonwealth v. Sherrard*, 4 Leigh 643; though it is no doubt sustained by many cases, if it be not a self-evident proposition.

Upon the whole, we think there is no error in the judgment, and that it ought to be affirmed.

Christian, J., dissented.

Judgment affirmed.

163 *Eastern Lunatic Asylum v. Garrett.

January Term, 1876. Richmond.

1. Public Corporations—Liability for Taking Private Property without Compensation.—The Eastern Lunatic Asylum is a corporation having charge of the asylum at Williamsburg. During the late war the United States forces took possession of Williamsburg, and held it until the end of the war. Upon their approach to the city the directors and principal officers of the asylum left it, and did not return. In January 1865 Colonel W, who was in command there, sent out a party some miles into the country, and took by force from the farm of G, who had left his home, corn and bacon, which was sent to the asylum, and used for the support of the inmates. After the war G brought trover against the corporation to recover the value of the articles so taken and used. **Held:**

1. **Same—Same—Without Compensation.**—By the laws of war such property could not be taken without compensation, for the purpose of feeding the inmates of the asylum.
2. **Same—Same—Same—Liability.**—The property having been taken without lawful authority, G's title to it was not divested, and it having been applied to the use of the asylum, he may recover its value from that corporation.
3. **Same—Same—Same—Same—Trover.**—Trover is a proper remedy in the case.

This was an action of trover in the Circuit court of James City county and the city of Williamsburg, brought in April 1873

***Public Corporations—Liability for Taxing Private Property without Compensation.**—The principal case is cited in *Dinwiddie County v. Stuart*, 28 Gratt. 555, and also, in *Maia v. Eastern Hospital*, 97 Va. 516, 34 S. E. Rep. 617, where it is fully discussed and distinguished.

TROVER AND CONVERSION.

Trover—Definition.—Trover is defined to be "a form of action which lies to recover damages against one who has, without right, converted to his own use goods or personal chattels in which the plaintiff has a general or special property." *Bouvier's Law Dict.* 1142.

Conversion.—"A conversion is any unauthorized dealing with the goods of another by one in possession, whereby the nature or quality of the goods is essentially altered, or by which one having the right of possession is deprived of all substantial use of the goods, permanently or temporarily." 26 Am. & Eng. Enc. Law 714.

Foundation for Action.—To maintain *trover* the plaintiff must show a conversion of personal property by the defendant, and that he had at the time of the conversion a general or special right of property in the thing converted, and also the possession

by George W. Garrett against the Eastern Lunatic Asylum, to recover the value of certain corn and bacon, which had been taken in 1865 by the military commander of the Federal forces, and applied to the support of the inmates of the Lunatic Asylum.

When the cause came on for trial, the parties submitted the case, both on the law and the facts, to the decision of the court. And the court having heard the evidence, rendered a judgment in favor of the plaintiff for the sum of \$363, with interest from the 1st of May 1865. The defendant thereupon moved the court for a new trial, but the motion was overruled, and the defendant excepted. The court certified the evidence as follows:

That in the year 1864 the plaintiff lived on the farm known as "Warhill," about six miles from Williamsburg. That in December of that year the plaintiff was arrested by the military forces of the United States, and was carried off by them and placed in confinement. That at the time plaintiff was so taken from his home he left there thirty-three barrels of corn, which he had measured up to itself, and which was worth then at least five dollars per barrel, and also some other corn which had not been measured up. That he also left three nine hundred pounds of salted pork, which was then worth twenty-two cents per pound, and he also left a lot of hogs. That the plaintiff did not return to his home until the last of April 1865. That during the late war the United States military forces occupied the

or a right to the immediate possession thereof. *Haines v. Cochran*, 28 W. Va. 719.

Declaration—Statement of Price of Thing Converted.—In an action of trover and conversion, the declaration need not state the price of the thing converted. It is not the price which the plaintiff sues for, but damages for the conversion; and even where the price is laid, he may recover more or less, provided the damages do not exceed those laid in the declaration. *Pearpoint v. Henry*, 2 Wash. 192.

Joinder of Counts.—In *Spencer v. Pilcher*, 8 Leigh 555, the declaration contained three counts, the first a common count in trover. Upon demurrer to such declaration it was held that the second and third counts were in *tor*, and are consequently well joined with the count in trover.

Proof of Conversion.—In an action of *trover* a conversion may be proved in three ways: first, by a tortious taking; second, by any use or appropriation to the use of the defendant indicating a claim of right in opposition of that of the plaintiff or owner; and third, by a refusal to deliver possession to the owner on demand. *Haines v. Cochran*, 28 W. Va. 719; *Arnold v. Kelly*, 4 W. Va. 642.

When Proof of Demand and Refusal Excused.—It was held in *Newsom v. Newsom*, 1 Leigh 88, 19 Am. Dec. 739, that proof of demand and refusal is never necessary in trover, where there is proof of an actual conversion.

When Title in Neither Party.—In an action of trover when neither the plaintiff nor defendant have title to the property, if it is competent for the defendant to show title in a third party under whom he does not claim, to defeat the plaintiff's action. *Smoot v. Cook*, 3 W. Va. 172.

city of Williamsburg, and extended their picket lines about one mile beyond said city. That, in 1863, one Dr. Crittett F. Watson came to the asylum as its superintendent, having been sent there by the Pierpoint government. That on his arrival he submitted the oath of allegiance to the United States government, to the officers then in charge of the asylum. That they refused to take said oath. That there was no board of directors for the asylum after the Federal forces took charge of Williamsburg. That the members of the board had left, and were scattered over the country. That said 165 Watson left the "asylum before the end of the year 1863. That from April 1863, to the end of the war, the military authorities stationed at Williamsburg controlled the asylum; the officer in command exercised the chief control. That many of the subordinate officers of the institution, who were in office prior to April 1863, remained in office while Watson and the military had control, and this state of things continued until the close of the war. That while the military authorities had control they furnished the institution with supplies, but very often they sent parties out in the country and took supplies for the asylum from the citizens. That in January 1865 one Colonel West was in command at Williamsburg, and a party was sent out in the country under command of Captain Holmes. That this party went to "Warhill," the residence of the plaintiff, and by force took from there all of his corn and

salted pork, it requiring ten large four-horse wagons to haul the same, one of which wagons and team belonged to the Eastern Lunatic Asylum. That the corn and pork was carried first to Fort Magruder, a military post near Williamsburg, and from there was sent by said Colonel West directly, and without unloading the wagons, to the asylum for its use, and that the said corn and pork was delivered to the asylum. That the plaintiff did not institute his suit at an earlier day because he did not know, until a short time before its institution, what had become of his corn and pork.

Upon the application of the Eastern Lunatic Asylum a writ of error and supersedeas was awarded by one of the judges of this court.

C. Branch, for the appellant.

R. H. Armistead, for the appellee.

166 *Staples, J. This is an action of trover, brought by George W. Garrett against the Eastern Lunatic Asylum, in the Circuit court of James City county. Upon the trial at the April term 1874, the parties waiving a jury, judgment was rendered for the plaintiff. The defendant moved for a new trial, which was overruled. Thereupon the defendant excepted and the court certified the evidence.

This evidence, so far as it is material to the present purpose, shows that from the beginning of the year 1863 to the close of the war, the federal troops stationed at

Parties.—In *Lowry v. Mountjoy*, 6 Call 55, it was held that the wife need not be joined with the husband in an action of trover for a slave belonging to her.

Against Two Jointly and One Released.—In an action of trover and conversion against two, where defendants appear and file a joint plea of not guilty and issue is thereon joined, it is competent for the jury to acquit one of the defendants and find the other guilty and assess damages against him. *Tracy v. Lloyd*, 10 W. Va. 19.

Against Bailee.—The accidental loss of a hired slave, occurring in an employment of the slave which the bailee has no right to make, amounts to such a wrongful conversion by the bailee, as will sustain an action of trover by the owner. *Spencer v. Pilcher*, 8 Leigh 567; *Harvey v. Epes*, 12 Gratt. 153.

Against Vendor.—The assignee of a vendee of standing trees, having chosen and marked the trees, may maintain trover against the vendor for felling and converting them, although the vendor had no notice of the election. *McCoy v. Herbert*, 9 Leigh 548.

By Tenant in Common against Co-Tenant.—Trover lies by one tenant in common of a personal chattel, against his co-tenant, for the appropriation of the chattel to his exclusive use, where the chattel is of such a nature as to be necessarily destroyed by the use thereof. *Lowe v. Miller*, 3 Gratt. 205, 46 Am. Dec. 188.

By Trustee.—A naked trustee of a chattel is entitled to recover, in trover, not only nominal damages, but the full value. *Newsum v. Newsum*, 1 Leigh 86, 19 Am. Dec. 730.

By Buyer against Seller.—In *Haines v. Cochran*,

28 W. Va. 720, it was held that the buyer of goods who has paid the full price could maintain an action of trover against the seller where the latter has failed to make delivery; but such action will not lie unless the buyer proves that he has paid the full price before the action is commenced.

When Not Maintainable by Ward.—Where timber-trees, growing on the inheritance of a ward, are thrown down by a tempest, or otherwise, they become personal property, and the guardian has a legal right to sell them as being perishable and of no value except as a subject of sale; in such case the infant cannot bring trover for them. *Truss v. Old*, 6 Rand. 556.

Plaintiff Not Having Right to Possession.—K, the owner of a slave for life, sells him to M, by whom he is then sold to J, who gave him to his daughter, by whom he is taken out of the state. Upon the death of K, the owners of the remainder in the slave bring trover against M to recover the value of the slave. Held, the plaintiff not having had the right to the possession of the slave at the time M sold him, cannot maintain this action against M. *Philips v. Martiney*, 10 Gratt. 333.

Against Personal Representative.—It was held in *Ferrill v. Brewis*, 25 Gratt. 765, that trover may be sustained against a personal representative as such, though the goods never came into his hands.

If an administrator sell a chattel, whereof his intestate died possessed, but which in truth belonged of right to another, and apply the proceeds to payment of his intestate's debts in due course of administration, without any notice of the right or claim of the true owner, he is personally liable to the true owner for the value in trover brought by the owner

Williamsburg controlled the asylum there, the officer in command exercising chief command.

Previous to this time, a superintendent appointed by the Pierpoint government had the management for a brief period. There was no board of directors, the members having left the community, and were scattered over the country. Many of the subordinate officers, however, remained at the asylum in discharge of their duties. During the time the military had the control, they furnished the institution with supplies, often sending parties into the country and taking provisions from the citizens. In January 1865, a party of Federal soldiers was sent out under the command of a captain, upon an expedition of the kind. They went to the residence of the plaintiff, who was absent, and by force took all his corn and salted pork, sufficient to fill ten large four-horse wagons, one of which belonged to the asylum. The wagons were first driven to Fort Magruder, a military post near Williamsburg, and from that place, without being unloaded, were sent by the commanding officer directly to the asylum, where the provisions were left for the use of the inmates.

Upon this state of facts we are called upon to determine whether the asylum can be held liable for the value of the plaintiff's property. No right-thinking man will question the equity of the claim asserted. The plaintiff ought to be paid, unless there is some very positive, direct, legal impediment in the way of his recovery.

The ground taken by the defendant is, that the Federal commander had by the laws of war the right to take the plaintiff's property; and the mere fact that the property was subsequently appropriated to the use of the asylum, instead of the Federal troops, cannot impose any legal liability

upon the asylum to account for its value. In other words, the goods became, by the capture, the property of the United States government, and the plaintiff had no longer any claim to them as against any person whatever.

In considering this argument, it is proper to enquire very briefly, what is the usage of nations engaged in war with regard to the capture of movable property on land. The general rule, well settled by the humanity and policy of modern times, is to abstain from taking such property without making compensation, unless in special cases declared by the necessary operations of war. The exceptions are, first, seizure by way of penalty for military offences; second, property taken on the field of battle, or in storming a fortress or town, which is usually termed booty; and, third, forced contributions or levies for the support of the invading army, or as an indemnity for the expense of maintaining order and affording protection to the inhabitants.

Another exception to the rule is said to be found in the peculiar nature of the property which is the subject of capture. If the hostile power has an interest in the property which is available to him for the purposes of war, that fact makes it prima facie liable to capture. 1 Kent Com. 112; Dana's Wheat. 256, note 171; Halleck 457.

In the late war between the northern and southern sections cotton was regarded as a subject of foreign and domestic commerce, and as one of the main sources of war relied upon by the Confederate authorities for the purchase of arms and the preservation and extension of the public credit. It was therefore held in the federal courts to be a lawful subject of capture. The decision of the Supreme Court of the United States in *Mrs. Alexander's cotton*, 2 Wall

against him. *Newsom v. Newsom*, 1 Leigh 86, 19 Am. Dec. 739.

By Owner of Lost Certificate against Bona Fide Purchaser.—In *Wilson v. Rucker*, 1 Call 500, a non-negotiable certificate of indebtedness was lost, and afterwards sold to a bona fide purchaser, without notice. Held, the original owner may maintain trover for it against the innocent vendee.

Liability of Principal for Conversion by Agent.—In *East. Lun. Asylum v. Garrett*, 27 Gratt. 174, it was held that in all cases a destruction of the chattel is an act of conversion; that when there has been an act of conversion by an agent and the principal ratifies such act, the latter is estopped to deny the authority of the agent; and that for such conversion trover is the proper remedy.

Judgment in Action of Trover Bar to Action of Trespass.—In *Hite v. Long*, 6 Rand. 457, the plaintiff brought an action of trover for the conversion of his horse, and there was a judgment in favor of the defendant. Held, such judgment is a bar to an action of trespass by the plaintiff for the taking of the same horse.

Evidence.—In an action of trover by R. against B., for goods which had been lent by B. to the wife of C., and afterwards conveyed by C. to R., the wife of C. is a competent witness. *Baring v. Reeder*, 1 Hen. & M. 154.

Proof of Title—Possession as Evidence.—Possession of personal property is *prima facie* evidence of title, and therefore if the defendant in an action of trover had possession of personal property after the plaintiff had possession thereof, such possession is sufficient evidence of title to sustain his defense until the plaintiff should prove title. *Smoot v. Cook*, 3 W. Va. 172; *Haines v. Cochran*, 26 W. Va. 719.

Measure of Damages.—The measure of damages in an action of trover for the conversion of personal property, is the fair value of the property at the time of the conversion, and is a question for the jury. *Arnold v. Kelly*, 4 W. Va. 642.

Effect of Judgment for Plaintiff.—A judgment against the defendant, for the full value of the property converted, vests the title to it in him, unless the property has been returned uninjured and unimpaired in value, in which event the plaintiff can only recover damages for its detention. *Arnold v. Kelly*, 4 W. Va. 642.

Where Property Taken and Returned.—The action of trover may be maintained in the case of an unlawful taking or intermeddling with personal property, against the wishes of the owner, although the property may have been returned to him before the institution of his suit. *Arnold v. Kelly*, 4 W. Va. 642.

U. S. R. 401, was placed avowedly upon this ground and this alone. See also Coolidge v. Guthrie, decided by Mr. Justice Swayne in the United States Circuit Court for the northern district of Ohio, 8 Amer. Law Reg. N. S. page 22.

In this last case the cotton had been taken from the farm of General Pillow and sold by General Curtis of the United States army. In an action against the purchaser, the defence was placed wholly upon the ground that cotton was lawful prize of war: It was not asserted by any one, that it was competent for a federal officer to seize and confiscate any and every species of movable property belonging to Southern citizens, and by such seizure divest the title of the true owner.

In 1780 an officer under the command of Lord Cornwallis, or Lord Raudon, took from a farmer in South Carolina negroes, horses, cattle and hogs, and under military orders had them taken to the British garrison at Camden. He was sued by the owner in 1784; and he pleaded the orders of his superiors, and further, that no part of the property was appropriated to his own use: but the court held that both his 169 superior officers and himself were equally guilty as trespassers.

In the case of Clark v. Dick, decided in the Circuit court of the United States for the district of Missouri, reported in 9 Amer. Law Reg. N. S. 739, the defendant pleaded that at the time of the alleged trespass a state of civil war existed, and martial law duly declared; that the alleged trespasses were compulsory assessments made by order of the commanding general of the army of the department of Missouri. It was held that these facts brought the case within the influence of the provision of the Missouri constitution exempting persons from all liability civil and criminal, for acts done during the war under the authority of the United States government and its officers. It was not pretended in that case, that the defendant was exempt by the laws of war from all liability. The sole reliance of the defence was the constitutional provision referred to. See also Lucas v. Bruce, 4 Amer. Law Reg. N. S. 95; Cummings v. Diggs' adm'or, 1 Heiskill N. 67.

These cases were not decided by courts of the last resort; they are, therefore not cited as controlling authority. Nor do I mean to affirm that the doctrines they announce are in entire harmony with the laws of war as laid down by learned publicists and commentators. They, however, show the general repugnance of the courts to give any extension to this doctrine of military supremacy over the lives and property of citizens even in the time of actual hostilities.

Be this as it may, the laws of nations already stated, exempt property on land from seizure and confiscation, except it be such as is available to the enemy for purposes of war, or such as may become booty in special cases, when taken from 170 enemies in the field or *in besieged towns, or such as may be necessary to

the actual operation of the invading army, and is taken by way of military contributions levied upon the inhabitants of the hostile territory.

In the present case, the seizure of the plaintiff's property cannot be justified upon either of the grounds mentioned. The only one of these which furnishes any semblance of warrant for the act, is that the goods were taken by way of military requisition or assessment. It will be observed, however, that they were not taken for the use of the army, or for the benefit of the United States government. It was not the intention of the officer to appropriate the property to either of these objects; nor was it taken by way of indemnity to the conqueror for expenses incurred in supporting the inhabitants. It is one thing to exercise a right of capture for the government, another, and a very different thing, to seize the property of one citizen merely for the purpose of transfer to another.

There is no doubt but that the federal commander at Williamsburg was influenced by motives of humanity, and to a great extent by actual necessity, in taking charge of the asylum, and in furnishing the inmates with the means of subsistence. The institution was left by the calamities of war without a board of directors, without a superintendent, and without the means of subsistence. In this condition of things the strongest considerations of humanity required the federal authorities to see that the unfortunate inmates were not left to starve, nor turned loose upon the country, to add to the horrors of the struggle. But whatever may have been the necessities of the asylum, the military authorities were not authorized to relieve them by exactions and forced contributions levied upon the plaintiff. With equal propriety it 171 might be *claimed that the federal

commander finding a citizen in want of a horse to cultivate his farm could seize the plaintiff's, and appropriate it to that purpose, and thus divest the title.

In the case of Moran v. Smell, 5 West Va. R. 26, it appeared that a party of Confederate soldiers had gone into the county of Taylor and taken a number of horses belonging to citizens of that county; thereupon a federal officer commanding a military post for the department of West Virginia, ordered an equal number of horses to be taken from citizens who sympathized with the Confederate cause, and turned over to the persons whose horses had been taken by the Confederate soldiers. The plaintiff was one of those whose horse was seized by the order of the federal commander, and after the war he brought his action of trover against the party having the horse in possession under authority of the federal officer.

The Supreme court of West Virginia, a tribunal then certainly having but little sympathy with the Confederate cause, unanimously held that the act of the federal officer was illegal, and conferred no title upon the defendant. And yet it is easy to understand that the decision would probably

have been very different if the officer had seized the horse for the use of the army, in the exercise of the right of capture. The plaintiff's title being divested by the capture for lawful purposes in war, he could not have recovered against the defendant, no matter how the latter might have acquired possession.

In the present case it may be that the federal commander seized the plaintiff's property by virtue of his authority and power as an officer; but it is perfectly clear that he was not exercising, or attempting to exercise, the right of capturing an enemy's property for *purposes of war.

That power he could exercise only for the benefit of his army or his government. In undertaking to seize and transfer the plaintiff's property to the defendant, he transcended his authority and violated the laws and usages of war.

The most just and reasonable inference is, that he did not intend to determine anything affecting the right of property; that having taken the plaintiff's goods by sheer physical power for the use of the asylum, his purpose was that the rights of the parties should be finally settled by the laws of that government to which they belonged. The fact that the provisions were taken to the asylum without unloading—if it indicates anything at all—plainly shows that the purpose was that these supplies must be understood as being designed exclusively for the asylum, and not for the benefit of the Federal government, its officers or agents.

We should hesitate long before we gave our sanction to an act which, if it was not robbery, was an arbitrary seizure of the plaintiff's property without the shadow of a justification, either as an act of war or of peace. We should be still more cautious how we sanction the doctrine that any officer of an invading army may, at his good will and pleasure, divest and establish the transfer of titles from one citizen to another, upon vague and general notions of belligerent rights and powers.

There is another point of view in which this question deserves some consideration. At the time of this seizure, the Federal authorities were in the undisputed occupation of the city of Williamsburg, and had been for more than two years. Their dominion was absolute and unquestioned. Now in Mrs. Alexander's cotton, 2 Wall. U. S. R.

15, it was insisted by her counsel, 173 *that her cotton was not liable to capture because the territory was not enemy territory. The Supreme court of the United States did not controvert the proposition of law; but they said the military occupation by the Federal troops was too limited, too incomplete, too brief and too precarious, to change the enemy relation created for the country and its inhabitants by three years of continuing rebellion, interrupted at least, for a few weeks only, but immediately renewed and ever since maintained.

In the case before us, whatever may have

been the effect of the long continued occupation of the region around Williamsburg by the federal forces—whether that territory did or did not cease to be enemy's territory, according to the strict terms of war—still, the plaintiff not being under the jurisdiction and control of the Confederate government, and the property being also at the time of seizure free from that control, and having so continued for years, was not in the predicament which made it the subject of capture. Both by its laws and proclamations the federal government had promised protection of persons and property to Southern citizens submitting to its control. If the officer had taken the plaintiff's property assuredly for the use of his army without compensation, he would have violated his duties and no doubt his instructions. Much more did he transcend his authority in plundering the plaintiff for the benefit of the asylum, in taking a citizen's goods to feed the state paupers. The language of the Supreme Court of the United States in Mitchell v. Harmony, 13 How. U. S. R. 115, is very applicable to such a case: And that is, that a military officer cannot impress the private property of a citizen into the public service without compensation,

except under the most urgent necessity, such as will *admit of no delay, and where the action of the civil authorities would be too late in providing the means which the occasion calls for. It is the emergency that gives the right; and the emergency must be shown to exist before the taking can be justified.

The only remaining question is whether an action of trover is the proper remedy in this case. The asylum is a corporation and as such may sue or be sued in trespass or trover. *Yarborough v. Bank of England*, 16 East's R. 5. If a corporation obtains property which does not belong to it, its duty is to restore it, or if used to render an equivalent to the owner. It was the duty of the corporate authorities to supply the inmates with the means of subsistence. If they failed or were unable to do so, and the plaintiff's property was taken for that purpose by one assuming to act for the asylum, and as its agent, and the goods have been actually used by the asylum, it is responsible for the value; and is estopped to deny the authority of the agent in the act of conversion. In all cases a destruction of the chattel is an act of conversion, for its effect is to deprive the owner entirely of his property.

It has been held in many cases, that where the law imposes an obligation on a corporation which it refuses or fails to discharge, it may be held liable civilly at the suit of a party who sustains damages in consequence of its refusal. And where the law makes paupers or lunatics a charge upon a corporation, it is bound to provide them a comfortable support. And it has been held in a number of cases that if the corporation will not discharge this duty, individuals may furnish the necessities and look to the corporation for remuneration.

Trustees of Cincinnati township &c. v. Ogden, 5 Ham. R. 23; Shreve v. Budd, 2 Halst. R. 431; *Seagraves v. City of Alton, 13 Illi. R. 366; Tomlinson v. Bentall, 5 Barn. and Cress, 738. See also Argenti v. City of San Francisco, 16 Cal. R. 255, 282. And see case in 2 Rob. Prac. (New E.) 443-'4. Here the case is much stronger. If the asylum did not intend to adopt the act of the officer acting as superintendent and agent it ought to have restored the goods, or if that was impossible it was bound to render an equivalent in value.

Christian, J. I cannot give my assent to the judgment of the court in this case.

In my opinion, upon plain principles of law, no legal liability can be fixed upon the corporation known as the "Eastern Lunatic Asylum," for the value of the provisions taken by the military commander, and appropriated by him to the use of the lunatics in that asylum.

The action brought by the appellee (Garrett) is an action of trover and conversion. To maintain such an action two things are essential: First, The title to the property must be in the plaintiff; Second, The conversion by the defendant must be wrongful, or at least voluntary. In this case both of these essential elements are wanting.

First: As to the title. Garrett was divested of his title, by the regular impressment made by the order of the military officer in command at Williamsburg.

The record shows that when the Confederate army retired from the Peninsula, the city of Williamsburg was occupied by the Federal army, and the Eastern Lunatic Asylum, located in that city, was from that time under the exclusive control and protection of the Federal commander assigned to that military post by the Federal government. Both the superintendent

176 *and directors of that institution had fled with the Confederate army. Indeed, all the officers of the institution, except perhaps the nurses and other subordinate employees of the asylum, left upon the evacuation of the city of Williamsburg by the Confederate forces. It became a matter of stern necessity, as well as the highest duty of humanity, that the military commander should take possession of that institution and provide for its unhappy and defenceless inmates, who could make no provision for themselves.

That this military commander had the right, under the laws of war, to make impressments, and compel forced contributions from the people residing within the military district of which he had command, for the support of the unfortunate lunatics whom the fortunes of war had placed under his protection, seems to me too plain a proposition for serious debate or question.

Upon the evacuation of the city of Williamsburg, and its occupation by the Federal army, Colonel West, the officer in command, found this asylum, with its hundreds of unhappy and dependent inmates, deserted by its officers, without provisions,

and helpless to provide them. Must they be turned loose? Must they be left within the walls of the asylum as prisoners to starve? What did the enlightened public law and the laws of civilized warfare demand at his hands? Plainly to protect them and provide them with food. Must this food be furnished out of his own commissariat? Had he not the right to make forced contributions upon the people for that purpose? Must these poor unfortunates starve because he could not furnish them out of his own commissary stores, and because he had no authority to impress provisions for that purpose? If these provisions (the corn and pork of Garrett) 177 had *been taken by impressment, by order of Colonel West for the support of his own army, the title (it is conceded) would have passed out of Garrett at the moment of the impressment. Did not the title also pass to the federal commander, and out of Garrett, the moment they were impressed for the legitimate and more humane use of these poor starving lunatics?

It must be borne in mind that these provisions (corn and pork) taken from the defendant in error (Garrett) were not seized by a band of marauders and robbers without authority, but by a military officer acting under authority of Colonel West, an officer in command of the military district, and in command of the army of occupation.

That such property as that taken from the plaintiff was a proper subject of capture under the laws of war cannot be denied.

The principles of public law, recognized by all civilized nations, and asserted by all enlightened publicists, declare the right of capture of such property by the army of occupation; and when taken, not by marauders, but by regular impressment, authorized by the officer in command, is lawful. Halleck's In. Nat. Law 458, § 15, and cases there cited.

The title to property thus taken in war must, upon general principles, be considered as immediately divested from the original owner, and transferred to the captor. As to personal property or movables, the title is in general lost to the former proprietors, as soon as the enemy has acquired a firm possession. The property becomes absolutely the property of the captor, and the original owner is absolutely divested of his title thereto. Wheaton on International Law, § 359; 1 Kent's Com. 110 (marg.); 178 also see Secretary Marcy's *Instructions to General Taylor in note to 1st Kent 92 (marg.).

Now it is conceded in the opinion of the court, that if Garrett's corn and pork had been taken for the support of the army of occupation, the capture would have been lawful, and the original owner divested of his title. But it is said that as they were not taken for that purpose, but for the use of the lunatics, the title of the owner was not divested, and that he may recover their value from the Eastern Lunatic Asylum. I cannot see the force of this view. If the property taken was subject to capture under

the laws of war; if it was made by regular impressment by an officer having authority to make it, the title was at once transferred to the captors, and was no longer in the original owner. It matters not (the property itself being under the laws of war a proper subject of capture), what disposition the captor made of it, whether he fed it away to his own soldiers, or distributed it among the poor, or gave it away to prisoners he had captured, or fed it away to starving and helpless lunatics, whom the fortunes of war had placed under his protection and control, the question of title cannot be affected by the use he made of the provisions. They were a proper subject of capture to an army of occupation in the enemy's country, and when captured by regular impressment the title passed to the captor, and cannot be affected by the use the captor made of them, whether used to feed the army of occupation, or as a benefaction to the helpless inmates of a lunatic asylum.

I deny that the military commander had the right to make capture of provisions only for the support and maintenance of his army. I insist that upon principle and express authority of the most learned writers on international law, he had the same
179 right to make *forced contributions from the people within his military lines, for the support of these unhappy lunatics whom the fortunes of war had temporarily placed under his protection, as, it is conceded, he had to make forced contributions for the support of his own soldiers. He could do this with or without compensation if the necessity arose; and of that necessity he was the sole judge.

Mr. Halleck, in his admirable work on the Laws of War, p. 457, says: "The modern usage is not to take private property on land without making compensation, except in certain specified cases. These exceptions may be stated under three general heads: 1st, Confiscation or seizure by way of penalty for military offences. 2nd, Forced contributions for the support of invading armies, or as an indemnity for the expenses of maintaining order and affording protection to the conquered inhabitants. And, 3d, Property taken on the field of battle or in storming a fortress or town. All enlightened publicists and writers on international law, Kent, Vattel, Grotius, Polson, Martens and Hefflite, lay down the same doctrine. One of the exceptions to the general rule (that private property on land ought not to be taken without compensation) is that it may be done "for the purpose of affording protection to the conquered inhabitants;" and these writers all agree that when so taken the title of the original owner is divested.

If private property may be taken for the purpose of affording protection to the conquered inhabitants, surely a *multi fortiori* it may be done also for the protection and maintenance of that part of the conquered inhabitants who are helpless and hopeless lunatics. It is clear, therefore, that the

corn and pork taken from Garrett being property which under the laws of war
180 *was subject to capture, and being taken by regular impressment by the commanding officer of the army of occupation, the legal title of Garrett in this property was divested from him and vested in the captor. It follows, therefore, that Garrett having no title, cannot maintain the action of trover.

So much for the plaintiff. How is it with the defendant? Did the defendant make a conversion of this property? Who is the defendant? The Eastern Lunatic Asylum, a corporation created by statute, and composed of the president and board of directors. How did this corporation make the conversion complained of by the plaintiff? At the time of the transaction, out of which this suit grew, the board of directors was scattered, the superintendent was gone. There was no corporate body at Williamsburg. The building was there, and the unhappy inmates were there; but the board of directors, and every officer except certain subordinates, such as nurses, &c., were all gone. The corporation was not there. It could make no contract—it could commit no trespass—it could make no conversion.

Here then we have a case in which, in an action of trover, a plaintiff who has no title, recovers against a defendant, who not only did not, but could not, make a conversion.

But it is said that the inmates of the Eastern Lunatic Asylum got the benefit of, had the use of Garrett's corn and pork, and therefore the corporation ought to pay for them. Is this a sound view? Now waiving the insuperable objections as to the form of the action, is this true? Let us see if, upon the most equitable and liberal principles, treating the action of trover as an equitable action, this is true?

Suppose that Colonel West (as he did do in fact) had arrested as prisoners a number of citizens of Williamsburg,
181 *and had fed them during their imprisonment with the provisions taken from Garrett: is it possible that after the close of the war those gentlemen could have been sued by Garrett, and a recovery had upon the ground that they had the use of the provisions thus taken, and that too in an action of trover and conversion? Or suppose (as he did do) Colonel West had distributed to the poor of Williamsburg certain provisions, and these were such as he had captured from Mr. Garrett: is it possible that after the war Garrett could have recovered of the returned Confederate soldier the value of these provisions, consumed by his family, given to them by the Federal commander, upon the ground that those families used them, and that too in an action of trover. The negative to these questions is no stronger than the negative to the proposition which this court asserts against the Eastern Lunatic Asylum. To maintain such an action is to reverse all the rules of law, and to declare that in an action of trover a plaintiff without title can

recover against a defendant who did not and could not make a conversion.

If the appellee has any claim it is one that ought to be addressed to the generosity and sense of justice of the legislature, but cannot be maintained in a court of law. I am for reversing the judgment of the Circuit court, and remitting the appellee for redress to the legislature.

Moncure, P., and Anderson, J., concurred in the opinion of Staples, J.

Judgment affirmed.

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*Cabell & als. v. Cox.

January Term, 1876, Richmond.

1. **Investment by Executor under Decree of Court—Pleading—Demurrer to Declaration.**—C executes a bond to H, executor of E, and commissioner under a decree of the Circuit court of H, in the case of H and R, with conditions reciting that C has borrowed of H, executor and commissioner as aforesaid, the sum of, &c., of the money of his testator's estate, which, by the decree aforesaid, he is authorized to put out at interest, &c. In an action on this bond by H against C, not averring any order of the court authorizing H to collect the money, upon demurrer held the declaration is sufficient.

2. **Same—Suit to Collect without Order of Court.**—The decree under which H loaned the money to C, authorized H to lend any money of his testator's estate in his hands upon security on real estate, and to take bonds in his own name as executor, the interest to be paid semi-annually, and the principal when he may so require, and hold and account therefor as executor as aforesaid. H may sue upon the bond without any further order of the court directing him to collect the money.

3. **Same—Confederate Contracts.**—In November 1867 H lent the money to G, secured on real estate. In 1861 G wished to pay it to H, who declined to receive it, saying it was well secured, and it was not needed. But in December 1861, being urged by G, he agreed that if G would find any person who would take it he might do so. In January 1862 G proposed to C to take it, and in February C did take it, and gave his bond to H for the amount secured by deed of trust. The whole arrangement was made through G, C not having seen H, and G paid C in Confederate money. It is not a Confederate contract, liable to be scaled.

The case is stated by Judge Christian in his opinion.

Wm. Green and John Howard, for the appellants.

Steger and Guy & Gilliam, for the appellee.

183 *Christian J. delivered the opinion of the court.

This case is before us on a writ of error to a judgment of the Circuit court of the city of Richmond.

*Pleading—Demurrer to Declaration for Insufficiency. — See citation of principal case in *Wells v. Hughes*, 80 Va. 547, 16 S. E. Rep. 689.

The following are the material facts disclosed by the record.

Henry Cox was the executor of Edward Cox. He held in his hand as such executor a considerable amount. He could not, it seems, distribute this amount among the legatees entitled, in consequence of pending litigation. Whereupon he filed his bill in the Circuit court of Henrico, asking the advice of the court as to a proper disposition of the fund. That court on the 17th of May 1854, entered its decree by which it was declared "that the plaintiff (Henry Cox) be authorized to invest any money of his testator's now in his hands, or which may hereafter come into his hands, on six per cent. loan of the state of Virginia, or bonds guaranteed by the state, or in loans to individuals secured on real estate, and on such additional security as he may think proper, taking bonds and certificates in his own name as executor, the interest thereon to be paid semi-annually and the principal when he may so require, and hold and account therefor as executor aforesaid."

The record further shows that acting under this decree, the executor Henry Cox, in November 1857, loaned to Goddin and Apperson the sum of \$14,082.52, for which they executed their bond, and secured the payment thereof by a deed of trust upon real property. That sometime in the fall of 1861, Goddin and Apperson desiring to pay off this bond, requested Cox to receive payment; but he expressed his unwillingness to receive it, saying the money was not needed, and as it was well invested

184 he was unwilling to receive it. *The defendant Goddin had several interviews with the plaintiff, who always expressed an unwillingness to receive the money. Finally about the month of December 1861, the defendant Goddin again saw the plaintiff and asked him if he (Goddin) could find a party who would borrow the money upon the same terms that they (Goddin and Apperson) held it, if he (the plaintiff) would be willing to take such party and release them. To this proposition the plaintiff assented. Shortly thereafter, in January '62, Goddin saw the defendant Cabell, and informed him if he wanted money he could effect a considerable loan for him, which he thought he could keep for a long time, as the money belonged to an estate, and was held in a fiduciary character, and would not be wanted for a considerable time. Cabell said he would think of the matter; and shortly thereafter told Goddin he would take the loan. This happened in the month of January 1862, but was not consummated until the 4th of February, 1862, when Cabell, with Goddin and Apperson as his sureties, executed the bond sued, and secured the payment of the same, by deed of trust on certain real property in and near the city of Richmond. Thereupon Cox delivered up to Goddin and Apperson their bond and a release of the deed executed by them.

The bond executed by Cabell, with Goddin and Apperson as sureties, and which is the

subject of controversy in this suit, is in the following words:

"Know all men by these presents, that we, Henry C. Cabell, Wellington Goddin, and James L. Apperson, are held and firmly bound unto Henry Cox, executor of Edward Cox deceased, and commissioner under a decree of the Circuit court of Henrico 185 in the case of *Cox v. Read and others, in the just and full sum of twenty-eight thousand one hundred and sixty-five dollars and four cents; for the payment whereof we bind ourselves jointly and severally by these presents, sealed with our seals and dated the 1st day of January 1862.

The condition of the above obligation is such, that whereas the above bound Henry C. Cabell has borrowed of the said Henry Cox, executor and commissioner as aforesaid, the principal sum of fourteen thousand eighty-two dollars and fifty-two cents of the money of his testator's estate, which by the decree aforesaid he is authorized to put out at interest. Now therefore, if the above bound Henry C. Cabell shall, whenever required by the said Henry Cox, or by an order of the court in said cause, pay the said sum of fourteen thousand and eighty-two dollars and fifty-two cents, with all interest in arrear thereon, and meanwhile pay the interest as it shall accrue semi-annually on the 1st day of July and 1st day of January in each year, then the above obligation is to be void, otherwise to remain in full force."

(Signed by Henry C. Cabell, W. Goddin, and J. L. Apperson.)

Upon this bond an action of debt was brought in the Circuit court of the city of Richmond. The defendants demurred to the declaration, pleaded payment, and tendered two special pleas in writing. The Circuit court overruled the demurrer, rejected the special pleas, and issue being joined on the plea of payment, and a jury being waived, the court gave judgment for the penalty of the aforesaid bond to be discharged by the payment of fourteen thousand and eighty-two dollars and fifty-two cents, with interest from 1st January 1862, 186 subject to a credit of sixteen *hundred and eighty-eight dollars paid 27th February 1864.

It was from this judgment that a writ of error was allowed by this court.

The court is of opinion that there is no error in the judgment of the Circuit court. First. The demurrer was properly overruled. There was no substantial variance between the bond of which oyer is craved, and the bond set out in the declaration. The bond sued on was due not to his testator, but to Henry Cox, the executor. The legal title was in him, and he had the right to demand and sue for the same. The words in the bond, "executor of Edward Cox, deceased, and commissioner of the Circuit court of Henrico, in the case of Cox v. Read and others," may be regarded as mere descriptio personæ. Henry Cox being the executor, and the debt being payable to

him and not to his testator, he may bring the suit in his own name.

Second. There was no error in the judgment of the Circuit court in rejecting the two special pleas offered by the defendants. The first plea alleges that the action could not be maintained against the defendants, "because they say that no order has ever been made by the court in the said suit of Cox v. Read, requiring of these defendants, or either of them, to pay the said sum of \$14,082.52, with interest as demanded, or any part thereof."

The 2nd plea alleges that the action cannot be maintained, because the plaintiff has never been authorized or required by an order or decree of the court in said suit of Cox v. Read, or otherwise, to collect the said sum of \$14,082.52, or any part thereof, and that he hath no lawful authority to collect the same by suit or otherwise."

The decree of the Circuit court of 187 Henrico in the *suit of Cox v. Read &c., was before the Circuit court of Richmond, and is a part of the record in this case. Looking to that decree, we find that Cox was directed to loan out the fund in his hands, or which might come into his hands on certain security specified, and to take "bonds and certificates in his own name as executor, the interest thereon to be paid semi-annually, and the principal, when he may so require, and hold and account therefor as executor aforesaid." It is plain under this decree, that Cox had plenary authority to collect and call in the fund loaned out at any time he saw fit, and no further order of the Circuit court was necessary either to require the parties, who had borrowed the money, to pay it into court, or to the executor, or to authorize the executor to collect it. He was already invested with that power by the decree under which he acted, and there was no occasion or necessity for any further order. The court was therefore not in error in rejecting the two special pleas.

Third. The said Circuit court did not err in giving judgment for the whole amount of the bond upon the issue-made up on the plea of payment.

The only question between the parties upon that issue was, whether the debt was subject to be scaled under the act of the 3d March 1866. It is clear, upon the facts of this case, that under numerous decisions of the court it must be held that the bond sued upon is not such a contract as comes within the terms or spirit of the adjustment act above referred to.

The scale of depreciation is applied, only in a case where it appears that according to the true understanding and agreement of the parties (that is, of both parties), the contract was to be fulfilled or performed in Confederate States treasury notes, or was entered into with reference to said 188 notes as a standard of value. "No such "agreement or understanding" "appears" either from the facts proved in the case or from any possible reasonable implication from those facts. But the very

contrary appears. Cox, as executor under the decree above referred to, had loaned the money (\$14,080.52) to Goddin and Apperson in the year 1857. He was unwilling to receive it, as it was safely invested and he did not need it for the use of the estate he represented. He only yielded, after repeated interviews, to the solicitations of Goddin, who conducted the negotiations, upon condition that he would find a party who would borrow the money upon the same terms that they, Goddin and Apperson, held it. Cox had no personal interview with Cabell, and no dealings with him in reference to the negotiation. Cabell's bond and Cabell's deed of trust were simply accepted by Cox in the place of the bond and deed of Goddin and Apperson; and Cabell in effect assumed to pay the debt of Goddin and Apperson, upon the latter paying over to Cabell the money due to Cox. This was certainly Cox's understanding of the matter. He certainly did not agree to receive a depreciated currency for a gold debt due to him as executor already amply secured. He was unwilling to change the investment already made, and did it, at last, for the accommodation of the defendants. It never could have entered into his mind for a moment, that when he accepted Cabell's bond and Cabell's deed of trust, he was thereby agreeing to receive a less amount than that for which Goddin and Apperson were bound to him.

As to what was the understanding of Cabell, the record is silent. It is argued here that he received Confederate money of Goddin, and ought to be required

189 *to pay only the value of Confederate money in gold at the time he received it. True, he received Confederate money; but at that time (February 1862) this currency was but little depreciated, and though according to the gold scale \$1.20 was worth only \$1.00, its purchasing value was but little, if any, less than gold, and it was universally received in payment of ante bellum debts at that time dollar for dollar. Colonel Cabell might have paid debts or purchased property with the \$14,000 he received, without suffering any loss from its depreciation. Whether he did or not, the contract which he made with Cox is not one to which, under the decisions of this court, the scale of depreciation can be applied. See Walker, personal representative, v. Pierce, 21 Gratt. 722; Bowman v. Miller & Co., 25 Gratt. 331; Tams v. Brannaman, 23 Gratt. 809; Shiffett v. Long's adm'r, 23 Gratt. 718.

The judgment of the Circuit court of Richmond must be affirmed.

Judgment affirmed.

190 *Morrison v. Morrison & als.

January Term, 1876. Richmond.

Deeds—Of Deaf and Dumb and Uneducated Person.—The deed of an uneducated deaf and dumb man acknowledged before a justice and recorded, sus-

tained upon the proof that the deed was explained to him, and that he was believed to understand it; and there being no evidence of any fraud on the part of the grantee.

This was a suit in equity in the Circuit court of Henry county, brought in November 1870 by Horace Morrison, and on his death revived in the name of his administrator and heirs, against Thomas J. Morrison, to set aside a deed executed by said Horace to said Thomas J. Morrison, on the ground that it had been procured by fraudulent means.

Horace Morrison was a deaf mute, without any education; though he was a man of good sense, and could make himself understood by signs by persons well acquainted with him, and such persons could make themselves understood by him. At the time the deed was made he was about fifty years old, unmarried, and his habits were not good. He owned a small farm of about twenty acres, on which there was a good house in which he lived, and also some horses and stock and farming implements.

The deed bears date the 10th of April 1867, and purports to be "in consideration of the natural love and affection which the said Horace Morrison has for his nephew, the said Thomas J. Morrison; and for

191 the *further consideration that the said Thomas J. Morrison has, since last September, lived with, and shall continue to live with, and support, the said Horace Morrison during the remainder of his life, the said Horace Morrison hath given, granted, &c., conveying the land and the personal property; and it concludes as follows: It being the intention of the said Horace Morrison to convey, and he does hereby convey, all of his property of every sort to the said Thomas J. Morrison, in consideration of the premises, and the said Thomas J. Morrison, on his part, in consideration of the said conveyance, agrees to live with and support comfortably the said Horace Morrison during the remainder of his life.

This deed was retained in the hands of Horace Morrison from its date until September 28th, 1869, when it was executed by both the parties to it, and their acknowledgment of it was taken by John Miller, a justice of the county of Henry; and it was then recorded.

The bill after stating plaintiff's condition, states that he agreed that his nephew, Thomas J. Morrison, and his wife, should come to his house, reside with him, and assist in the management of his farm and domestic operations; and that in pursuance of said agreement his said nephew and wife did come to his house, and resided with him during parts of the year 1866 and 1867. But instead of being content with the share of the farm products, as he agreed to do, the said Thomas and his wife began soon to control and manage his farm as if it belonged to them. That plaintiff, in consequence of his condition and declining health, was willing to enter into an agreement with his said nephew, to the effect that he, the

said Thomas J. and wife would aid him in the management of his affairs 192 *during his lifetime, and be kind and affectionate to him, that plaintiff would by will or deed convey to them his premises aforesaid, to take effect at his death, and communicated to them his willingness to do so in the best manner he could.

He further states that Thomas J. Morrison procured a deed to be written, and represented to the plaintiff that it was strictly in accordance with the aforesaid agreement, and desired plaintiff to sign it; but plaintiff did not then do so. That in consequence of a disagreement between him and his said nephew and wife, they left his house, and his wife never returned again; and the said Thomas J. came only occasionally, not to aid the plaintiff, but to control his property. That thus matters remained between them until the fall of 1869, when the said Thomas J. insisted upon plaintiff consummating the said proposition, by acknowledging said deed before a magistrate, in order that it might be recorded; and again represented to the plaintiff that the deed, which he had had prepared, only conveyed the said lands to him at plaintiff's death; and did not in any way affect his title and dominion of the same during his life. He declares that he was wholly ignorant of the contents of the deed when he signed it; that Thomas J. Morrison wilfully and knowingly misrepresented the contents of the deed to the plaintiff, for the purpose of cheating and defrauding him out of his home and property. And he prays that the deed may be annulled and set aside as fraudulent and void; that said Thomas J. may be inhibited from selling or controlling the property, and may be required to account for all that he has disposed of; and for general relief.

Thomas J. Morrison answered the bill.

He denies positively every insinuation or allegation of fraud. 193 *He says he had lived, before his marriage, on the most friendly terms with the plaintiff, who was his uncle; and after his marriage, the said Horace, without any importuning by the respondent, proposed that respondent and his wife should make his house their home as long as he should live, and promised and agreed that if respondent would comply with his wishes in this respect, he would execute a deed in fee simple to the respondent of all his property, both real and personal, with the condition, of course, that respondent and his wife would treat him kindly. That respondent accepted the proposition. That in view of respondent's approaching marriage, the deed was prepared; and, after respondent's marriage, he and his wife lived with plaintiff for six months, when his wife wished to return to her father's at a distance of about two miles and a half, to which the said Horace kindly agreed, upon the condition that respondent should still attend to his business; and respondent visited the said Horace every day

or so to enquire into his condition and provide for his wants.

Respondent further says, that at the time he and his wife left the house of the said Horace, the deed, though written, was in his possession and not executed. After it was executed and acknowledged, the said Horace insisted that respondent and his wife should take up their regular abode at his house, he having of his own accord and unsolicited delivered the said deed to the respondent; and they did return, and they remained there about six or eight months, and during that time did everything in their power to please the said Horace and promote his comfort. But very soon after their return, his habits became, from drunkenness, very disagreeable, so that respondent could not in justice to his family remain longer in the house; and in

194 the *spring of 1870 he left the house for the reason herein stated. But after he left, the said Horace often called on respondent to transact business for him, in the most friendly way, when he was sober. And respondent, whenever called on, without hesitation, supplied him with whatever money he wanted, kept him well supplied with provisions of all kinds up to the period of his death, which occurred in May 1871.

A number of witnesses were examined by both plaintiffs and defendants. This evidence is referred to by Judge Anderson in his opinion. There is certainly no evidence of improper persuasion by Thomas J. Morrison, to induce Horace Morrison to execute the deed; and Miller, the justice who took the acknowledgment of the deed, and who was called by the plaintiff as a witness, states that the explanations of the deed were made to Horace Morrison by Thomas J. Morrison, Skelton Coleman, and G. J. Gray; that he seemed to acquiesce in the explanation very willingly, and willingly signed the deed. Witness was not at that time familiar with the sign language of said Horace Morrison; but he would not have certified to the acknowledgment of the deed unless he had believed he understood the nature of the instrument and willingly executed it. His belief was based upon the representations of his willingness to sign the deed, and upon the representations of the witnesses and bystanders as to his knowledge of its contents. Indeed, there is no evidence of his unwillingness to execute the deed; though there is some that he intended it to take effect at his death.

The cause came on to be heard on the 8th of May 1872, when the court set aside the deed, and directed the defendant Thomas J. Morrison to surrender the land and other property. And thereupon Thomas J.

195 *Morrison applied to this court for an appeal; which was allowed.

James Alfred Jones, for the appellant.

There was no counsel for the appellees.

Anderson J. delivered the opinion of the court.

Horace Morrison and Thomas J. Morrison on the 28th day of September 1869 executed and acknowledged a deed before John Miller, a justice of the peace, to annul and set aside which, for fraud, the bill in this case was filed by the former. The answer positively denies any and every intimidation and allegation of fraud. The decree of the Circuit court, in which the cause was pending, set aside and annulled the deed as fraudulent and void; from which decree the defendant appealed to this court.

I do not think that the charge of fraud is supported by the proofs. It is true that the plaintiff was both deaf and dumb, and was born so. But it appears from the testimony of both the plaintiff's and the defendants' witnesses, that he was capable of making known his thoughts and wishes by signs to those who were well acquainted with him, and of understanding their communications to himself with a most remarkable certainty. He was not educated, but the weight of testimony shows that he was a man of intelligence, and was remarkably cautious in his business transactions, and understood well his own interests. It is proved that an application was made at one time to the court of his county to appoint an agent to attend to his business, but the court refused, upon the ground that he was fully competent to attend to his mat-

196 ters *himself. The plaintiff's witness, Silas Minter, says "if he was not drinking, I don't think he would be apt to sign any paper without understanding fully the purport and meaning of the paper;" and it is not pretended that he was drinking at the time this deed was prepared or executed. It was written more than two years before he executed it, and remained in his possession, affording him opportunity of having it explained to him by his acquaintances, of which it is probable he availed himself. He sent for men to witness it, who undoubtedly explained it to him. Mr. Miller, the justice before whom it was acknowledged, testifies that Skelton Coleman and G. J. Gray were witnesses to the deed, though their names do not appear to be subscribed to the copy in the record. And he says that both of them in his presence explained it to him before he executed it, and acknowledged it before him. He certified his acknowledgment, and swears that he would not have certified it if he had not believed that he fully understood the nature of it. This witness was introduced by the plaintiff, and certainly had no leaning to the defendant. Mr. Coleman says he was present when the deed was made, and had no doubt that his mind was as good as it ever was, and that "he perfectly understood what he was doing."

There is evidence too that before he made the deed he had determined to give all his property to this nephew, and not to have it divided amongst his kin. One of the witnesses, William Watson, testifies that sometime before he made this deed, he told him that he intended to give all his property to Thomas J. Morrison, and proposed to him

to go with him to Henry Courthouse, to get Mr. George D. Gravely to write the deed, which he declined to do, as it did not concern him. Andrew Morrison testifies, that he sent him after *the men to witness the deed, and told him a number of times that he intended to make the deed. At least eight or nine witnesses testified to the deed, and that they knew that it was his intention to give all his property to Thomas J. Morrison, his nephew. Indeed he does not himself deny that such was his purpose, or that he signed the deed in question. But he is made to say in his bill that he signed it under the misrepresentation of his said nephew, that it was not to take effect until after his death. How can we know that he alleged the facts or statements of the bill, or the foregoing charge against his nephew? If he could make himself understood as to those matters, he could have made known his wishes as to the disposal or conveyance of his property. And if he could understand the allegations made in the bill, so as to give them his sanction and to make it his bill, why could he not understand the explanations made to him by Coleman and Gray, and others, as to the purport and meaning of the deed, which he kept for two years, and then executed? or if he could be made to understand its contents after it was executed, why not before? The deposition of Coleman was taken, and he testifies that he fully understood what he was doing. The grantor approved of it upon his explanation and Gray's, and Thomas Morrison, and willingly signed it and acknowledged it before the magistrate, who being satisfied that he understood it, certified his acknowledgment. But his bill charges that Thomas J. Morrison misrepresented to him the purport and meaning of the deed. There is no proof in the record to support the allegation. The contrary is established by the evidence, as far as a negative can be proved. It is proved that Coleman and Gray both explained the deed to him, and the presumption is that they explained it to him 198 *truthfully, and it is the fair inference, that Thomas Morrison explained it to him in the same way they did. Indeed the charge of misrepresenting the purport and meaning of the deed to him by Thomas Morrison cannot be maintained without convicting Coleman and Gray, who appear to be disinterested and unimpeached witnesses, of a false representation of its purport and meaning. I think the testimony proves that he was satisfied with the deed as it was represented to him by Coleman and Gray, and willingly signed it; and it negatives the charge of a false and fraudulent representation to him by his nephew. There is no testimony in the cause of either party in conflict with this view of the case, but much that has not been commented on to support it.

It seems that Thomas Morrison was not living with his uncle when the deed was executed, but two or three months after went to live with him, agreeably to his

promise, and he and his wife remained with him some six or eight months. The unfortunate old man's habits had become very bad, and he was frequently drunk, or under the influence of liquor, and treated his nephew's wife badly, so that her husband could not, with any propriety, require her to remain there, and they moved away, as they were required to do by the plaintiff, and with his consent. But the proof is, that whilst they remained on the premises their treatment of the old man was uniformly kind and respectful, and that they clothed him and fed him well. And after they moved from the place he was visited by his nephew, and his wants inquired into and supplied by him, as far as he would allow him.

It is not pretended by Horace Morrison, or by those who may have been anxious to defeat the transfer of his little property to his nephew, that they might get 199 *it themselves, that it was not his intention to give the whole of his property to the appellant. That seems to be conceded on all hands, and he objects to the deed only upon the ground that as represented to him, it in effect takes the property from him during his life and transfers it to his nephew. It is not clear that it may not be differently construed. It does not seem to contemplate any removal of property, or transfer of possession during the life of the grantor. It is true the deed passes the title to the grantee in present; but it can only be enjoyed by the grantee during the life of the grantor by his living with him. The grantor's right to his home is recognized by the clause which requires the grantee to live with him during his life. Under the provisions of this deed I do not think it would have been in the power of the grantee to have ousted the grantor of his possession during his life. And I think he could only have enjoyed the use of the personal property during his life, whilst he lived with him. It seems to me that is implied in the grantee's covenants. And to make it more effectual the deed is signed and sealed and acknowledged by him as well as by the grantor. Whether the deed will bear this construction in law or not, it might have been so understood by the parties, and such, as I understand the record, has been its practical working. When the grantee was forced to leave, by the conduct of the grantor in the maltreatment of his wife, he did not seek to disturb the grantor in his possession whilst he lived.

If the foregoing construction was given to the deed, as we have seen might have been fairly given to it, it is not really different in effect from what the plaintiff below alleged he understood it to be. And according to his understanding of the deed 200 he enjoyed his property *in the main during his life; and there is nothing shown by this record to warrant a court of justice to divest the appellant of the title to the property after the death of the grantor, which, by his deed in his lifetime, which he deliberately, understandingly and will-

ingly executed, he vested in the appellant. I am of opinion therefore to reverse the decrees of the Circuit court, and to dismiss the plaintiff's bill with costs.

Decree reversed.

201 *Adams & al. v. Logan & als.

January Term, 1876, Richmond.

I. Principal and Surety—Deeds of Trust—Extension of Time.—A and B are sureties of W in a bond to L for \$3,000, executed in 1858. In May 1862 L lent to W \$7,500 of Confederate money, and took his bond payable in two years with interest; and W executed a deed, by which he conveyed to S real and personal estate in trust to secure both debts; and it provided that upon the prompt payment annually, of the interest upon the two bonds, W should keep quiet possession of the property for two years. W did not pay the interest. **Held:**

1. Same—Same—Same—Effect of Such Agreement.—

W not having paid the interest, the parties were left in the same situation, and with the same rights and obligations, as if the agreement to extend the time had not been made.

2. Same—Same—Same—Same.—The agreement only operated to postpone a sale of the property under the deed of trust. It did not tie up the hands of L from pursuing his debtor W at law.

3. Same—Same—Same—Same.—If L had sued W at law and recovered judgment and levied an execution on the personal property embraced in the deed, he might thereby have forfeited the benefit of that security, or subjected himself to an action for damages; but a court of equity would not interfere to prevent a sale of the property under the execution, upon the mere contract to pay interest on the debt.

4. Same—Same—Same—Same—"Stay Law."—But if the agreement operated as an extension of the time of payment of the debt, as the act of the 30th of March 1862, known as the stay law, forbade the issue of execution upon a judgment, and L was under no obligation to the sureties to raise the question of its constitutionality, the agreement did not have the slightest effect upon the rights and remedies or obligations of any of the parties.

5. Same—Same—Same—When a Discharge of Surety.*—The principle upon which an agree-

202 ment for an extension of *time discharges a surety is, that the creditor thereby deprives the surety of the means of relieving himself, by paying the debt and proceeding immediately against the principal; or by his filing his bill *quis timet* to compel the debtor to pay the debt; or by notice to the creditor under the statute. The sureties cannot be discharged by an act which in no manner affected their rights, or impaired the remedies of the creditor.

II. Same—Same—Compromise—Confederate Money—Scaling.—W having been declared a bankrupt in

*Principal and Surety—When Agreement for Extension of Time Discharges Surety.—The principal case is cited and the doctrine in the fifth headnote followed in *Bank v. Parsons*, 45 W. Va. 609, 22 S. E. Rep. 275. See also, *Shannon v. McMullin*, 25 Gratt. 29; *Harrison v. Price*, 25 Gratt. 553; *Wells v. Hughes*, 89 Va. 543, 16 S. E. Rep. 689; *Norris v. Crammer*, 2 Rand. 323; *Hunter v. Jett*, 4 Rand. 104.

the United States court, L. and the assignees of W. by compromise agreed that the debt of L for \$7,500 should be scaled to \$3,500, with interest from date, and L should retain the benefit of the deed of trust; and that L should not object to the exemption in favor of W, or to the allowance of 200 acres of land to his wife, in commutation of her contingent right of dower; and this agreement was confirmed by the Bankrupt court. S sold the balance of the trust fund, and apportioned the net proceeds between the two debts of W to L. **HOLD:**

1. ~~Same-Same-Same-Same-Same~~.—A and B cannot complain of the scale applied to the debt of \$7,500, which seems reasonable in itself, and was agreed to by L and the assignees of W, and approved and confirmed by the court.
2. ~~Same-Same-Same-Acts of Bankrupt Court~~.—If there was error in the decree of the Bankrupt court in allowing W the exemption claimed by him, or in assigning to his wife the 200 acres of land, they are acts of a court of competent jurisdiction, and cannot be questioned elsewhere.
3. ~~Same-Judgment against Principal~~.—A judgment having been rendered in favor of L against W for two years' interest on the bond for \$3,000, upon an insufficient notice, and execution levied on his property, W gives L notice that he will move to have it set aside; and L being aware of the insufficiency of the notice, releases the property. The sureties are not entitled to a credit for the amount of the judgment.

This was a suit in equity in the Circuit court of Pittsylvania, brought in January 1871, by James M. Adams and David Barber, to enjoin a judgment recovered against them and A. B. Womack, by William Logan, for \$3,000, with interest from the 2d of August 1858, subject to credits endorsed thereon.

It appears that A. B. Womack, the principal, and the *plaintiffs and J. C. Thompson, since deceased, as his sureties, executed a bond for \$3,000, to William Logan, payable one year after date. That in 1862 Barber becoming uneasy on the subject of his securityship for Womack, gave notice to Logan to sue upon the bond; but he was induced to withdraw the notice for the time, and shortly afterwards, viz: on the 23d of May 1862, Logan lent to Womack, in Confederate money, \$7,500, for which he took Womack's bond payable two years after date, with interest from the date, in lawful money of Virginia; and Womack at the same time, executed a deed by which he conveyed to Richard Logan and Beverly Sydnor, two tracts of land, twenty-three slaves, and their future increase, all his stock of horses, cattle, hogs, his plantation tools and his household and kitchen furniture, in trust to secure the said two bonds; and it was provided that upon the prompt payment annually of the interest accruing upon the said bonds at the rate of six per cent. per annum, Womack should keep quiet possession of the property for the term of two years, unless he should determine otherwise.

*Acts of Bankrupt Courts.—For the proposition that the act of a bankrupt court cannot be elsewhere questioned, see *Brengle v. Richardson*, 78 Va. 410, where the principal case is cited and quoted from.

It appears further that in 1867 Logan gave a notice to Womack that he would move for a judgment against him for one year's interest due upon the debt for \$7,500; that a judgment was rendered on this notice for \$450, and execution was issued and levied on the property of Womack; and proceedings were stopped for a time by order of the plaintiff. The explanation of this given by Logan in his answer, in response to the charge in the bill, is, that at the court to which the notice was given his counsel ascertained that the notice was not served on Womack twenty days before, as the law required, and therefore declined to apply for a judgment thereon; that 204 after said counsel had *left the court, some friend of his happened to see the notice, and supposing it to have been overlooked applied for a judgment, which was entered in the absence of any defence to the motion; that the execution was issued and levied, and that Womack through his counsel gave Logan notice that he would move to set aside said judgment on the ground that it was improperly granted, and requested that proceedings on said execution should be stayed for a short time; which Logan acceded to, he being satisfied that the judgment should not have been entered, and that Womack was entitled to the stay. Very shortly afterward, and before said motion could be heard, Womack filed his petition, and was adjudged a bankrupt.

Soon after Womack became a bankrupt, Sydnor the surviving trustee, was about to sell the property of Womack to satisfy the two debts mentioned therein, when he was stopped by an injunction from the judge of the United States District court; and in that court the assignees of Womack claimed that the debt of \$7,500 should be scaled as of May 1864. This question was argued before the District judge, who postponed the decision of it until he could consult Judge Chase; and whilst it was pending, viz: in January 1869, the assignees and Logan entered into an agreement of compromise, by which the debt of \$7,500 was to be settled at \$3,500 with interest from that date, and Logan was to have the benefit of the deed of trust. This agreement was to be subject to the future ratification of the District court; and in the event of its ratification, Logan agreed to make no opposition to the exemption set apart to said Womack, by said assignees, nor to the assignment of two hundred acres of land made by said assignees and the trustee to the wife of 205 Womack in commutation of *dower.

This agreement seems to have been confirmed by the District court. And upon the sale of Womack's property embraced in the deed of trust, the debt of \$3,000 for which the plaintiffs were bound, was credited by \$1,677.95 as its proportionate part of the net proceeds of the property.

The cause came on to be heard on the 1st of June 1872, when the court made a decree dissolving the injunction which had been granted, with costs. And thereupon Adams

and Barber applied to this court for an appeal; which was allowed.

Jones & Bouldin, for the appellants.

Ould & Carrington and Logan, for the appellees.

Staples J. delivered the opinion of the court.

The court is of opinion that the deed of trust executed by Womack, the principal debtor, on the 29th May 1862, did not discharge the appellants from their liability as sureties upon the bond due the appellee Logan. By the terms of the deed Womack was permitted to retain possession of the property for two years, upon condition of paying the interest annually upon the debts secured. The effect of this arrangement was, that upon performance of the condition, no sale of the property could be made under the deed until after the expiration of two years. The debtor having failed to pay the interest, the parties were left in the same situation and with the same rights and obligations, as if the agreement to extend the time had never been made. *Norris v. Crummy*, 2 Rand. 234.

It was argued, however, that although the debtor failed to comply with the terms upon which indulgence was granted, he was nevertheless entitled to one whole year to make the first payment of interest; and as he was in no default till the end of the year, the appellee Logan during the intervening period was prevented from enforcing the collection of his debt. It will be observed, however, that the agreement operated only to postpone a sale of the property under the deed of trust—the deed being a mere collateral security for the debt. It did not tie up the hands of the creditor for a single moment from pursuing the debtor at law. The appellee might have sued and recovered judgment notwithstanding the deed. If the appellee had sued out and levied an execution upon the property embraced in the deed, he might thereby have forfeited the benefit of that security or subjected himself to an action for damages; but a court of equity would not interfere to prevent a sale of personal property under an execution, upon a mere contract to pay interest, as stipulated in the deed; more especially if the effect of such interference would be to release the sureties from all liability.

But if it be conceded that the agreement operated as an extension of the time of payment of the debt, still it did not have the slightest effect upon the rights and remedies or obligations of any of the parties. Under the provisions of the act of 29th March 1862, generally known as the stay law, no writ of *elegit*, *fieri facias* or *venditioni exponas* could be issued while that act remained in force. Whatever may now be said in respect to the constitutionality of this law, the creditor was under no obligation to the sureties to raise that question. Had they notified him to institute

suit against the principal, and prosecute it with due diligence to judgment and by execution, the appellee might have recovered judgment; but no one can doubt what would have been the result of an effort to enforce the collection of the debt by execution. The appellee was therefore as effectually precluded by the statute from making his money by legal process as he would have been had the courts been closed during the existence of the war. The principle upon which an agreement for an extension of time discharges the surety is, that the creditor thereby deprives the surety of the means of relieving himself by paying the debt and proceeding immediately against the principal, or by filing his bill *quia timet* to compel the debtor to pay the debt, or by notice to the creditor under the statute. Neither of these remedies would have been available, even though the deed of trust had never been executed. It would be a grievous injustice to hold the sureties discharged by an act which in no manner affected their rights or impaired the remedies of the creditor. If authority on this point is necessary, it may be found in the case of *Price v. Edmunds*, 10 Barn. & Cress. 578; *Harnsberger's ex'or v. Geiger's adm'r*, 3 Gratt. 144.

The court is further of opinion that the appellants, whose liability as sureties is confined to the three thousand dollar bond, have no just cause of complaint with the scale of depreciation applied to the seven thousand and five hundred dollar bond, for which they are not bound. The adjustment seems to have been just and fair in itself: it received the sanction of the debtor and the assignees in bankruptcy, and was approved and confirmed by the District court of the United States.

The appellee, in receiving the amount thus ascertained to be due, has not lost, or in any manner impaired, his remedies upon the bond for which the appellants are bound as sureties.

The court is further of opinion, that the appellee cannot be held liable for any error, if such there be, in the decree of the Bankrupt court, allowing Womack the exemption claimed by him, or assigning to his wife two hundred acres of land by way of compensation for her contingent right of dower. These were acts of a court of competent jurisdiction, having cognizance of the parties and the subject-matter. It must be presumed, at least until the contrary appears, that the decrees and orders were fairly made with due regard for the interests of all parties. The extent of the appellee's participation in the arrangement, allowing the exemption and assignment, was the withdrawal of his opposition to the decree of the court sanctioning the same. If any injustice has been done the appellants, or others interested in the estate of Womack, the remedy is not in the state courts.

The court is further of opinion, that the appellees are not entitled to any abatement or deduction by reason of anything done by the appellee in respect to the supposed judg-

ment for three hundred dollars. All that appears in the record in regard to that judgment, beyond the averments of the bill, is what is found in the answer of the appellee. It is there stated that a judgment was recovered against Womack for two years' interest on the three thousand dollar bond; but no execution was ever levied on his property, he having previously gone into bankruptcy: the amount of the judgment was however paid by the appellants, and credit given accordingly. This statement being responsive to the bill must be taken as true.

It seems, however, that a judgment 209 was recovered *against Womack for four hundred and fifty dollars, interest upon the seven thousand and five hundred dollar bond, execution issued and levied upon his property. This property was released by order of the appellee. The reason he assigns, and it is sustained by the evidence, is that the judgment was rendered upon an insufficient notice, and the defendant was taking steps to vacate the judgment and quash the execution. The appellee being satisfied that such would be the result, released the lien of the execution. This he had the right to do. He was under no obligation to persist in a hopeless controversy, because the effect of the release might ultimately be to withdraw a part of the trust fund pledged to the security debt. If the appellants have sustained any loss from this cause, the appellee cannot be made liable for it.

Upon the whole there is no error in the decree, and it must be affirmed.

Decree affirmed.

210 *City of Richmond, for &c., v. Duesberry & als.

January Term, 1876, Richmond.

I. Landlord and Tenant—Deed of Trust—Distress—Priority.—N leased of D a house for one year commencing January 1st and ending December 31st 1871. In March, M, without the assent of D, took N's lease, and purchased his furniture on the leased premises, and having borrowed the money to pay for it from C, conveyed it in trust to secure his debt to C. M paid the rent to D, and at the end of the year held over, and in March 1872 he, without D's assent, turned over the house and furniture to P, who paid the rent to D until July or August. In the latter part of the year P failed to pay the rent; whereupon D sued out a warrant of distress which

***Landlord and Tenant—Distress—Deed of Trust—Priority.**—The provisions of the statute, cited in the head-note, were similarly construed in *Upper Appomattox Co. v. Hamilton*, 88 Va. 322, 2 S. E. Rep. 196, where the principal case was cited by the court, and also, in *Wades v. Figgatt*, 75 Va. 575. In *West Virginia* the principal case is cited and quoted from in *Anderson v. Henry*, 45 W. Va. 323, 31 S. E. Rep. 1000; and also, in *Bartlett v. Loundes*, 34 W. Va. 498, 12 S. E. Rep. 704. Both turn on the interpretation of the West Virginia statute, which contains the same provisions as the one construed in the principal case.

was levied upon the property conveyed to secure C. **Held:** The holding over by M in 1872 was under a new lease, and the lien in favor of C having been upon it when that lease commenced, C's lien is valid against D's lien for the rent of 1872. See Code of 1860, ch. 138, §§ 11 and 12.

This was an action of debt in the circuit court of the city of Richmond, brought in April 1873, in the name of the city of Richmond, at the relation of Manfred Call, against A. B. Duesberry, high constable of the city of Richmond, and his sureties in his official bond, to recover the value of certain property which Duesberry had levied on and sold under a distress and attachment for rent. The court below rendered a judgment in favor of the defendants; and the plaintiff thereupon applied to this court for a supersedeas, which was awarded.

Guy & Gilliam, for the appellant.

Nash and Gordon, for the appellees.

211 *Christain, J., delivered the opinion of the court.

This case is before us upon a writ of error and supersedeas to a judgment of the circuit court of the city of Richmond.

The question arising in this case is between a landlord on the one hand and a beneficiary under a deed of trust on the other.

Each claims a superior right to subject the same property to the payment of a debt, the one for rent by virtue of his landlord's lien, the other for a loan of money, whose payment was secured by a deed of trust conveying the property in question.

The facts disclosed by the record are as follows: In the latter part of the year 1870, one Norvel Cobb leased of Drewry & Price a certain house in the city of Richmond, known as the Arlington house, to be used as a boarding-house, for the year 1871, the term of the lease being one year, from the 1st January 1871 to 31st December 1871: That in February or March 1871, Daniel W. Mosely purchased of said Cobb his household and kitchen furniture, which was upon the leased premises at the Arlington house; and paid for the same with \$1,500, loaned him (Mosely) by Manfred Call; who, in order to secure the payment of said loan, took a note, payable at twelve months, and dated February 24th 1871, of said Mosely, secured by deed of trust, which was duly recorded in the office of the chancery court of the city of Richmond on the tenth March 1871. Mosely arranged with Cobb to take his lease for the year 1871; and this change was made on the 15th March 1871, without consulting the landlords (Drewry & Price); who were informed of it thereafter, and made no objection, but received the rent from Mosely for the year 1871. At the 212 expiration of *the year (1871) Mosely continued to occupy the premises without any special contract with the landlords. Some time in March 1872 Mosely made an arrangement with a certain B. M. Pratt to

give up the Arlington house and furniture to him; and he (Pratt) took charge of said house without consulting the landlords, who, when informed of it, made no objection thereto, and thereafter received the rent from Pratt until July or August 1872. In the latter part of the year 1872, Pratt failed to pay said rent for the Arlington house; whereupon the landlords sued out a distress warrant for rent due and an attachment for rent to become due.

The distress warrant and attachment were levied on the household and kitchen furniture, which had been conveyed by Mosely to secure his debt to Manfred Call, and the same was sold under said distress warrant by A. B. Duesberry, high constable of the city of Richmond, and the proceeds paid over to B. H. Nash, Esq., attorney for Drewry & Price, the landlords.

The suit is brought in the name of the city of Richmond, for the benefit of Manfred Call, against the high constable on his official bond, the object being to recover of him the amount of the proceeds of sale of said furniture.

A jury being waived, and the case being submitted to the court upon the law and facts, the court rendered a judgment for the defendant. From this judgment a writ of error was awarded by this court.

The effect of the decision of the said Circuit court was to declare that the furniture conveyed by Mosely by his deed, put on record on the 10th March 1871, was liable to the distress warrant in favor of the landlords, Drewry & Price, for rent due 213 from Pratt in the latter *part of 1872; and this is the question we now have to consider.

The solution of this question depends upon the true construction to be given to the 11th and 12th sections of ch. 138, Code 1860.

At common law, all goods found on the leased premises were subject to the landlord's lien for rent, no matter to whom they belonged.

By our statute the goods of the lessee, or his assignee, or under-tenant, found on the premises, or which may have been removed therefrom not more than thirty days, are liable to distress. If such goods, when carried on the premises, are subject to a lien, which is valid against his creditors, his interest only in such goods shall be liable to distress. If any lien be created thereon while they are on the leased premises, they shall be liable to distress, but only for one year's rent, whether it shall have accrued before or after the creation of the lien.

If after the commencement of any tenancy a lien be obtained or created by deed of trust, mortgage or otherwise, upon the interest or property in goods on premises leased or rented of any person liable for the rent, the party having such lien may remove said goods from the premises, upon condition that he pay rent that may be in arrear, and securing so much as is to become due, not

being more altogether than one year's rent. See Code 1860, ch. 138, §§ 11, 12.

From these sections, it is plain that the intention of the legislature was to secure one year's rent to a landlord against all liens created by the tenant after the lease has commenced.

The landlord is protected by the statute against all deeds of trust, mortgages, and other liens, where the lien has been created 214 after the commencement of the tenancy, upon goods on the leased premises which belong to a person liable for rent, and where there is an existing liability for rent in arrear, or to become due at the time the lien is created.

Now in the case before us, the contract of lease between the landlords (Drewry & Price) and their tenant Cobb, was for one year from January 1st, to December 31st, 1871. In March, Mosely with the assent of the landlords, took Cobb's lease. I say with the assent of the landlords, because they made no objection to it, and collected the rents from him, acknowledging him as their tenant. This lease expired on the 31st December, 1871; but Mosely held over for the year 1872 until March, there being no new contract between the parties. In March 1872, Pratt, without objection on the part of the landlords, took the Arlington house and furniture from Mosely; and the landlords collected rent from him till July or August. In the latter part of the year 1872, Pratt failed to pay the rent, and then the distress warrant was issued and levied.

Now Cobb having leased for one year, and Mosely, who took his lease, having held over after the expiration of the lease without any further contract, the tenancy must be regarded as a tenancy from year to year. Archbold on Land. and Tenant, 65-6 and 68 (marg.); Sherwood v. Phillips, 13 Wend. R. 479, and cases cited in the opinion of the court.

It follows, therefore, that the lease of Cobb of which Mosely was the assignee terminated on the 1st day of January 1872. On that day a new term commenced. The rent for the whole year 1871 had been paid. The deed of trust to Call was executed and recorded on the 10th March 1871. At the commencement of the new tenancy, to wit, on the 1st January 1872, not a dollar of rent was due, nor was any due in arrear 215 until *the latter part of 1872. The

lien on the furniture was therefore created before the commencement of the tenancy. That furniture was on the leased premises, subject to a lien created before the tenancy for the year 1872 commenced, and not after—and in contemplation of the statute, construing both sections together, must be held subject to the same conditions as if when carried on the leased premises it was subject to a lien valid against the creditors of Mosely.

The liability for the rent in this case came long after the lien was created; and the tenancy during which the lien was created had expired and every dollar due under that lease had been paid. A new tenancy had

commenced with an existing lien upon the furniture created and recorded long before it began.

I am therefore of opinion, that the deed of trust to secure Manfred Call must take precedence to the landlord's lien, and that the judgment of the Circuit court should be reversed.

Staples, J., dissented.

Judgment reversed.

216 *Continental Ins. Co. v. Kasey.

January Term, 1876, Richmond.

1. Foreign Insurance Companies—Domicile—Venue.*—

In an action upon a policy of insurance by a citizen of the state of Virginia against a foreign insurance company doing business in this state, the foreign corporation is *quoad hoc* domiciled in the state by virtue of the statutes authorizing the company to do business here, and is not entitled under the act of congress of 1867 to have the cause removed to the United States court on the ground that the corporation is a resident of another state.

2. Same—Same—Same—Removal of Causes from State to Federal Court.†—

After a trial of an action at law, and a new trial directed by the appellate court, a party is not entitled under the act of congress of 1867, to have the cause removed to the United States court upon the ground that he is a non-resident of the state.

3. Same—Same—Same—Same—Time of Application for.—

If a party in an action at law would have the cause removed from the state court to the United States court, on the ground that he is a non-resident of the state, he must present his application for it before there has been a trial of the cause.

This case was argued at the term of this court held at Wytheville in 1875, and was decided at this term of the court in Richmond. It was an action at law in the Circuit court of the county of Roanoke, brought by Thomas A. Kasey against the Continental Insurance Company, a corporation chartered by the state of New York, upon a policy of insurance issued by the defendant in favor of the plaintiff. The case was once before in this court, upon an appeal by the company, and the judgment of the court below was reversed, and the cause sent back to the Circuit court for a new trial. See 25 Grattan, 268.

217 *The cause came on again to be tried at the November term 1874 of the Circuit court, when the defendant pre-

sented his petition, accompanied with his affidavit, asking that the cause might be removed to the circuit court of the United States for that judicial district; but the court overruled the motion; and the defendant excepted. The petition and affidavit are set out in the opinion of Judge Christian.

On the trial there was a verdict and judgment in favor of the plaintiff for \$4,950.50, with interest at six per cent. per annum from the 26th of June 1872 till paid; and a motion for a new trial, which was overruled. And the record states that the defendant excepted; but the bill of exception is not in the record. Upon the application of the company, this court allowed a supersedeas to the judgment.

Griffin, for the appellant.

J. F. Johnson, for the appellee.

Christian, J. The record in this case presents for our consideration a single question; and that is whether, under the acts of congress relating to the removal of causes from state courts to the circuit courts of the United States, the appellant had the right to remove its case from the circuit court of Roanoke to the circuit court of the United States, in the judicial district in which the county of Roanoke was situate.

The appellant, the Continental Insurance Company of the city of New York, having its home office in said city of New York, but doing business in the state of Virginia, under the conditions and requirements of the statute law of this state, was defendant in a certain action at law, brought by 218 Thomas A. Kasey, upon an *insurance policy issued by said company, insuring against fire a certain building belonging to said Kasey.

Kasey, at the April term of the circuit court of Roanoke 1873, recovered a judgment against said company. To that judgment a writ of error was awarded by one of the judges of this court.

Upon this writ of error the case was heard at Wytheville in July 1874, and this court reversed the judgment of the circuit court, and remanded the case for a new trial to be had in said circuit court of Roanoke. This reversal was in favor of the Continental Insurance Company. But when the case came on again to be heard in the Circuit court of Roanoke, upon the new trial awarded by this court, the company by its counsel filed the following petition.

To the honorable the judge of the circuit court of Roanoke county:

The petition of the Continental Insurance Company of the city of New York, respectfully represents, that it is a foreign corporation, created and having its place of business in the state of New York, and in legal contemplation is a citizen of that state; that it is sued in your honor's court by one Thomas A. Kasey, a citizen of the state of Virginia, upon a contract of insurance; that the matter in dispute in said suit exceeds

*Foreign Insurance Companies—Domicile.—See *McLean v. P. & A. Life Ins. Co.*, 29 Gratt. 361, and monographic note; also, monographic note to *Mut. Assur. So. of Va. v. Holt*, 29 Gratt. 612.

†Removal of Causes from State to Federal Court—Upon Ground of Non-Residence.—A suit cannot be removed from a state to a Federal court unless it might have been brought originally in the latter court. *Beery v. Irick*, 22 Gratt. 484; *George v. Pilcher*, 28 Gratt. 308. The principal case is cited in *Hall v. Bank*, 14 W. Va. 623.

the sum of five hundred dollars, exclusive of costs, and that there has not been a final trial of said cause. Your petitioner is advised, that under the laws of congress, in such cases made and provided, it has the right to have said cause removed into the circuit court of the United States for this judicial district; and it hereby offers good and sufficient surety for its entering copies of the papers in that court on or before the first day *of the next term thereof, and it prays your honor that a removal of said cause may be directed.

The Continental Insurance Company,
Of the city of New York,

By counsel.

This petition was accompanied by the following affidavit:

State of Virginia—

Roanoke county, to wit:

I, P. H. Gibson, agent and attorney of the Continental Insurance Company of the city of New York, do solemnly swear that I have reason to, and do believe, that from prejudice or local influence, the said Continental Insurance Company of the city of New York will not be able to obtain justice in the circuit court of Roanoke county, in the suit now pending in said court, in which Thomas A. Kasey is plaintiff, and the said Continental Insurance Company of the city of New York is defendant.

P. H. Gibson.

Subscribed and sworn to by P. H. Gibson before me, F. Johnston, a notary public for the state of Virginia.

Given under my hand this 11th day of November, 1874.

F. Johnston, N. P.

The circuit court of Roanoke denied the prayer of the petition, and refused to order the removal of the case to the circuit court of the United States. To this ruling of the court the company excepted, and obtained a writ of error, which brings up the question to this court.

220 *There was a judgment in the court below against the company for the sum of \$4,950.50; but against this judgment no other error is assigned; and the whole case here turns upon the single question, whether the circuit court erred in refusing to remove the cause, upon the petition of the company and the affidavit of its agent to the circuit court of the United States.

The solution of this question depends, 1st, upon the true construction to be given to the acts of congress relating to the removal of causes from the state courts to the United States courts; and, 2nd, upon the effect of the statute law of this state imposing certain conditions and requirements upon foreign insurance companies doing business in this state. First, as to the true construction to be given to acts of congress in reference to the removal of causes.

This motion is made under the provision of the act of congress approved March 2, 1867, which declares that in a controversy between a citizen of a state, in which suit is brought, and a citizen of another state, when a party shall make and file an affidavit

stating that he has reason to, and does believe, that from prejudice or local influence he will not be able to obtain justice in such state court, may at any time before final hearing or trial of the suit file a petition for removal of the suit into the next circuit court of the United States for the district in which his suit is pending. And then declares, that upon giving certain security the state court shall proceed no further in the suit. See 14 U. S. Stat. at Large 558-9.

It would seem sufficient to say, that this court has already by its unanimous judgment, construed this act of congress against the pretensions of the appellant in this case.

In *Beery v. Irick*, 22 Gratt. 489, this

221 *court construing this same act says:

"The question we have to consider is, was the application (for removal of the case) made before the 'final hearing or trial,' within the meaning and intent of the statute? The word 'final' in the act applies to and qualifies the word 'hearing,' and not the word 'trial.' In the act of 1866 the language is before 'trial or final hearing.' The transportation of the words in the act of 1867 so as to read, 'before final hearing or trial' was probably accidental and not affecting nor designed to affect any change in the meaning. The words 'final hearing' are ordinarily applied to cases in equity, while the word 'trial' is applied to actions at law. The obvious and unmistakable intention of the statute was to require a party desiring a removal of his case, to make his application before a 'trial' in actions at law, and before a final hearing in suits in equity." * * * "It certainly never was the object of the act of congress to provide for a review of the decisions of a state court, but simply for the exercise of an election by a party to a suit in a state court, to transfer it to another court of original jurisdiction for trial. The design manifestly was to give him an election between two tribunals, not to give him a chance at both. Any other construction would be to confer upon the federal courts, whose jurisdiction is carefully limited by the constitution of the United States, an extraordinary and incongruous appellate jurisdiction, by which the judgment or decree of a state court solemnly pronounced in a case where it had the undoubted jurisdiction, could be reviewed, reversed and annulled by a federal court. * * *

Such unprecedented and dangerous jurisdiction in the federal courts will never be recognized by this court, unless the very letter of the law imperatively requires it;

222 and unless such law, *if enacted by congress, shall be declared by the supreme court of the United States to be consonant with the constitution which expressly limits the jurisdiction of the federal courts."

This was the construction of the act of 1867, and these the views expressed by this court in 1873, in my opinion in *Beery v. Irick* and *Newton v. Bushong*, 22 Gratt. 484.

I might be content to rest this case upon that opinion, but that the able counsel for

the appellant, in an argument of much learning, has called upon us to review our opinion in that case; and relies especially upon a recent decision of the supreme court of the United States; *Insurance Company v. Morse*, 20 Wall. U. S. R. 445; which is certainly adverse to our construction of the act of 1867.

That decision, adopting as its rule of construction the literal interpretation of the words of the act, declares that a party may at any time before a final trial remove his case upon proper affidavit and security. He may take his chances before a state court; may go up to the supreme court of the state, and take his chances there; and then, after years of litigation in the state courts, which have the unquestioned jurisdiction of his case, and to whose jurisdiction he has voluntarily submitted, may, any time before his case is finally tried, remove it to a circuit court of the United States. Now, while I have great respect for the decisions of the supreme court of the United States, and the decisions of that august tribunal are always recognized as very high authority in this court, I cannot follow that court in the construction which it has given to the act of congress under consideration. Especially since the decisions of every state in the

Union where the question has come
223 up, except the *state of Rhode Island, has given a different construction to the act. Certainly the supreme courts of the states of Massachusetts, Ohio, Wisconsin, Maryland and Virginia have united in declaring that the application for removal of a case to the circuit court of the United States must be made before trial; and that after trial is had in a state court, the case cannot be removed. See *Galpin v. Critchlow*, 112 Mass. R. 339; *Home Life Ins. Co. v. Dunn*, 20 Ohio State R. 175; *Akerly v. Vilas*, 24 Wisc. R. 165; *Adams Express Co. v. Frego*, 35 Mayr. R. 47; *Beery v. Irick*, 22 Gratt. 484.

In ascertaining the true interpretation of the words "before final hearing or trial" in this act, we may properly refer to the earlier acts of congress on the subject of removing causes from the state courts to the circuit courts of the United States, as constituting parts of one judicial system. Under the first judiciary act of the United States, where the removal is claimed upon the ground that the defendant is an alien or citizen of another state, the right can only be exercised "at the time of entering his appearance," and not "afterwards," even with the assent of the state court. 1 U. S. Stat. at Large, 79; *Gibson v. Johnson*, Pet. C. C. 44.

So under act of congress passed during the war of 1812, as to officers civil or military, when sued in a state court for acts done by virtue of such office, he might remove the case to the United States court "at the time of entering his appearance," 3 U. S. Stat. at Large 198, 200, 396; 14 Mass. R. 412.

So also the right of removing an action pending in a state court between citizens

of the same state claiming lands under grants of different states, must be exercised by either party "before the trial." 1 U.

S. Stat. at Large 80.

224 *So also in suits against revenue officers brought in state courts, for acts done by virtue of their office, the case could be removed "at any time before trial." 4 U. S. Stat. at Large 633.

So also by the act of congress of 1863, ch. 81, § 5, in a suit against any military or civil officer for acts done as such, he might, "at the time of entering his appearance," remove a case from a state court to a circuit court of the United States. 12 U. S. Stat. at Large 756.

So also by act of 1865, it was declared that the right of removing such cases should be exercised "before a jury is empanelled to try the same."

The act of 1866 provides that, under its provisions, a cause may be removed "at any time before trial or final hearing."

Now the review of the previous legislation on the subject shows that up to 1867, certainly, there was no authority for removing from a state court to a federal court, any case whatever in which a trial on the merits had commenced.

Now the question is, does the act of 1867, by simply transposing the word "final," placing it before the word trial, as well as hearing, so as to make it read "final hearing or trial," instead of "trial and final hearing," reverse the whole policy of the law as plainly declared in all the acts of congress on the subject from 1789 to 1866 inclusive? and by this slight transposition (accidental no doubt) of a single word, confer upon the federal courts the extensive, all-pervading and dangerous jurisdiction, which would constitute the federal courts appellate tribunals to the state courts. I cannot arrive at this conclusion, even if I have to disregard a decision of the supreme court of the United States. I prefer

225 to follow the *decisions of the state courts (and adhering to my former opinion in *Newton v. Bushong*, supra) aid them in checking the modern spirit now so often manifested, in which the United States courts are stretching out their hands to grasp the jurisdiction which under the constitution, and under our ancient system of jurisprudence, belongs exclusively to the state courts.

It is worthy of note, in considering this question of construction of the act of 1867, that since the decision of the supreme court of the United States in the case of *Home Insurance Co. v. Morse*, 20 Wall. 445, there has been a significant legislative construction by congress of this very act: In 1874 there was a codification and revision of the acts of congress—directed to be published, when completed, under the direction of the secretary of state—and when promulgated by him to be accepted as the Revised Statutes of the United States. Accordingly on the 2nd of February 1875, the Hon. Hamilton Fish, Secretary of State, issued his proclamation, certifying the "Revised Statutes

of the United States enacted by congress on the 22d day of June 1874, were prepared, printed and published according to the provisions of the act of June 20th, 1874;" and these Revised Statutes are now accepted and recognized as the Code of Revised Statutes of the United States.

In these Revised Statutes, p. 113, congress has adopted the act of 1866, and not the act of 1867, containing the transposition of the word "final" before the words "trial and hearing," so that the provision of the act reads as follows: "Third. When the suit is between a citizen of the state in which it is brought, and the citizen of another state, it may be so removed on the petition of the

latter, whether he be plaintiff or
226 "defendant, filed at any time 'before the trial or final hearing' of the suit; if before, or at the time of filing said petition, he makes and files in said state court an affidavit stating that he has reason to believe, and does believe, that from prejudice or local influence he will not be able to obtain justice in such state court."

It will thus be seen that the revisors of the statutes concur in opinion with this court and the other supreme courts of the states, where the question has been considered, that the transposition of the word "final" in the act of 1867, was merely accidental; and that the true construction to be given to the act, consonant with all the statute law theretofore enacted, and with the spirit of our system of jurisprudence is, that the application for removal of a case from a state court to a federal court must be made before the trial of an action at law, and before the final hearing of a case in equity.

These views lead me confidently to the conclusion, that the application for removal in this case came too late, and that the circuit court of Roanoke was not in error in overruling the plaintiff's motion.

But there is another view of this question, which, though not raised in the argument of this case here, is well worthy of consideration.

The question is this: Is the plaintiff (the Continental Insurance Company) a citizen of another state in the meaning of the act of congress?

I am aware that it has been held by the supreme court of the United States that corporations of other states come within the purview of the act. That is the general principle from which I express no dissent. But here is a New York corporation doing business in the state of Virginia under the conditions and limitations prescribed by our statute. One of these conditions

227 "is, that every such company, before they issue policies in the state, shall deposit with the treasurer of the state a certain fund, which is to remain intact to meet the losses of citizens insured in such companies. There is another most important condition imposed on all such companies, to wit: § 20, ch. 36, Code 1873, p. 366: "Every such insurance company shall, by a written power of attorney, appoint

some citizen of this commonwealth, resident therein, its agent or attorney, who shall accept service of all lawful process against such company in this commonwealth, and cause an appearance to be entered in every action in like manner, as if such corporation had existed and been duly served under process in this state."

The plain object of that provision of our statute is to give to our citizens the privilege of suing these foreign corporations in the courts of this state.

This would be, in the last degree, a futile and incongruous provision of the law if the privilege to sue in the state courts is to be at once defeated, if the corporation as soon as suit is brought may remove the cause to another and foreign jurisdiction. This would defeat the very object of the statute.

My own view is that these corporations are placed by our statute on precisely the same footing quoad hoc as the home corporations, and that when they come into this state and accept the provisions of our statute law, they become domiciled here; and as to all contracts and obligations made and assumed under the provisions of our laws, they are no longer citizens of another state, but are subject to the laws, to sue and be sued as citizens of this state.

The Continental Insurance Company, though chartered by the state of New York, when it commences business in this state,

and complies with the terms of

228 "the statute of Virginia by making the necessary deposit and appointing an agent to accept process, becomes, as to all contracts with citizens of Virginia, domiciled here; and in contentions with our citizens growing out of policies of insurance, must sue and be sued in our state courts; and do not come within the terms or spirit of the act of congress relating to the removal of cases from a state court to a federal.

Upon the whole I am for affirming the judgment of the circuit court of Roanoke.

The other judges concurred in the opinion of Christian J.

Judgment affirmed.

229 *Duerson's Adm'or v. Alsop & als.

January Term, 1876, Richmond.

1. *Creditor's Bills*—Prayer for Account in.—Though a creditor files a bill to subject the personal and real estate of his deceased debtor to the payment of his debt, saying nothing of other creditors, yet if he prays that the administration account may be settled, that an account of all debts and liabilities of the estate may be taken and their priorities fixed, that the amount and value of the real estate may be ascertained, and that all other

**Creditor's Bills*—Prayer for Account in.—In *Williams v. Newman*, 38 Va. 724, 26 S. E. Rep. 12, the court, citing the principal case, said: "It is well settled that a suit in chancery, brought by one creditor against the estate of a decedent, although filed on behalf of himself only, may, by decree com-

accounts and orders which are proper may be taken and made, this is a creditor's bill.

2. **Same—Same—Decree for Account under.**—Under such a prayer a decree for a general account may be made; all the creditors permitted to come in and prove their debts, and an order entered staying all other suits, and all the assets administered in the one suit.

3. **Same—Under Whose Control.**—Although a bill is in behalf of all creditors, it is yet under the control of the party bringing the suit, at least until there is a decree for an account. And if his claim is proved or admitted, and the executor confesses assets, the plaintiff may at the hearing have a decree for payment, and he is not compelled to take a decree for an account.

4. **Negotiable Paper—Law Applicable.**—In relation to negotiable paper, the rights and obligations of the parties are governed by the law as it was when the contract was made, and not by the law as it was when the paper becomes payable.

5. **Same—Statutory Excuse, during War, of Demand, Protest and Notice.**—The ordinance of the Virginia Convention of the 24th of June 1861, dispensed with demand, protest and notice upon all checks, bills and notes payable at a bank located in any city or town, if, at the time of the maturity of such instruments, the town or city was occupied, invested, or access thereto interrupted, by the public enemy. By an act of the legislature, passed on the 10th of May 1862, this ordinance was amended so as to require notice of the dishonor of the bill or note to be given within ten days after the removal of the obstruction created by the presence of the enemy.

A note was made and endorsed on the 11th of December 1861, payable, &c., at a bank in

230 "Fredericksburg in six months. When it fell due the town of Fredericksburg was in possession of the United States forces; but they left in a few months afterwards; but no notice of non-payment was given at any time to the endorsers. The rights and obligations of the parties are governed by the ordinance which was in operation when the note was made and endorsed; and notice of non-payment was not necessary to bind the endorsers.

6. **Same—Holder for Value—Presumptions.***—A holder of a note endorsed for the accommodation of the maker, which fell due in June 1862, gives no notice that he holds it to one of the endorsers who died in 1863, or to his representative until 1870, makes no effort to collect it from the maker, though down to 1868 he was able to pay it, and died insolvent in

vening all the creditors and directing the statement of proper accounts, be converted into a general creditor's bill, and from the date of such a decree it will be considered, and will carry with it all the incidents and consequences attending the filing of a technical creditor's bill." See also, the following cases, citing the principal case for the same rule: *Beverly v. Rhodes*, 86 Va. 418, 10 S. E. Rep. 572; *Rice v. Hartman*, 84 Va. 252, 4 S. E. Rep. 621; *The Piedmont etc., Co. v. Maury*, 75 Va. 510; *Hurn v. Keller*, 79 Va. 418; *Carter v. Hampton*, 77 Va. 637.

***Negotiable Notes—Holder for Value—Presumptions.**—Under certain circumstances the presumption that the holder of a negotiable note is a holder for value fails, and the burden of proof shifts upon him to show that he is such. *Bank v. Hatcher*, 94 Va. 231, 26 S. E. Rep. 606, citing principal case; also, *Vathir v. Zane*, 6 Gratt. 246; *Wilson v. Lazief*, 11 Gratt. 477.

1870; and waits until the other endorser is dead insolvent. Under these circumstances the presumption that the holder of a note is a holder for value fails, and he must show that he gave value for it.

7. **Same—Suits on—Parties.**—In such a case, in a suit by the holder of a note to subject the estate of a deceased endorser to satisfy it, the representatives of the deceased maker and of another endorser should be made parties.

In January 1871, John T. Alsop instituted a suit in equity in the circuit court of Spotsylvania county, against John C. Cammack, administrator of Robert C. Duerson, deceased, and the heirs at law of said Duerson, to subject his real estate to the payment of a debt which the plaintiff claimed to be due to him. In his bill he states, that on the 11th of December 1861, at the town of Fredericksburg, a certain John James Chew made his note by which he promised to pay six months after date, to the order of George F. Chew and Robert C. Duerson, the sum of nineteen hundred dollars, payable and negotiable at the office of discount and deposit of the Bank of Virginia at Fredericksburg; and that afterwards the said George F. Chew and Robert Duerson endorsed the said note to the plaintiff. That the said note was not paid when it fell due, and that the town of Fredericksburg was then in the possession and

231 occupation of the troops of "the United States, by reason whereof, under the ordinance of the convention of Virginia passed on the 24th of June 1861, demand, protest and notice of non-payment were dispensed with, and the endorsers remained bound, as if protest and notice of non-payment had been given. That both plaintiff and Duerson resided outside of the town of Fredericksburg when the note fell due, and all access to the town was cut off by the federal troops.

The plaintiff further charges, that there is not personal property belonging to Duerson's estate in the hands of his administrator or under his control, sufficient to satisfy the principal and interest of said note, no part of which has been paid to the plaintiff; and therefore he is compelled to seek the aid of a court of equity, to subject the real estate of said Duerson to the payment of said note.

The prayer of the bill is that the administration account may be settled; that an account of all debts and liabilities of said estate may be taken and the priorities fixed; that the amount and value of the real estate may be ascertained; and that all other accounts and orders which are proper in the cause may be taken and made, that the real estate of which Duerson was possessed at his death may be sold, or so much thereof as shall be necessary to satisfy the debt due the plaintiff; and for general relief.

The plaintiff filed the note as an exhibit with his bill. It is in the usual form, signed by John James Chew endorsed by George F. Chew and Robert C. Duerson, and at the foot is Cr. Dr. G. F. C. R. C. D.

Cammaack, the administrator of Duerson, demurred to the bill for want of equity, and also answered. He says Duerson died in 1863, and his widow qualified as his administratrix in August of that year, and

232 proceeded *to administer the assets of his estate until her death in 1865; and in October of that year respondent qualified as administrator de bonis non of said estate. That though plaintiff lived near Fredericksburg, and went to that town nearly every week of his life, he never made any claim against Duerson in his lifetime, or against his estate during the lifetime of his administratrix. That though he is well acquainted with plaintiff, respondent never heard of this claim until the latter part of December 1870, when he received a letter from plaintiff's attorneys informing him that they had been retained to bring a suit upon the note. He knows nothing of the facts, and calls for proof: Insists it was the duty of the plaintiff to give notice of the non-payment of the note directly the United States troops ceased to occupy the town, which occurred in August 1862, very soon after the note fell due, and there was no obstacle thereafter to free communication by mail or otherwise to and from said bank, and between all the parties to said note; yet the plaintiff did not then or afterwards make demand of payment of said note at said office of discount and deposit of said bank, nor give notice of non-payment to said endorsers or their personal representatives. He insists that the ordinance of the Virginia convention, dispensing with demand and notice of non-payment in the cases specified, was unconstitutional; that after the evacuation of the town of Fredericksburg, demand of payment should have been made, and notice of protest for non-payment given; that the permanent residence of Duerson was in the town, and his family remained there, so that notice through the post office was neither necessary nor proper, but should have been left at his residence; and that long before the note fell due, viz.:

on the 16th of May, 1862, an act was

233 passed by the general assembly *of Virginia amending and re-enacting the said ordinance, by virtue of which Duerson could not be held bound as endorser of said note, unless notice of dishonor had been given within ten days after the evacuation of the town of Fredericksburg by the United States forces.

The respondent denied that there was no personal estate of Duerson sufficient to satisfy all legal and just claims against said estate. It was true these assets consisted mainly of choses in action; but upon these judgments had been recovered; and most of them were regarded as perfectly solvent; and these solvent assets, when realized, as to which there was no reasonable doubt, were more than sufficient to satisfy every demand against the estate, so far as respondent knew or believed.

The defendant further relied on the great delay of the plaintiff in setting up his claim, and his neglect in either attempting

to obtain payment of the note from the maker John James Chew, who was possessed of a considerable property during and for some time after the war and who lived until 1870, or to give to the endorsers or their representatives, any notice of the claim. And then after Duerson had been dead for years, and both the Chews were dead and their estates insolvent, after the death of all the parties to the note, and when there was no one living except the plaintiff to explain his strange delay he asserts this stale demand against the estate of respondent's intestate.

The parties agreed certain facts which were admitted as evidence. It appears that the maker and both the endorsers of the note lived in Fredericksburg when it was made; and that the plaintiff Alsop lived about eight miles from the town, and

234 has resided *at the same place ever since. The note was an accommodation note endorsed for the benefit of the maker, and was never deposited in bank; and no demand of payment or notice of non-payment was given at its maturity. That the town of Fredericksburg was occupied by the federal troops on the 18th of April 1862, and was evacuated on the 30th of August 1862. That the maker John J. Chew, and George F. Chew, one of the endorsers, remained in the town during said occupation: Duerson, who was sheriff of the county of Spotsylvania, left his residence on the approach of said troops, but remained in said county and Louisa during said occupancy, and shortly after said evacuation returned to his residence in Fredericksburg, where his family had remained all the time. Both Duerson and Alsop were within the Confederate lines during said occupation. Duerson died in 1863: his widow qualified as his administratrix on the 13th of August of 1863; and she died in 1865; and Cammack qualified on the 12th of October 1865. He then resided, and still resides, in the county of Louisa. That Alsop lived in the county of Spotsylvania, and that the military lines lay between his house and the town.

It further appeared that John J. Chew, the maker of the note, owned real estate and slaves, and that he paid in 1866 and 1868 debts amounting to upwards of \$5,000; he died in January 1870, and his estate was insolvent. And there was no proof that Duerson or his representatives had ever heard that the note was unpaid; and it was admitted that Cammack never heard of the note until the receipt of the letter of the plaintiff's counsel.

The cause came on to be heard upon the 12th of June 1871, when the court

235 overruled the demurrer to *the bill, and decreed that Cammack out of the assets, &c., should pay to the plaintiff the sum of \$1,900, with interest thereon from the 14th of June 1862, and his costs. And liberty was reserved to the plaintiff to proceed against the real estate in the bill mentioned, if this should become necessary. From this decree Duerson's adm'or applied

to a judge of this court for an appeal; which was allowed.

Wm. Green and F. V. Winston, for the appellant.

Marye & Fitzhugh, for the appellee.

Staples J. Before considering the main question arising in this case, it is proper to notice a preliminary objection to the jurisdiction of the court. It is insisted, that this is a single creditor's bill, brought to enforce a legal demand, as to which there is no obstacle in the way of a recovery and relief in a court of law.

The bill alleges there is not personal property belonging to Durson's estate, in the hands of his administrator or under his control, sufficient to satisfy the debt claimed by the appellee, and it asks for a decree subjecting the real estate in the possession of the heirs to sale for that purpose. It further asks, that the administration account may be settled; that an account of all the debts and liabilities of the estate may be taken, and their priorities fixed; and that all other accounts and orders which are proper in the cause may be taken and made.

Under this prayer a decree for a general account may be entered, all the creditors permitted to come in and prove their debts, an order entered staying all other suits, and all the assets administered in the 236 one *suit. The bill is therefore substantially a creditors' bill, although it does not profess to be filed in behalf of all the creditors of the decedent.

Whatever doubt there may be as to the right of a single creditor at large to bring a suit in a court of equity for an account of assets and the payment of his debt, there is no difficulty as to the jurisdiction where the bill is filed in behalf of the complainant and all other creditors who may come in and prove their claims. *Poindexter's ex'ors v. Green's ex'ors*, 6 Leigh 504; *Wilkins v. Finch, adm'r*, Phillips Eq. 355. Upon such a bill a general account of the assets is ordered, the priority of debts and liens ascertained and settled, multiplicity of suits avoided, and final and complete relief administered.

Although the bill in such case is in behalf of all the creditors, it is yet under the control of the party bringing it, at least until there is a decree for an account. If his claim is proved or admitted, and the executor confesses assets, the plaintiff may at the hearing have a decree for payment, and he is not compelled to take a decree for an account. *Daniel Ch. Prac.* 236; *Adams Equity* 257, 258.

In this case the administrator admits assets under his control sufficient to pay all the liabilities of the estate. They consist, however, almost entirely of choses in action upon which judgments have been recovered. If the appellee had sued at law a recovery there would not have availed him, as no execution could have been levied upon such choses in action.

At the time of filing the bill, the appellee could not know the precise condition of the estate, the nature and extent of its liabilities. He had therefore a right to file his bill asking a discovery of assets and an account. The administrator having 237 confessed assets sufficient *when collected to satisfy the appellee's demand, it was the privilege of the latter to waive the account, and take a decree for payment out of these assets, with a right to apply to the court for any additional relief which might become necessary. In all this the proceeding was in conformity with the practice and the established doctrine of the equity courts.

The main question in this case is, whether the rights and obligations of the parties are governed by the ordinance of the Virginia convention adopted on the 24th of June 1861, or by an act of the legislature passed on the 16th of May 1862, amendatory of the provisions of the ordinance.

The effect of the ordinance was to dispense entirely with demand, protest and notice upon all checks, bills and notes payable at a bank located in any city or town, if at the time of the maturity of such instruments the town or city was occupied, invested, or access thereto interrupted by the public enemy.

The effect of the act of the legislature, on the other hand, was to require notice of dishonor of the bill or note to be given within ten days after the removal of the obstruction created by the presence of the enemy.

The note, which is the subject of controversy, was made on the 10th of December 1861, whilst the ordinance was in force. It fell due on the 10th June 1862, after the ordinance had ceased to operate, and whilst the act of May 1862 was in full force. At the time of the maturity of the note the town of Fredericksburg was in possession of the federal forces, and consequently no demand was ever made, or notice given of the dishonor of the note. Under this state of facts, if the ordinance of the convention controls the rights of the parties, the holder of the note is entitled to recover, notwithstanding the failure to make demand 238 and give *notice of non-payment.

If the act of May 1862 governs, the indorsers are discharged by reason of the failure of the holder to comply with the provisions of that act.

This question is to be solved by determining whether demand and notice are regulated by the laws in force when the endorsement is made, or by those in force at the time of the maturity of the note. The learned counsel for the appellant maintains that the proceedings to be taken upon the dishonor of a negotiable note, with a view to fix with liability the indorsers, is the law of the place, and the time when and where such dishonor takes place. In support of this proposition much reliance is placed upon two cases. One of these is *Barlow v. Gregory*, reported in 31 Conn. R. 261. It was there held, that a statute es-

tablishing a legal holiday was applicable to antecedent transactions, and did not impair the obligation of the contract, although the effect might be to exclude one of the days of grace to which the maker of a negotiable note was entitled. This decision was placed mainly upon the ground, that laws establishing legal holidays are in the nature of police regulations, and may be sustained upon the score of public health and morality; that days of grace constitute no part of the original contract, but are mere matters of indulgence granted the debtor, in regard to which the parties have made no stipulation; and further, that in looking forward to the time of payment, the parties are required to have respect to the general holidays which may then be established, and they are presumed to contract with reference to the custom of observing such holidays.

Now what is said by the learned court with respect to the allowance of days
239 of grace, as a mere matter of *favor to the debtor, is undoubtedly correct; but when it is asserted that the parties have made no stipulation with reference to days of grace, the proposition is not sustained by the authorities. On the contrary, nothing is better settled than that the usage in regard to the allowance of days of grace, prevailing at the place of payment, is a part of the contract. *Jones v. Fales*, 4 Mass. R. 245; *Planters Bank v. Markham*, 9 How. Miss. 405; *Mills v. Bank of the United States*, 11 Wheat. 431; *Ogden v. Saunders*, 12 Wheat. R. 213, 342; *Story on Prom. Notes*, sec. 215, note.

Be this as it may, the Connecticut court having reached the conclusion that the allowance of days of grace is no part of the original contract, it could of course have no difficulty in arriving at the further conclusion, that one of these days might be excluded from the computation by the occurrence of a legal holiday, established even after the execution of the note.

But the court does not say, that demand and notice, and the circumstances under which they may be required or dispensed with, are not incidents of the original contract, or that they are governed by the laws in force when the notes become payable, or that the parties are presumed to contract with reference to such laws. The decision is confined to the narrow ground, that as the observance of holidays tends to the preservation of public health and morals, the parties in making their contract are required to have respect to such as may from time to time be established by law. Thus restricted, there is perhaps no particular objection to the dictum laid down by the supreme court of Connecticut.

The other case cited by the learned counsel is that of *Rouquette v. Overman*, decided by the court of queen's bench, and found in the *Law Reports 1875*, 10 Queen's
240 *Bench L. R. 525. The action was upon a foreign bill of exchange, drawn and endorsed in England, upon a house in Paris, and accepted there. The national

assembly of France having by various decrees or orders extended the time of payment upon bills of exchange in consequence of the existence of the German war, the bill in controversy was not protested, nor was notice given of its dishonor until the expiration of the time fixed by the legislative decree. The question before the court was, whether the indorser, residing in England, was bound by the law of France made after the date of his indorsement, or must be discharged by the failure to make protest and give notice at the maturity of the note. It was held that the indorser was not discharged. Chief Justice Cockburn, in delivering the opinion of the court, sets out with the concession, that although time of payment is the essence of the contract, it was competent for the sovereign power of France to change or extend it at its pleasure, so far, at least, as subjects of that country were concerned. He then proceeds to show, that as the holder of the bill could not be required to present it to the acceptor for payment until it became legally payable according to the law of the place where payable, so he could not be required to give notice of dishonor until payment had been legally demanded of the acceptor and refused. And as the acceptor resided in France, and as according to the law of that country payment could not be legally demanded of him until the day fixed by the legislative decree, there could of course be no protest and no notice given the indorser until then.

Now it is very clear, that no such case as this could have arisen in Virginia since the adoption of the federal constitution;

for the obvious reason that a law
241 *changing the time of payment fixed by the parties would be treated as a law impairing the obligation of the contract. And yet the acknowledged power in the government of France to pass such a law was the basis upon which the entire argument of the learned judge was founded. He did not maintain that the indorser had contracted with reference to some new law which might be in operation when the bill matured. The decision is based upon the idea, chiefly, that as the liability of the indorser is to be measured by that of the acceptor whose surety he is, it followed that an indorser residing in England might be reached by a law of France through the medium of the acceptor who resided in France.

It will be seen from this simple statement, I am not called on to controvert the decision of the queen's bench or the reasoning upon which it is based.

It is worthy of observation, however, that the decision is in direct conflict with that of the supreme court of the United States in the case of *Musson v. Lake*, 4 How. U. S. R. 262.

The great question in that case was whether the contract between the holder and indorser was to be governed by the law of Louisiana, where the bill was payable, or by the law of Mississippi, where it was

drawn and indorsed. The supreme court of the United States, after stating the proposition, that due presentment of a foreign bill of exchange to the drawee, protest and notice are conditions entering into and making a part of the contract between the parties, and that the law imposes the performance of them upon the holder as conditions precedent to the liability of the indorser—say, “The acceptors resided at New Orleans: they became parties to the bill by accepting it there. So far, therefore, 242 as their liabilities *were concerned, they were governed by the law of Louisiana. But the drawer and indorsers resided in Mississippi: the bill was drawn and indorsed there, and their liabilities, if any, occurred there. The undertaking of the defendant was, that the drawee should pay the bill; that if the holder after due diligence failed to obtain payment from them, he would pay it, with interest and damages. This part of the contract was, by the agreement of the parties, to be performed in Mississippi, where the suit was brought. The construction of the contract, and the diligence necessary to be used by the plaintiffs, to entitle them to a recovery, must therefore be governed by the laws of the latter state. The laws of Louisiana could not affect the contract of the parties residing in Mississippi.” In support of this view numerous cases are cited by the learned judge delivering the opinion.

The questions arising in the two cases just cited have been the prolific source of controversy among judges and writers on commercial law in every country where that law is recognized. That controversy does not, however, turn upon the question whether the rights and liabilities of the parties are governed by laws in force when the indorsement is made, or by those in force when the bill matures. The real point of contention is, whether the contract of the indorser is to be considered as made with reference to the law of the place where the indorsement takes place, or with reference to the law of the place where the note or bill is to be paid. But whichever it may be, whether the law of the place of indorsement or the law of the place of payment is to govern, the rights and obligations are to be determined by existing laws, the laws in force when the contract is made. It is with reference to these the 243 parties are presumed to contract, *and not with reference to some future laws of which they can know nothing.

Wherever the law merchant prevails, demand and notice are incidents of the contract of indorsement; they are conditions precedent to a right of recovery on the bill or note. This position is sustained by abundant authority.

In *Rothschild v. Currie*, 41 Eng. Com. Law R. 43, a case much relied on in the argument, Lord Denman, chief justice, said: “Is then notice of the dishonor parcel of the contract? The manner in which by the 165th section it is connected with the

citation in judgment would at first raise an impression that it was not, but only a step in the remedy at law; but, upon consideration, we think it is parcel of the contract. The indorser contracts to pay the bill, not primarily or absolutely, but on two conditions: one, the dishonor by the drawee or acceptor; the other, the due notification to him of such dishonor.” This, it will be conceded, is very high authority. The authority of the case has been questioned in other respects, but the soundness of the view just stated has not been expressly denied by any case I have seen. See also *Berry v. Robinson*, 9 John. R. 121; *Aymar v. Sheldon*, 12 Wend. R. 439; *Story's Conflict of Laws*, sec. 360; 1 Rob. Prac. 79; *Williams v. Wade*, 1 Metc. R. 82; *Short & Co. v. Trabue & Co.*, 4 Metc. R. 299.

In *Ogden v. Saunders*, 12 Wheat. R. 213, 341, Chief Justice Marshall, speaking with reference to the drawer of a bill of exchange—and the remark is equally applicable to the indorser—said, he ought to have notice that his bill is dishonored, because this notice enables him to take measures for his own security. It is reasonable that he should stipulate for this notice and the law presumes that he did stipulate for it.”

244 *But if the argument made here in behalf of the appellant be sound, while the indorser stipulates for notice as a measure essential to his security, he at the same time agrees that he will dispense with it provided the legislature (as has been done in one of the states) abolishes the law merchant before the maturity of the bill or note. And so the holder agrees that he will make demand of payment and give due notice of the dishonor; but it is said he at the same time impliedly agrees to do some other act if the legislature should, in the meantime, require it: what it is of course is wholly unknown to him. What confidence can be placed in negotiable instruments clogged with conditions of this character? The great value of these securities is, that they are governed by well established rules of law recognized throughout the commercial world, and well understood by the parties at the time of assuming their respective liabilities.

It is no answer to this view to say, that such changes will be rarely made in the law, so as to affect antecedent contracts. The mere recognition of such a doctrine will be mischievous in the extreme. Experience attests that laws materially affecting vested rights are not unfrequently passed through legislative bodies without discussion or even suspicion of their nature and effect. In cases of negotiable securities, the inducements to such legislation would be peculiarly great. Under the operation of a statute imposing new duties in regard to demand and notice, of which parties in distant states can know nothing, securities to the amount of millions may be rendered absolutely worthless. In all other transactions mankind are presumed to contract with reference to existing laws. In the language of a distinguished writer,

"These are necessarily referred to in 245 all contracts, and forming a "part of them as the measure of the obligation to perform, by one party, and the rights acquired by the other." Cooley on Con. Limitation 284; Sherrill v. Hopkins, 1 Cow. R. 103, 107; Don v. Lippmann, 5 Clark & Fin. R. 1-13; Homestead cases, 22 Gratt. 266.

There is no valid reason why a different rule should be accepted with respect to negotiable instruments. On the contrary, every consideration of sound policy requires that the principle should be applied in its utmost rigor to these securities.

The case in hand strongly exemplifies these views. The ordinance of the convention, already mentioned, provides, that where any city or town, in which a bank is located, shall be occupied by the public enemy, the parties to negotiable paper payable in such town or city shall remain bound after the maturity of the paper, without demand, notice or protest, as if they had been regularly made or given. Parties making or indorsing notes or bills, after this ordinance went into operation, are presumed to know of its existence. They are supposed to contract with direct reference to its provisions. It entered into and became an essential element of the contract. It is as if the indorser had agreed in writing with the holder, that in the contingency mentioned he would waive demand, protest and notice. Suppose he had in fact done so, in the absence of an ordinance, will it be maintained that it was competent for the legislature by a subsequent enactment to require that notice should be given as a condition precedent to a right of recovery? And yet the waiver in the present case is as positive and unmistakable in its terms as though it had been written at large on the paper containing the promise to pay. The bank might well say, it would not have discounted the note, the holder might

246 say he would not have purchased *it in those unsettled times, but for the security afforded by the ordinance. Both might well say, that they rested with absolute confidence upon this security, and failed to give notice of the dishonor; that they never knew of the existence of the act of May 1862 in sufficient time to conform to its requirements; or, if they did, they were under no obligation to regard it; for, if the act was to be construed as applying to antecedent transactions, it was an effort of the legislature to impose conditions not expressed in the original contract.

It is to be observed that the act in question is not simply a repeal of the ordinance, not the restoration of the law merchant. It is the adoption of a new rule different from the law merchant, different from the ordinance. Under that act it was not sufficient to give notice of the dishonor of the note within a reasonable time after the removal of the impediment, but a peremptory limit of ten days was prescribed, applicable alike to each and every case, without regard to

the circumstances which might surround the holder or the state of the country.

It is difficult to believe that the legislature could ever have designed that this law should apply to bills and notes executed previous to its enactment. If such was the purpose, the effect was to impair the obligation of the contract, and to violate the constitution.

Since the foregoing was written I have examined the decision of this court in the case of Farmers Bank of Va. v. Gunnell's adm'r, made at the March term 1875, and not yet reported. That decision will be found to sustain the views already presented in regard to the ordinance of the convention, and upon the question of the steps to be taken upon the dishonor of a negotiable note.

247 *The learned counsel for the appellant, both in the petition for an appeal and in his oral argument, has maintained that the convention of 1861, having no legislative power, could not pass a "valid ordinance of the character at present under consideration.

The act of the Virginia legislature calling a convention was ratified by the people. That act, among other things, provided that the members of that body after assembling in Richmond "shall proceed to adopt such measures as they may deem expedient for the welfare of the commonwealth." These are very comprehensive terms: they show that the design was not to confine the convention merely to the consideration and adoption of such measures as affected the relations of the state with the federal government, but to confer upon it important powers affecting the internal affairs, the domestic economy of the commonwealth. The measures to be adopted from time to time by the convention must, of necessity, have included many matters of ordinary legislation. It was necessarily, to a very great extent, the judge, and the exclusive judge, of what was essential and proper to be done under all the circumstances surrounding the state. The courts would hesitate long before undertaking to declare that a body thus constituted had transcended the just limits of its authority. It could only be done where the act was a palpable invasion of the reserved rights of the people.

Large and numerous classes of the people were interested in the banks. The state was vitally concerned in their just and wise administration. These institutions were important agencies in the fiscal affairs of the commonwealth, in supplying both people and government with a sound currency. In the then existing condition of affairs,

248 with invading armies *occupying many of the towns and cities of the state, and threatening others with incessant raids, some such provision as that adopted by the convention might justly have been regarded as expedient both for the commonwealth and the banks. At the time of the adoption of the ordinance the legislature was not in session, and the convention was necessarily required to adopt many measures

more appropriate perhaps to an ordinary legislature. Without therefore entering into a discussion of the question of the powers of a convention to exercise the functions of a legislative body, under ordinary circumstances, it is sufficient to say that the convention of 1861 did not exceed its powers in adopting the ordinance now under consideration.

The next and only question to be considered, is as to the right of the appellee to recover without proof that he has paid value for the note. As a general rule the possession of a negotiable instrument is prima facie evidence of a good title. And although it may be an accommodation note, the holder is presumed to have given value for it. On the other hand, circumstances may be shown to exist which will remove this presumption, and cast upon the holder the onus of proving that he is a holder for value.

In *Mills v. Barber*, 1 Mees. & Wels. R. 425, it was held that if the instrument be connected with some fraud, and a suspicion of fraud be raised from its being shown something has been done with it of an illegal nature, as that it has been clandestinely taken, or has been lost or stolen, in such case the holder must show that he has paid consideration for it.

And in another case where the drawer of the bill proved that he indorsed it in blank, and delivered it to W to get it dis-
249 counted for him; which W promised *to do, and bring him the money on the following Monday; but never returned with the bill or the money, and the drawer heard no more of it until called upon by H to pay it; it was held that H must prove that he gave consideration for the bill. *Hall v. Featherstone*, 3 Hurl. & Nor. 284; Story on Bills Sec. 193, note.

In the nature of things it is impossible to lay down any fixed unvarying rule, as to the circumstances which will be deemed sufficient to throw upon the holder the burden of showing that he has given value for the note. The courts must determine in each case, whether the transaction is of such a character as to rebut the presumption usually arising from the possession of the instrument.

The note which is the subject of the present controversy matured in June 1862. When or how the appellee obtained possession of it, does not appear. He does not state what consideration he paid for it, or indeed that he paid any consideration at all; although his long delay rendered some explanation of the kind peculiarly proper and even necessary. The only statement bearing upon this point contained in the bill is, that John J. Chew made the note on the 11th December 1861, payable to the order of George F. Chew and Robert C. Duerson; and that afterwards the said Chew and Duerson indorsed the same to the appellee. It is not very clear from this, whether the appellee obtained the note from the indorsers or from the maker. The fair implication is, that it was the former, and yet it is

manifest from the face of the note itself, it was accommodation paper for the benefit of the maker. The note, although payable at the bank in Fredericksburg, was never placed in that bank; and, so far as

this record discloses, has never been
250 *seen by any one, or even heard of,

since the date of its execution, until very shortly before this suit was brought, in December 1870. Duerson, one of the indorsers, against whose estate this claim is asserted, died in 1863. George F. Chew, it seems, is also dead: when his death occurred does not appear; it was certainly before the institution of the suit. John J. Chew, the maker, it would seem, even after the close of the war, was possessed of sufficient property to pay the note. He died in the year 1870, utterly insolvent. Notwithstanding all the parties lived in or near Fredericksburg, notwithstanding the death of maker and indorsers, and the failure or threatened distribution of their estates, the appellee, from 1862 to 1870 inclusive, so far as the record informs us, never disclosed to any one that he was the owner of this large debt. It was not until the death of every person who could throw any light upon the transaction, that he brings forward the note, and claims to recover against one of the indorsers. Very curious to say, these circumstances seem to have attracted but little attention in the court below. They are alluded to in the answer of Duerson's administrator, not so much to throw discredit upon the title of the appellee, as to fix upon him the imputation of gross laches in the assertion of his demand to the manifest prejudice of the indorsers. The appellee having brought his suit within the time allowed by the several statutes passed since the war, I do not perceive how he can be barred upon the ground of any supposed laches. But his long delay in connection with the other circumstances, already alluded to, removes the presumption arising from the mere possession of the note, and makes it incumbent upon him to show that he paid consideration for it, or at least facts and circumstances, from which it may be inferred that he has paid such consideration.

251 *I do not think the bill ought to be dismissed by this court, because it must be admitted that the pleadings and issues in the court below do not appear to have distinctly presented this point. It was for the first time raised by the learned counsel for the appellants in his argument here. The appellee should therefore have an opportunity of showing, if he can, that he has paid consideration for the note. With that view the decree of the circuit court is reversed, and the cause remanded for an issue, to be tried by a jury, or for an inquiry before a commissioner as to that court may seem best under all the circumstances.

The other judges concurred in the opinion of Staples, J.

The decree was as follows:

The court is of opinion, for reasons stated

in writing and filed with the record, that the circuit court erred in decreeing in favor of the appellee, without requiring him to show that he is a holder for value of the note in controversy, and without also requiring the appellee to make the representations of John J. Chew and of George F. Chew parties to the suit.

It is therefore decreed that for the said errors the decree of the said circuit court be reversed and annulled, and that the appellee pay, &c.

It is further decreed, that the cause be remanded to the said circuit court, in order that the proper parties may be made, and the appellee may have an opportunity of establishing by proper proof that he is such holder for value. And to that end the said circuit court may direct an inquiry before one of its commissioners, or an issue to be tried before a jury, as it may deem most advisable.

Decree reversed.

252 *Muse & als. v. Farmers Bank of Virginia.

January Term, 1876. Richmond.

1. Practice—Discontinuance—Judgment by Default.*—

B brings an action of debt against F & M, as late partners and makers of a negotiable note, and C and G as endorers. The case stands on the office judgment docket at the next term of the court, when F files his plea of *nil debet*, which is sworn to; and on the motion of B by his counsel, the cause is discontinued as to F. The other parties not appearing, there is a judgment by default against them. **HOLD:**

1. **Same—Same—Same—Statute.**—The judgment is a valid judgment against M, C and G. See Code of 1860, ch. 177, s. 19.

2. **Same—Same—Retraxit.**—The discontinuance as to F is not a *retraxit*. A *retraxit* can only be entered by the plaintiff in person, and in open court.

This was an action of debt in the circuit court of Pittsylvania county, brought in March 1866, by the Farmers Bank of Virginia against Wm. A. J. Finney and Henry L. Muse, late partners under the style of Finney & Muse, as makers, and George Craft, John H. Gill and another as endorers, of a negotiable note for four thousand dollars. The note bore date January 14th, 1861; was payable in four months at the office of the Farmers Bank at Danville; was signed in the name of Finney & Muse, as makers; was endorsed by Craft and two others for the accommodation of the makers, and discounted at the bank in Danville, and protested for non-payment.

The process was served on Finney, Muse, Craft and Gill, and stood on the office judgment docket of the court at the June term for 1866. At this term of the

253 *court Finney appeared and filed a

*Discontinuance as to One—Judgment by Default against Others.—See collection of authorities on this subject, and citation of principal case in *note* to Bush v. Campbell, 26 Gratt. 408.

plea of *nil debet*, which was sworn to. And at the same term of the court, on the plaintiff's motion, by counsel, the case was discontinued as to the defendant Finney; and none of the other parties appearing, there was judgment by default against them.

Nothing seems to have been done in the case until June 1871, when Muse, upon notice, moved the judge in vacation to set aside the judgment, which motion was overruled; and in August 1871 Craft's executor made a similar motion; which was overruled in October of that year. Muse and Craft's executor applied to a judge of this court for a *supersedeas*; which was allowed.

Ould & Carrington, for the appellants.

Jones & Bouldin, for the appellee.

Staples, J., delivered the opinion of the court.

This case comes before us upon a writ of error and *supersedeas* to a judgment of the circuit court of Pittsylvania county. The Farmers Bank of Virginia at Danville brought an action of debt in that court against Finney & Muse, as makers, and three others, as indorsers of a negotiable note payable at that bank. The defendant, Finney, alone appeared, and filed a plea of *nil debet*, which was verified by his affidavit; and thereupon, on motion of the plaintiff by his attorney, it was ordered that the cause be discontinued as to him. The other defendants not appearing, judgment by default was rendered against them for the debt claimed in the declaration.

This judgment has been assailed by 254 the learned *counsel for the plaintiff in error upon various grounds. In respect to the principal ground of objection, it is sufficient to say, it is the same urged before this court in the case of Bush v. Campbell, decided at the last term of this court, and not yet reported. There the action was upon a bond purporting to have been executed by several persons. Three of the defendants filed separate pleas of *non est factum*; and upon that issue verdict and judgment were rendered in their favor. The defendant, Bush, filed a plea of *usury*, which was tried at a subsequent term, and a verdict found against him. The question was, whether judgment could be given against him on the verdict. This court held it could be so given under the provisions of the 19th section of chapter 177, Code of 1860, which provides, that in an action founded on contract against two or more defendants, although the plaintiff may be barred as to one or more of them, yet he may have judgment against any other or others of the defendants, against whom he would have been entitled to recover if he had sued them only. According to the view taken by this court, this statute changed essentially the rule of the common law requiring in actions on joint or joint and several contracts one final judgment for or against all the defendants. The effect

of that change is to relieve a plaintiff, who proves a good cause of action against part of the defendants, but not against the others, from being put to the expense and delay of a new action against those who are bound. If, therefore, the plea of one of the defendants is of such a character that the plaintiff might have recovered against the others, had he sued them only, he is entitled to judgment in the pending action against those who are liable. This is the construction given by the New York courts to

255 a statute from which ours *was probably taken, and is very similar in its provisions. *Blodgett v. Morris*, 14 New York R. 482, 487.

The learned counsel for the defendants insists that the present case is distinguishable in several particulars from that of *Bush v. Campbell*. For example, it is said that all the defendants were in that case parties, apparently at least, to the contract. Their names were signed to the bond, and the plaintiff could not know they were not really so until the trial of the issues upon the pleas of non est factum. Whereas, in the present action, the plaintiff has sued the wrong person, one having no connection with the instrument declared on, real or apparent. And it is argued, that the statute giving joint actions upon negotiable notes against makers and indorsers, authorizes one, all, or any intermediate number, to be sued, but it does not permit a defendant to be included who is neither maker nor indorser.

The learned counsel is unquestionably correct in saying that the statute he refers to does not authorize the joinder of a person who is neither maker nor indorser. That proposition does not admit of discussion. And if that statute stood alone the argument would be unanswerable. But it must be read in connection with the provisions of the section already cited, which provide that although the plaintiff may be barred as to one or more of the defendants, he may nevertheless have judgment against the others. These provisions apply as well to joint actions upon negotiable instruments, as upon instruments not negotiable. In either case the object and effect of the statute is to avoid the expense, delay and trouble of a new suit against parties who are liable. There is no good reason why it should not apply in the one case as in the other. No one, of course, should be

256 joined in the *suit as defendant who does not appear expressly, or by proper averment, to have made or indorsed the note. A misdescription of the writing in a material matter, whether as to parties or otherwise, is fatal on demurrer for the variance, or on objection to its admission as evidence. But if the parties are properly described in the declaration as they appear by the instrument sued on, the plaintiff is not to be turned around to a new suit merely because one or more of the defendants is shown never to have been a party to the contract.

In the present case the declaration is

against William A. J. Finney and Henry L. Muse, late partners trading under the style of Finney & Muse. The record states that the said William A. J. Finney comes by his attorney and says he does not owe the sum of money in the declaration mentioned. It may be that there were two persons of the same name, and that process was served upon the wrong person. As nothing of the kind appears by the record we cannot presume that such was the fact. One thing is very clear, that the defendant named in the declaration and writ bears the same name as the person upon whom process was served, and by whom the plea of nil debet was filed. That plea verified by affidavit, put the entire declaration in issue. Under it any fact may be relied upon which shows that the party pleading does not owe the debt. The plaintiff may have been satisfied that the defendant Finney did not sign the note, nor authorize any one else to sign it for him; or that the partnership had been dissolved before the note was executed by Muse. Either of these matters was sufficient for the discharge of Finney without affecting the liability of the other defendants. This court will presume rather

that Finney did not owe the debt, as 257 *the issue purports, than that the other defendants did not owe it. It will not take it for granted for purposes of reversal, that the matters relied on by him affected the liability of the others, and precluded a judgment against them also; but that these matters went to his personal discharge, and did not concern the other defendants. Such presumptions are often made in appellate courts, upon principles of necessity and convenience, based upon the maxim that acts of courts of competent jurisdiction are presumed to have been rightly and regularly done until the contrary is made to appear. *Powell on Appellate Proceedings*, and cases there cited, 127, 241.

The learned counsel for the defendants, varying his ground of attack upon the judgment, insists that the conduct of the plaintiff in discontinuing the suit against the defendant Finney, amounts to a retraxit; the effect of which is to preclude the other defendants from recourse upon Finney for contribution or indemnity.

But clearly the order in question was not a retraxit; as that can only be entered by the plaintiff in person in open court.

The term "discontinuance" is not applied in pleading merely to those cases in which the plaintiff leaves a chasm in the proceedings of his cause. The word is also frequently used to indicate that the "plaintiff discontinues his action." The judgment in such case is no more than an agreement not to proceed farther in that suit against that particular defendant. Such judgment is not a bar to any future action against the same party. And this is precisely the effect of the order of discontinuance entered in the present case. *Coffman & Richardson v. Russell*, 4 Munf. 207, is a direct authority upon this point.

258 *If, therefore, the defendant Finney

is released from all liability, it is not by reason of the discontinuance as to him, but because either he was never a party to the contract, or because he has discharged by matter subsequent, personal to him. We must presume it is one or the other. Whether it is one or the other the effect is the same. In either case the plaintiff is entitled to judgment against the others.

Upon the whole, we think there is no error in the judgment of the circuit court, and that the same must be affirmed.

Judgment affirmed.

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Warren v. Saunders.

March Term, 1876, Richmond.

1. *Plea in Abatement—Sufficiency.*—W sues S in *assumpsit* in the county of J, and sends the process to the city of R, where S resides, and it is served upon S by the sheriff of R. S files a plea in abatement stating these facts, but does not say where the cause of action arose. **HOLD:** The plea is sufficient in this case, though it does not give the plaintiff a better writ.

2. *Practice—Motion to Dismiss Suit—Process.*—W having demurred to the plea, and the court having sustained the demurrer, when the cause is called for trial S moves to dismiss the cause from the docket. **HOLD:** The motion should have been sustained and the suit dismissed; the statute expressly providing that when the suit is brought where the cause of action arose, process shall not be directed to an officer of any other county or corporation than that wherein the action is brought.

This is a supersedeas to a judgment of the late district court of appeals for the third judicial circuit, reversing a judgment of the circuit court for the city of Williamsburg and county of James City, rendered in a certain matter of controversy therein depending, wherein the plaintiff in error, James R. Warren, was plaintiff, and the defendant in error, Edmund A. Saunders, was defendant. The following is a statement of the case.

On the 16th day of February 1869, a summons was issued by the clerk of the said circuit court, directed to the sheriff of the city of Richmond, commanding him to summon the said Saunders to appear at the clerk's office of the said circuit court at the rules to be holden for the said court on

*For monographic note on Pleas in Abatement, see end of case.

†*Process—Misdirection.*—The principal case was cited and its construction of the statute sustained in the following cases: *Brown v. Chapman*, 90 Va. 175, 17 S. E. Rep. 855; *Raub v. Otterback*, 89 Va. 649, 16 S. E. Rep. 938; *Guarantee Co. v. Bank*, 95 Va. 488, 28 S. E. Rep. 909; *Dillard v. Central, etc., Co.*, 82 Va. 741-3-5, 1 S. E. Rep. 124; *Lavell v. McCurdy*, 77 Va. 771; *Coda v. Thompson*, 39 W. Va. 69, 19 S. E. Rep. 548. See also, 4 Min. Inst. (2d Ed.) 575; *Barton's Law Pr.* (2d Ed.) 262; Va. Code, § 3220; *Noell v. Noell*, 93 Va. 433, 25 S. E. Rep. 242.

the first Monday in March 1869, to answer the said Warren of a plea of 260 *trespass on the case, *assumpsit*, &c.

This summons was executed by a deputy of the sheriff of the city of Richmond, and was returned with a return thereon endorsed and signed by the said deputy, stating that it was "executed, March 1st 1869, on E. A. Saunders, by delivering to him a copy of the within."

At March rules 1869 the plaintiff filed his declaration in the case, which contained two counts, one a special count for a lot of wood, estimated to contain two hundred and seventy cords, lying at "Perry's landing" on the Chickahominy river, and bargained and sold by the plaintiff to the defendant on the terms in the said special count mentioned; and the other a general count for one hundred and ten cords of pine wood, sold and delivered by the plaintiff to the defendant.

Whereupon the defendant appeared and filed his plea in abatement, to which the plaintiff demurred, and the defendant joined in demurrer.

By the said plea the defendant appeared in proper person and cravedoyer of the writ, which was read to him, and, with the return endorsed thereon, inserted in the plea. The defendant then in his said plea "prays judgment of the writ aforesaid, and says that this court ought not to have or take further cognizance of said action, because he says that it appears by said writ that he the said defendant is not sued with any person residing in the city of Williamsburg or the county of James city, and that the said writ is issued against the said defendant alone, and that the said writ is directed to the sheriff of the city of Richmond, and that the endorsement on said writ shows that the said writ was served upon said defendant by the sheriff of the city of Richmond by deputy. And the said

261 defendant in fact says, that at the time of the *issuing of said writ, and at the time of the service thereof upon him, he was, and ever since has been, and is now a resident of the city of Richmond, and that the said writ was served upon him in the city of Richmond, and that he is not sued with any person residing in the city of Williamsburg or the county of James City; and this the said Saunders is ready to verify: wherefore he prays judgment of the said writ, and that the same may be quashed," &c.

There is an affidavit of the truth of the plea annexed thereto, which bears date on the 1st day of March 1869, the very day on which the summons was executed on the defendant.

At May term 1869 of the said circuit court the said demurrer was argued and sustained, and the defendant was ordered to answer further to the declaration; and the cause was continued until the next term.

At which term, to wit: on the 27th day of November 1869 the defendant moved the court to dismiss the cause from the docket: which motion was overruled, and the de-

fendant excepted. He then plead non assumpsit, on which issue was joined, and there was a trial by jury and a verdict for the plaintiff, whose damages were assessed at \$500: whereupon the defendant moved the court to set aside the verdict and grant a new trial, on the ground that the verdict was contrary to the law and the evidence; but the court overruled the motion, and rendered judgment according to the verdict.

During the progress of the trial, at the instance of the defendant three bills of exceptions were signed and sealed by the court and made a part of the record. No. 1 was to the action of the court, in overruling his motion to dismiss the case; No. 2 was 262 to the action of the court in overruling a motion for a continuance; and No. 3 was to the action of the court in overruling his motion for a new trial; in which last bill the facts proved on the trial were certified. But it will be unnecessary here to notice further any of these bills except No. 1.

That bill states, that at the calling of the cause, at the November term of the court the defendant moved the court to inspect the writ, which was accordingly done by the court, and to dismiss the case from the docket, upon the ground that it appears by said writ that the defendant is the sole defendant in this action, and is a resident of the city of Richmond, and was at the time of the suing out said writ, and the said writ was issued by the clerk of the circuit court for the city of Williamsburg and the county of James City, and directed to the sheriff of the city of Richmond, and was served upon the defendant in the city of Richmond by the deputy sheriff of said city; which motion the court overruled, and refused to dismiss the case from the docket; and the defendant excepted.

To the said judgment of the circuit court the defendant applied to a judge of the said district court for a supersedeas, which was accordingly awarded; the errors in said judgment as assigned in the petition for a supersedeas being, 1st, in sustaining the demurrer to the plea in abatement, and in refusing to quash the writ, and in compelling the defendant to answer further; 2d, in overruling the defendant's motion to dismiss the case from the docket; and 3d, in overruling the defendant's motion for a new trial.

On the 4th day of January 1870 the case came on to be heard in the said district court upon the supersedeas, when it seemed to the court that there was error in the judgment of the circuit court in this, 263 *that the defendant's plea in abatement to the writ was good and sufficient in law, and that the court below erred in sustaining the plaintiff's demurrer to the said plea in abatement. Therefore the judgment of the circuit court was reversed, the said demurrer was overruled, the said plea was adjudged to be good and sufficient in law; and the cause was remanded to the circuit court, with instructions to direct that the plaintiff join issue in fact on said

plea; and the defendant recovered his costs in the district court.

To the said judgment of the district court the plaintiff applied to a judge of this court for a supersedeas; which was accordingly awarded.

Jones & Bouldin, for the appellant.

Cannon & Courtney, for the appellee.

Moncure, P., delivered the opinion of the court.

After stating the case he proceeded:

There can be no doubt but that the summons by which the action was commenced in this case was illegal and void, and ought to have been quashed, if the facts appeared and the question was properly presented to the circuit court. The action was brought in the circuit court of the city of Williamsburg and the county of James City, and was commenced by the issuing of a summons which bore date on the 16th day of February 1869, before the declaration was filed. There was but one defendant in the action, Edmund A. Saunders, who resided in the city of Richmond. The supposed cause of action, it seems, arose in the county of James City. The summons was directed to the sheriff of the city of Richmond, to whom it was sent, and by whose 264 deputy it was executed and returned,

*with an endorsement thereon showing the time and manner of its execution. It was without any authority of law that this summons was directed to the sheriff of the city of Richmond.

The Code, chapter 165, section 1, provides, that "any action at law or suit in equity, except where it is otherwise specially provided, may be brought in any county or corporation: First, wherein any of the defendants may reside." Neither the exception referred to in the said first section, nor the subsequent enumerations appended thereto, apply to this case. Section 2 provides, that "an action may be brought in any county or corporation wherein the cause of action or any part thereof arose, although none of the defendants reside therein." Chapter 166, section 2, provides, that "process from any court, whether original, mesne, or final, may be directed to the sheriff of any county or sergeant of any corporation, except that process against a defendant (unless a railroad, canal, turnpike, or telegraph company be defendant), to answer to any action brought under the second section of chapter 165, shall not be directed to an officer of any other county or corporation than that wherein the action is brought."

Now these are all the provisions of law which apply to this question. This action might have been brought, under section 1 of chapter 165, in the city of Richmond, where the only defendant in the action resided, or, under section 2 of the same chapter, in the city of Williamsburg and county of James City, wherein the cause of action arose. It was brought in the latter,

wherein the cause of action arose. In that case, however, as we have seen, chapter 166, section 2, expressly required that the process should not be directed to an officer of any other county or corporation 265 than that *wherein the action was brought. And yet, in plain violation of that law, the summons in this case was issued and directed to the sheriff of the city of Richmond. It was palpably void for illegality; and the only question is, whether the defendant used the proper means to avail himself of such illegality.

He was certainly very prompt in making his defence. On the very day on which the summons was executed upon him, to-wit, the 1st day of March 1869, he made affidavit to a plea in abatement setting out the facts and grounds of his defence, which plea he filed immediately on the filing of the plaintiff's declaration in the case, which was at March rules 1869. The plea was, therefore, filed in due time. Was it sufficient in form and substance? It stated that the defendant appeared "in his own proper person," and cravedoyer of the writ, which was read to him, and was set out in *haec verba* in the plea. It then proceeded: "which being read and heard, he," &c., as already set out in the statement of the case.

The details of this plea are very minute, and seem to embrace all the facts necessary to be stated in such a plea under the circumstances. The only objection made to it by the plaintiff is, that it does not aver where the cause of action arose, and therefore does not do what it is contended such a plea must always do, that is, give to the plaintiff a better writ. It does give to the plaintiff a better writ, by showing that the action might have been brought in the city of Richmond. But it is said the action might also have been brought in any county or corporation wherein the cause of action or any part thereof arose, although none of the defendants reside therein, and therefore the plea should show in what county or corporation the cause of action in this 266 case arose. The answer to *this is,

that the plaintiff knew where the cause of action arose, and his declaration shows that it arose in the county of James City, wherein the action was actually brought. Surely it could not be necessary to aver that the court in which the action was brought had jurisdiction thereof. The objection was, not that the action was brought in a court not having jurisdiction of it, but that the summons was illegally issued and sent to another county or corporation than that in which the action was brought, and therefore the summons was illegal and void. The plea shows that the plaintiff sued the only defendant in the action in a county in which that defendant did not reside, and had the summons issued and sent for execution to the county or corporation in which he did reside. Now that was an unlawful act, which it was only necessary for the defendant to show in order to be entitled to have the writ quashed. The doctrine about giving the plaintiff a

better writ does not apply to such a case. He brought his suit in James City, and instead of suing out his writ to the sheriff of that county, he sued it out to the sheriff of the city of Richmond, without any authority whatever for so doing. If he had, by mistake, brought his action in the wrong county, supposing that the defendant resided there, or that the cause of action arose there, and had sued out his summons to the sheriff of that county, it might have been reasonable and proper to require the defendant in his plea to the jurisdiction to give the plaintiff a better writ by showing not only where the defendant resided, but also where the cause of action arose—and such seems to be the effect of the two cases so much relied upon by the learned counsel who prepared the petition of the plaintiff to the district court for a *supersedeas* in 267 this case. Those two cases *are *Middleton v. Pinnell*, 2 Gratt. 202; and *Raine v. Rice &c.*, 2 Pat. & Heath 529. In neither of those actions was any opinion delivered by the appellate court, but in each of them the judgment of the court below was simply affirmed. We cannot therefore know precisely the ground of the court's decision in either of them. The supposed ground is, that the plea to the jurisdiction was fatally defective in not showing where the cause of action arose. Admitting that to have been the true ground, as it may have been, and probably was, there was this material difference between those cases and this, that in each of them the writ was issued to the sheriff of the county in which the action was brought, which was certainly proper if the court had jurisdiction of the case, whereas, in this case, it was issued to the sheriff of a corporation in which the action was not brought, which was certainly not proper, whether the court in which the action was brought had jurisdiction of it or not.

But the rule that "pleas in abatement must give the plaintiff a better writ," is by no means a rule of universal extent and application. As to the nature of it, see what is said in 5 Rob. Prac., p. 104-5, and the cases there cited. In *Massachusetts*, *Wilde, J.*, observed that the rule is of limited application, and is binding only in cases where misnomer is pleaded, or the defect relied on depends on some fact presumed to be within the peculiar knowledge of the defendant. *Guild v. Richardson*, 6 Pick. R. 369, 370. *Dewey, J.*, says: "There are many cases where a plea in abatement need not furnish the plaintiff with a better writ; as a plea that no such person exists as the plaintiff, or plea of non-tenure, 268 or plea of disclaimer and the *like." *Wilson v. Nevers*, 20 Pick. R. 23. See 5 Rob. Prac., *supra*.

But without pursuing this subject any further, we are of opinion that the circuit court erred in sustaining the plaintiff's demurrer to the defendant's plea in abatement, and that the district court did not err in reversing the judgment of the circuit court on that ground.

We are also of opinion that the circuit court erred in overruling the motion of the defendant to dismiss the case from the docket, upon the grounds set out in bill of exceptions No. 1, the purport of which is already set forth in the preliminary statement of the case; the said grounds being also embraced in the plea in abatement aforesaid. We think there are cases of this kind, and that this is one of them, in which a plea in abatement is not necessary, but the court may *ex officio*, and a fortiori upon motion, abate the writ or the suit. See 1 Rob. Prac., old ed., p. 162, and cases there referred to, especially *Garrard & c. v. Henry & c.*, 6 Rand. 112, 117; *Mantz v. Hendley*, 2 Hen. & Mun. 308. In 5 Rob. Prac. 95, it is said "the general rule is, that if the defendant would object to the plaintiff's writ he must do it by pleading in abatement. *Cooke v. Gibbs*, 3 Mass. R. 195. It is indeed sometimes said that if the writ be bad and insufficient on its face, the court may *ex officio* quash it. S. C. 196; *Mantz v. Hendley*, 2 Hen. & Mun. 308." It does not appear that the provision in the Code of 1849, ch. 171, § 18, referred to in 5 Rob. Prac. 101, was intended to prevent a court from quashing a writ in any case whatever without a plea in abatement. After providing in § 17 that "no plea in abatement for a misnomer shall be allowed in any action," § 18 "provides that, 'in other cases, a defendant, on whom the process summoning him to answer appears to have been served, shall not take advantage of any defect in the writ or return, or any variance in the writ from the declaration, unless the same be pleaded in abatement.'" This section does not seem to cover a case like this, in which the writ is not merely defective, but absolutely void, and in which therefore it may be quashed, not only on plea in abatement, but also on mere motion, or by the court *ex officio*. But in this case the question seems not to be material, as the objection was taken not only by motion, but also by plea in abatement.

The court is therefore of opinion that there is no error in the judgment of the district court, except that instead of remanding the cause to the said circuit court of the city of Williamsburg and county of James City, with instructions to direct that the said plaintiff join issue in fact on said plea, the said district court ought to have quashed the plaintiff's writ. But the said judgment may be amended in that respect, and as amended affirmed.

The judgment of the district court is therefore amended and affirmed accordingly, and it is considered that the defendant recover against the plaintiff his costs by him about his defence in this court expended.

Judgment amended and affirmed.

PLEAS IN ABATEMENT.

I. Nature of the Plea.

II. Kinds of Pleas in Abatement.

- a. Plea to the Jurisdiction of the Court.
- b. Another Suit Pending.

- c. Plea in Suspension of the Action.
- d. Plea in Abatement for Disability of the Person to Sue or Be Sued.
- e. Plea in Abatement for Matter Apparent on the Face of the Writ and Declaration.
- f. Plea in Abatement for Non-Joiner of Co-Contractors.
- g. Plea in Abatement for Misnomer of Plaintiff or Defendant.
- h. Variance between the Writ and Declaration.

III. Time of Filing Plea.

IV. Form of the Plea.

V. Pleas in Abatement in Criminal Cases.

I. NATURE OF THE PLEA.

A plea in abatement is a dilatory plea, being such as do not affect to answer the action upon its merits, but to defeat it in the shape in which it is brought. 4 Min. Inst. (2d Ed.) 673.

II. KINDS OF PLEAS IN ABATEMENT.

a. *Plea to the Jurisdiction of the Court.*—A plea to the jurisdiction is one by which the defendant denies the jurisdiction of the court to entertain the action, and occurs when a party is sued in one county or corporation when the action should have been brought in another. 4 Min. Inst. (2d Ed.) 674.

Plea to the Jurisdiction Must Show Where Defendants Reside.—A plea in abatement of the court, on the ground that the defendants do not reside in the county where the action was brought, nor did the cause of action arise there, must not only show where the defendants do reside, but where the cause of action arose. *Raine v. Rice*, 2 Pat. & Heath 529. For form of a plea to the jurisdiction, see 4 Min. Inst. (2d Ed.) 675.

A plea in abatement to the jurisdiction of the court, on the ground that the defendant did not reside in the county in which the action was brought, nor did the cause of action arise there, must state where the defendant does reside; and where the cause of action did arise. *Middleton v. Pinnell*, 2 Gratt. 302.

A plea to the jurisdiction ought to show where the suit ought to be brought. *Barton's Law Prac.* (2d Ed.) 289.

When Too Late.—It is too late, after issue joined, to object to the court's jurisdiction, on the ground of non-residence of the defendant. *Monroe v. Redman*, 2 Munf. 240.

Same—West Virginia.—A plea in abatement to the jurisdiction of the court cannot be filed after a conditional judgment or decree *nisi*. *Simpson v. Edmiston*, 23 W. Va. 675, citing and following *Carey v. Burruss*, 20 W. Va. 571; *Delaplain v. Armstrong*, 21 W. Va. 211.

b. *Another Suit Pending.*—That another suit is pending for the same matter between the same parties, and in a court of the same state, is ground for a plea in abatement; such a defence can only be taken advantage of by plea in abatement. *Barton's Law Prac.* (2d Ed.) 290.

Necessary Averment.—A plea in abatement of a former action must aver the pendency of the action at the time of filing the plea. *Archer v. Ward*, 9 Gratt. 622.

c. *Plea in Suspension of the Action.*—This plea is in the nature of a plea in abatement. Mr. Minor says that the only instance of such a plea in Virginia today, is where the plaintiff, since the contract, has become an alien enemy. This fact disables him from suing during the pendency of hostilities, and is

therefore a proper subject for the plea for a suspension of the action. 4 Min. Inst. (2d Ed.) 675.

d. Plea in Abatement for Disability of the Person to Sue or Be Sued.—In Virginia coverture alone is ground for such a plea. For form of plea, see 4 Min. Inst. (2d Ed.) 677.

e. Plea in Abatement for Matter Apparent on the Face of the Writ and Declaration.—Mr. Minor gives, "Repugnancy, want of sufficient time, or too great time between the teste of the writ and the return day thereof; as for instance, that the writ is not returnable within ninety days from its date" as instances when such a plea is proper. 4 Min. Inst. (2d Ed.) 678.

f. Plea in Abatement for Non-Joinder of Co-Defendants.—Every plea in abatement, for non-joinder of a co-defendant must state that such other defendant resides in the state, and must state his place of residence with convenient certainty. Code, § 3261. See generally, 4 Min. Inst. (2d Ed.) 679; for form, *Id.* 682.

If one of several joint contractors be omitted as defendant, advantage of the omission can be taken only by plea in abatement. *Prunty v. Mitchell & Cobbs*, 76 Va. 169.

In assumpsit against one defendant, the plea being non-assumpsit, and it appearing during trial, that with him as partner, another was interested in the contract sued on, and that plaintiff knew it before suit, the jury were instructed that if from the evidence they believed those facts, they must find for defendant. *Held*, error, as non-joinder in assumpsit, as well as in debt and covenant, can only be taken advantage of by plea in abatement, save when it appears on the face of the declaration. *Prunty v. Mitchell*, 76 Va. 169.

g. Plea in Abatement for Misnomer of Plaintiff or Defendant.—In Virginia, now, by statute no plea in abatement for this cause is allowed in any action; but instead of it, the declaration on defendant's motion, and on affidavit of the proper name, is amended by asserting the right name. Code, § 3258.

h. Variance between the Writ and Declaration.—For form, see 4 Min. Inst. (2d Ed.) 677. By statute in Virginia the only means of taking advantage of such a variance is by plea in abatement. Code, § 3259.

If the plaintiff be permitted to amend his declaration, by consent of parties, after issue joined on a plea to the action, the defendant ought not to be permitted to plead in abatement any variance between the amended declaration and the writ, which equally existed between the writ and the original declaration. *Moss v. Stipp*, 8 Munf. 159.

After the court of appeals has passed upon a case, and remanded the cause for a new trial upon the general issue, a demurrer to the declaration or a plea in abatement upon the grounds that the christian names of the respective parties are not mentioned therein, ought not to be received. *Lanier v. Cocke*, 6 Munf. 580.

When Defendant Waives Defects in Writ.—By appearing and pleading to the action, or by taking or consenting to a continuance, the defendant waives all defects in the process and the service thereof. *Harvey v. Skipwith*, 16 Gratt. 410, cited and followed in *A. & D. R. Co. v. Peake*, 87 Va. 130, 140, 12 S. E. Rep. 348.

Ejectment.—A plea in abatement is admissible in an action of ejectment. *James River, etc., Co. v. Robinson*, 16 Gratt. 434. A defendant may waive his plea in abatement and plead in bar. *James River, etc., Co. v. Robinson*, 16 Gratt. 434.

III. TIME OF FILING PLEA.

General Rule.—The general rule is that all pleas in abatement must be filed before an office judgment. A plea to the jurisdiction must be filed at the same rules the declaration is filed. 4 Min. Inst. (2d Ed.) 678.

After Issue Joined.—After issue joined on a plea to the action, it is too late to move the court to dismiss the suit on the ground of a defect in the writ, or for leave to file a plea in abatement. *Payne v. Grim*, 3 Munf. 297.

Cannot Set Aside Office Judgment—Pais Darrein Continuance.—A plea in abatement ought not to be received to set aside an office judgment, unless it be a matter which arose *pais darrein* continuance. *Bradley v. Welch*, 1 Munf. 284; *Hunt v. Wilkinson*, 2 Call 49.

Must Be Put in before Defendant's Plea in Bar.—A plea in abatement to the jurisdiction of the court must be put in before the defendant's plea in bar. *Washington, etc., Co. v. Hobson*, 15 Gratt. 122.

IV. FORM OF THE PLEA.

"Plea No. 1 was a plea to the jurisdiction of the court. The plea is bad, and was properly stricken out by the court. It has not the proper conclusion of a dilatory plea, in that it omits the prayer for judgment 1 Chit. Pl. 451; 4 Min. Inst. 626, 1022; and 5 Rob. Prac. 2. It fails to state that the cause of action did not arise in Lynchburg; nor does it state where it did arise 5 Rob. Prac. 23; *Middleton v. Pinnell*, 2 Gratt. 32; and *Raine v. Rice*, 2 P. & H. 529. It fails to give the plaintiff a better writ by showing what court of the state has jurisdiction of the cause of action. 5 Rob. Prac. 23; and *Hortons v. Townes*, 6 Leigh 58." *Guarantee Co. v. National Bank*, 95 Va. 486, 28 S. E. Rep. 98.

Not Regarded with Favour.—"Dilatory pleas are not regarded with favour, and in order to discourage their use, are required to be drawn with the greatest accuracy and precision." The court in *Guarantee Co. v. National Bank*, 95 Va. 486, 28 S. E. Rep. 909, citing 1 Chit. on Plead. 445; 4 Min. Inst. 1036; *Hortons v. Townes*, 6 Leigh 58.

Strictness Required of Plea.—"The utmost strictness is required in pleas in abatement; and a general demurrer to such a plea has all the effect of a special one. Plea in abatement to jurisdiction held *naught* (1) because pleaded by attorney, not in person (2) because concluded with prayer *quod bills cesserit*, instead of *si curia cognoscere velit* and (3) because it did not give plaintiffs a better writ. *Hortons v. Townes*, 6 Leigh 47.

"The rule that 'pleas in abatement must give the plaintiff a better writ,' is by no means a rule of universal extent and application." The court in *Warren v. Saunders*, 27 Gratt. 259, 267.

Instance.—W sues S in assumpsit in the county of J, and sends the process to the city of R, where S resides, and it is served upon S by the sheriff of R. S files a plea in abatement stating these facts, but does not say where the cause of action arose. *Held*, the plea is sufficient in this case, though it does not give the plaintiff a better writ. *Warren v. Saunders*, 27 Gratt. 259.

Must Be Verified by Affidavit.—All pleas in abatement must be verified by affidavit. Va. Code, § 323. But it is sufficient if the affiant swears that he believes the plea to be true. *Barton's Law Prac.* (2d Ed.) 289.

How Plea Ought to Conclude.—A plea in abatement to an attachment ought not to conclude with pray-

ing judgment if the plaintiff ought to have and maintain his attachment and action, but only that the attachment be quashed. The plea that the defendant never absconded, is a plea in abatement. *Mantz v. Hendley*, 2 H. & M. 308.

Should Not Be Guilty of Duplicity.—A plea in abatement that sets out two distinct and sufficient defenses either of which if true, would have necessitated a finding on the issue in favour of the defendant, is bad, for duplicity. *Guarantee Co. v. First Nat. Bank*, 95 Va. 480.

Instances.—Administratrix, with the will annexed, must be sued in that character; and, if sued as administratrix only, without the addition of the words, with the will annexed, she may plead in abatement. *Hunt v. Wilkinson*, 2 Call 50.

A *scire facias* against the heir upon a judgment recovered against the ancestor, need not aver proceedings against the personal representative, without effect. But if no such proceedings have been had against the personal representative, the heir must set up such defense by plea, in the nature of a plea in abatement. *Rogers v. Denham's Heirs*, 2 Gratt. 200.

A joint plea in abatement by two defendants, which is bad as to one, is necessarily bad as to the other. *Simpson v. Edmiston*, 23 W. Va. 675.

V. PLEAS IN ABATEMENT IN CRIMINAL CASES.

Prisoner Should Plead in Person.—A prisoner indicted for felony should be present in court, and should plead in person, and the record should show that fact. *State v. Allen*, 45 W. Va. 65, 30 S. E. Rep. 209.

How Issue Joined on Plea Should Be Tried.—Upon an indictment for a felony, the prisoner pleads in abatement that one of the grand jurors who found the indictment against him, was at the time a surveyor of a highway; and the attorney for the commonwealth takes issue upon the plea. The issue should be tried by a jury. *Day v. Commonwealth*, 2 Gratt. 562.

Time of Filing Plea.—After a prisoner has been tried by an examining court and remanded for further trial before the circuit court, and an indictment has been found against him, it is too late to plead in abatement that, or move to quash the indictment because, there were irregularities in his examination before the committing magistrate. *Clore's Case*, 8 Gratt. 605.

After a verdict against a prisoner, he cannot move in arrest of judgment, that he was not examined for the felony, of which he was indicted. The objection comes too late. *Angel v. Commonwealth*, 2 Va. Cas. 281.

After a verdict convicting a prisoner of a felony, a plea in arrest of judgment, that he has not been examined for the offense by a court of competent jurisdiction (alleging that the corporation court, by which he was examined, has no criminal jurisdiction), ought to be overruled; because the said plea suggests matter making no part of the record, but matter which, if true, is proper for a plea in abatement, or for a motion to quash the indictment. *Commonwealth v. Cohen*, 2 Va. Cas. 158.

In a suit for freedom there is a special verdict which finds that the defendant took possession of the plaintiff in the county of Prince Georges, Maryland, and has since retained her in his possession down to the institution of this suit; but it does not state that the plaintiff was detained as a slave in the county where the suit was brought. Though deten-

tion of the plaintiff where the suit is brought is necessary to give the court jurisdiction, yet as the court has general jurisdiction over the subject-matter of controversy, the objection to the exercise of jurisdiction in the particular case, for this cause, is matter in abatement of the proceeding, and should be pleaded, or brought to the notice of the court by rule or motion before the jury is sworn in the cause. *Hunter v. Humphreys*, 14 Gratt. 287.

The refusal of the examining court to grant the prisoner a continuance of the case, is no ground for arresting judgment in the circuit court; but, if available there at all, it should be taken advantage of by plea in abatement or motion to quash the indictment. *Morris v. Commonwealth*, 9 Leigh 636.

Prosecutor's Name Need Not Appear in Felony Case.—Code 1887, § 3991, does not require name of prosecutor to be written at foot of indictment for felony, but only for misdemeanor. *Thompson v. Commonwealth*, 88 Va. 45.

Same—Misdemeanor.—In an indictment for a trespass or misdemeanor, it is not necessary to insert the name or surname of a prosecutor at the foot of the indictment, if it appears that the indictment was found true on the evidence of a witness sent to the grand jury, either at their own request, or by direction of the court, and this whether there was a previous presentment or not. *Wortham v. Commonwealth*, 5 Rand. 609.

The omission to write the title or profession of the prosecutor at the foot of an information or indictment, is no ground of exception, either by motion to quash or plea in abatement. *Commonwealth v. Dever*, 10 Leigh 685.

Names of Witnesses Need Not Appear on Indictment.—The omission by the grand jury to write the name of the witness on whose testimony an indictment is found, at the foot thereof, is no ground for quashing the indictment. *Commonwealth v. Williams*, 5 Gratt. 702.

Two Pleas Admissible to Same Indictment.—A plea in abatement, that one of the grand jury is the owner of a mill, is good. Two pleas in abatement to the same presentment are admissible. *Commonwealth v. Long*, 2 Va. Cas. 318.

Autrefois—What Plea Must Show.—A plea of *autrefois acquit*, which does not set forth the court, nor the time, nor other circumstances of the trial or acquittal, nor vouch the record, nor show it, if of another court, should be rejected on motion. The attorney ought not to be required, either to plead or demur to it. *Wortham v. Commonwealth*, 5 Rand. 609. See monographic note, "Autrefois, Acquit and Convict." 26 Gratt. 951.

Should Be Verified by Oath.—Pleas in abatement, offered in prosecution for misdemeanor, ought to be verified by oath or affirmation. *Commonwealth v. Sayers*, 8 Leigh 722.

Plea in Abatement Waived by Pleading General Issue.—"By pleading the general issue alone, a defendant has always been understood to waive the right to interpose afterwards a plea in abatement. The settled doctrine, however, is that the judge may permit a pleading to be withdrawn, and another one to be substituted, whenever by so doing he does not violate any positive rule of law or of established practice. But such a discretion will rarely, if ever, be exercised in aid of an attempt to rely upon a merely dilatory or formal defense. 1 Bish. Crim. Proc. (2d Ed.) sec. 124." The court in *Early v. Commonwealth*, 86 Va. 924.

Plea to the Jurisdiction Should Always Be Considered.

—On the 24th of June 1867 P. was committed by a justice of the peace for examination, upon a charge of murder. The examining court commenced on the 2nd of July, and sent him on for trial before the circuit court of the county. At the October term 1867 of the circuit court, he was indicted for murder, and when he was arraigned he tendered a plea to the jurisdiction of the circuit court. The court had jurisdiction to try the prisoner. Though the plea rendered by the prisoner was informal and properly rejected by the court, yet the objection to the jurisdiction being a mere question of law, however made whether by suggestion or motion *ore tenus*, should be considered and decided by the court. *Phillips v. Commonwealth*, 19 Gratt. 486.

Instance.—A plea in abatement of an indictment for a trespass, or misdemeanor, alleging that the prosecutor is not a labourer, but a husbandman, is bad on demurrer. *Haught v. Commonwealth*, 2 Va. Cas. 3.

Upon a presentment for gaming, defendant pleads in abatement, that the clerk *de facto*, who administered the oath to the grand jury that made the presentment, was not clerk *de jure*, at the time. *Held*, the plea is naught. *Hord v. Commonwealth*, 4 Leigh 674.

Plea in abatement will not lie to an indictment, for that the court, if a sufficient number of jurors summoned are not in attendance, causes the required number to be returned from the county at large. Nor for that two or more of the grand jury which found the indictment, had served on another grand jury at the same term. How they voted on the indictment as members of the first grand jury, could not properly be inquired into. Nor for that the sheriff or his deputy were in the grand jury's room, when they were deliberating and examining witnesses, upon whose testimony the indictment was found. *Richardson v. Commonwealth*, 76 Va. 1007.

A plea in abatement to an indictment which avers that the prosecuting attorney, of his own motion, without authority of law, went into the room where the grand jury were sitting, and, in the presence of the grand jury, examined certain named witnesses, upon whose testimony the indictment was found, and talked in the presence of the grand jury about the said testimony of said witnesses, and thus unlawfully conspired against the defendant to have and procure the grand jury to find the indictment, does not present cause for abating the indictment, and was properly rejected. *State v. Baker*, 33 W. Va. 319, 10 S. E. Rep. 639.

270 *Tosh & als. v. Robertson & als.

March Term, 1876, Richmond.

1. **Executor—Receiving Confederate Money.**—R dies in 1866, and by his will directs his executor to sell his land in three parcels, at public auction, upon such terms as he deems best for the interest of testator's legatees. These legatees are infants. In November 1860 the executor sells the lands on a credit of six and twelve months, taking bonds of the purchasers and retaining the title. The execu-

***Fiduciaries Receiving Confederate Money.**—See *Taylor v. Lancaster*, 33 Gratt. 1, and *note*; *Patteson v. Bondurant*, 30 Gratt. 94, and *note*; *Purdie v. Jones*, 32 Gratt. 827, and *note*; *Crawford v. Shover*, 29 Gratt. 60; *Myers v. Nelson*, 26 Gratt. 729, and *note*.

tor being in the army during the war, the purchasers paid the purchase money to his agent, during the years 1863 and 1864, in confederate currency. **HELD:** The executor was guilty of a *devastavit* in receiving the purchase money in the then depreciated currency, and the purchasers were parties to the *devastavit*; and they will be required to take the lands at their value at the time of the decree, or the lands will be again sold.

2. **Improvements—Rents and Profits.**—Though the decree makes no allowance for improvements which the purchasers allege they have made upon the lands, yet, as the rents and profits of the lands, or the interest on the purchase money, with neither of which they are charged, would amount to more than these improvements which they claim, there is no error in the decree.

This was a suit in equity in the circuit court of Pittsylvania, instituted in December 1867, by Christopher C. Robertson and three others, who were infants, against Crispin Dickenson, the executor of Henry Robertson deceased, to have a settlement of his executorial accounts, &c. The bill was afterwards amended, and the purchasers of the land of the testator from the executor were made parties defendants. On the 11th of November 1871 there was a decree against the purchasers of the land; and they 271 thereupon applied *to this court for an appeal; which was allowed. The case is stated in the opinion.

Grattan, for the appellants.

Jones & Bouldin, for the appellees.

Christian J. delivered the opinion of the court.

This is an appeal from a decree of the circuit court of Pittsylvania. The material facts disclosed by the record are as follows: Henry Robertson by his will, admitted to probate and record in the county court of Pittsylvania on the 15th October 1860, made the following devise: "It is also my will and desire, that my executors hereafter named shall, as soon as convenient to them after my death, divide my landed estate into three different tracts as follows: the mill tract, as per the survey from C. W. Ward; the home tract and the William Fowler tract to compose one lot; and the gold mine tract, as purchased by my brother E. O. Robertson, the other lot; and sell the said three tracts of land at public auction, upon such terms as they may deem best for the interest of my legatees." These legatees were his children, who were all infants, and who were to share equally in the proceeds of said sale. John D. Glenn and Crispin Dickenson were appointed his executors. The former declining to qualify, Dickenson alone undertook the execution of the will. He sold the land in different lots, as directed by the testator. The sale was made on the 12th November 1860, on a credit of six and twelve months; so that the bonds became due respectively on the 12th May 1861 and November 12, 1861. The aggregate amount of these land sales 272 was \$5,240.61: the sale of *personal property, amounting to nearly \$2,000, was made on the same day, upon a credit

of six months, except for sums under five dollars.

The executor settled no account of his administration of his testator's estate until after the close of the war; and everything which he did in that direction before this suit was brought was to return an inventory and account of sales of his testator's estate, real and personal.

The debts of the testator seemed to be inconsiderable, and were all paid in 1860, 1861 and 1862. But not a dollar was ever paid over by the executor to the legatees.

In December 1867 these legatees, three of them still being infants, filed their bill in the circuit court of Pittsylvania, calling upon the executor for a settlement of his transactions as executor, and the payment of them of whatever remained of their father's estate after payment of his debts. This bill after setting out the will of the testator, the sale by the executor of the real and personal estate in 1860, and the debts due to the testator, charged that "when the executor was called on to settle his account with complainants and their proper guardians, he refused to do so, alleging that the purchase money for the real and personal estate, as well as the evidences of debt mentioned aforesaid, were not collected by him until late in the year 1864, and were collected by him until late in the year 1864, and were collected in confederate treasury notes, which became by the issue of the late war entirely worthless; and that the executor has settled before a commissioner of the county court of Pittsylvania an ex parte account since the close of the war, accounting for the proceeds of this large estate of his testator, which was sold when the currency was gold, or its equivalent, in confederate currency, which, scaled to its

273 *gold value, reduces said estate to a mere trifle." The bill further charges, "that if the executor chose to indulge the purchasers at the sales made by him, or chose to collect the same in 1864 in confederate money, he did it at his peril, and should be held accountable to them for it. They insist that being then infants, unable to maintain and demand their rights and watch their own interests, it was imperatively the duty of the executor to use his utmost diligence in securing and protecting their rights; that if he failed to collect the debts, when there was a standard currency in specie or its equivalent, he had no right to receive any other; but that it was his duty to secure said debts either by good personal security or by judgment liens, for the attainment of which the courts were all the time open and available. To this bill the executor and his sureties were made parties defendants, and the prayer of the bill was, that the executor might be compelled to settle his account before a commissioner of the court, and be required to account for the proceeds of the sales made by him in such currency as said sales were made by him.

The executor answered this bill. He admitted the sales of real and personal es-

tate, as set forth in the bill; and then says, in justification of his course in not collecting the bonds when due, and in receiving confederate currency when so greatly depreciated:—this respondent used every effort to collect said purchase money soon after the commencement of the war as long as he remained at home, and after going into the service, he appointed an agent to collect it for him, who in 1863, and to the first of 1864, collected a portion of the same, all of which, as his said agent informs him, he has in hand now—the identical notes he collected.

This respondent was in the service 274 from *the time he entered it (in February 1862) until the surrender at Appomattox, so that he could not give the matter his personal attention; but he appointed a discreet, prudent agent to attend to it for him, and he never used for his own purposes, either for speculation or otherwise, one dollar of the money. The said agent informed this respondent that he made repeated efforts to have said money distributed among the legatees; but such was the state of things, and the courts were so occupied with matters relative to the war, that he (as he informs this respondent) never could have it done. This respondent, finding that he could not possibly attend to his duties as executor while in the service of the country, wrote to his agent to have someone appointed in his stead, and two or three times (as he informed him) it was attempted to be done, but, from the same causes it was not effected; and after the confederate authorities passed a law compelling all creditors, under heavy penalties, to take confederate money, and not until then, did this respondent agree that his agent should collect said debts in confederate money; and this respondent collected his own debts, due to him, individually, before the war in the same currency, and, so far as he is informed, the people generally did the same, and he is advised that a fiduciary is not an insurer of the currency of the country at any time, and, least of all, in times such as we have fallen on within the last few years, and that he will not be held liable if he acts in good faith and manages the affairs of the estate committed to his care in the same way that he and other prudent people manage their own private affairs. All the bonds, notes, &c., belonging to the estate, and not collected, are now in the hands of this respondent, and he is ready to make such

disposition of them as the court may 275 direct, and *to settle his account in such manner as to the court may seem right. He further states, that no deeds have been made to the purchasers of said lands; and this respondent submits that, under the circumstances, he should not be held responsible for the money, and be required at the same time to convey the lands to the purchasers; and if the sales are to be set aside as to anything, that they should be set aside out and out, and a re-sale directed. One of the purchasers of the land proposed to pay this respondent for the same in confederate money when he was at home

on a furlough in 1863, and on being informed that this respondent had not the papers with him, threatened to compel him to take the money under the penalties of the law, and, under the advice of counsel, it was paid to the agent aforesaid.

Upon the coming in of this answer, the court entered a decree directing one of the commissioners to take and report an account of the value of confederate money at the time the bonds for the payment of the lands sold by the executor, Crispin Dickenson, in the proceedings mentioned, respectively became due, and also the value of the currency at the time payments were made by the purchasers of said lands to the executor or his agent for said lands, and also the value of said lands in good currency at this time. The court doth further adjudge, order and decree, that said executor is properly chargeable with the bonds and other evidences of debt which came into his hands or were taken by him as executor of Henry Robertson, deceased, and filed with and referred to in commissioner Banks' report, and that said executor proceed at once to collect the same. The court being further of the opinion that the parties who purchased the lands, sold by said executor, should be
276 made parties to this suit, "doth order that the plaintiffs amend their bill and make such persons parties thereto.

Under this decree the plaintiff filed an amended bill, making the purchasers of the real estate parties defendant.

The purchasers answer the bill, admit that they paid the purchase money in confederate currency, part in 1863 and part in 1864; but claim that having fully paid the purchase money to the executor who was authorized to receive it, they are entitled to have the lands conveyed to them. Two of them claim that they have put valuable improvements upon the lands so purchased, and "claim the benefit of the improvements so made."

The report of the commissioner returned under the above decree directing him to ascertain the value of the currency at the time the payments were made, shows that the larger portion of the purchase money (all of which was due in a sound currency and before confederate currency came into circulation), was paid in the year 1864, when the rate of depreciation was \$27.00 for \$1.00; showing that the purchaser Tosh paid his debt of \$2,685.50 due in gold, with a currency worth only \$319.50, and that the purchaser Crider paid his debt of \$2,404.50, due in gold, in a currency worth only \$144.98, and that the purchaser Jacobs paid his debt of \$512.47, in a currency worth only \$18.31; or in other words, showing that the debts arising from the sale of lands of the testator devised to be sold and to be divided among his infant children, amounting to \$5,602.47, were discharged by the payment of \$482.79.

The commissioner also returned a report showing the present value of the three tracts of land sold by the executor. Upon the return of these reports of its commis-

sioner, the circuit court at the November term *1871, entered its decree declaring "that the interests of the legatees of Henry Robertson under his will, all of whom were infants during the time, were improperly and grossly prejudiced and sacrificed by the executor through his agent, in receiving a currency so greatly depreciated when no necessity existed to justify the same, and also by the purchasers in paying in a greatly depreciated currency the purchase money on said lands, for which bonds were executed when there was no depreciation in the currency of the country, and before confederate currency was issued." The court then decreed that unless the purchasers should elect within sixty days, to take the land purchased by them respectively in 1860, at the then present value reported by the commissioner, the same should be sold by a commissioner appointed for that purpose; and that if they should elect to take the same at such value they should be credited by the gold value of the payments they made to the executor at the time such payments were made. It is from this decree that an appeal was allowed by this court.

The court is of opinion that there is no error in this decree, so far as it holds the purchasers as well as the executor liable to the devisees of Henry Robertson for the purchase money of the lands sold by the executor. The conduct of the executor in receiving debts contracted to be paid in gold or its equivalent, in a currency depreciated to such an extent that debts amounting to \$5,602.47, well secured, were discharged by the payment of \$482.79, was so grossly negligent, and such a reckless sacrifice of the interests of these infants whom his testator had committed to his care and protection both as executor and trustee, as to constitute a fraud in law, and cannot be tolerated for a moment in a court of
278 equity. His answer, upon the "most liberal interpretation of his motives and conduct, furnishes no justification or excuse. The fact that war was flagrant and business suspended, and the courts closed, may furnish an excuse for not bringing suit upon the bonds he held; but can furnish none for his receiving gold debts well secured, in confederate money almost worthless—for instance in giving up a debt of upwards of 500 dollars for 18 dollars.

It is not true, as asserted in his answer, that there was any "law compelling all creditors, under heavy penalties, to take confederate money." No such law existed. The statute in respect to a tender of confederate money applied only to a case where the contract of the parties was to be fulfilled or performed in confederate treasury notes. It had no reference, and could have none, to debts contracted for gold or its equivalent, and before the existence of confederate currency. There is and can be no justification or excuse for an executor guilty of such gross negligence and palpable fraud in law as is shown in this case.

And now the question is, did the purchasers, in failing to pay these debts when they became due in May and November 1861, and in insisting on paying them in 1863 and 1864 in an almost worthless currency, participate in the devastavit of the executor and the breach of trust committed by him, so as to make them liable to the infants, whose lands they got, but never paid for? We think they did. We do not mean to say, that in every case where an executor may be held liable, as committing a devastavit, for collecting a good debt, well secured and payable in gold, in a depreciated currency, that the party who pays the debt is necessarily liable as participating in such default or fraud of the executor. On the contrary, there may be

cases where the collection of a debt in 279 a depreciated currency *would be a devastavit in the executor, and yet no liability is fixed upon the party who pays the debt. He, the debtor, does not know, and is not, generally, bound to inquire, what may be the necessities of the estate represented by the executor. For aught he knows, the debt which he pays may pay a debt due from the estate, or pay a legacy which a legatee may be willing to receive in a depreciated currency. But this is not the case before us. Here is not the case simply of the collection of a debt due to the testator and collected by the executor, but the dealing is directly between the executor and these defendants as seller and purchaser, vendor and vendee.

These defendants are in default in not paying the bonds when they became due in the currency which they agreed to pay, and in paying to the agent of the executor a worthless currency for the land of these infants, for which they agreed to pay gold. In other words, they hold the lands of these infants, for which they have not paid one-tenth of their value. They have taken in and cancelled their bonds, amounting to upwards of \$5,000, by paying to the executor something over \$400. Suppose the executor had sold these bonds—for instance, suppose he had sold Jacobs' bond of \$500 for \$18, would not both seller and buyer have been held liable for so gross and palpable a fraud? Pinchard v. Woods, 8 Gratt. 140; Jones' ex'or v. Clarke, 25 Gratt. 642. Practically this was just what was done. Jacobs paid but \$18 for his obligation of \$500; and both he and the executor must be held liable for the gross fraud upon the rights of these infants, in which both participated.

We are therefore of opinion that there is no error in the decree of the circuit court directing a sale of the land, unless the 280 purchasers elect to pay for the *same the value of the same ascertained by the commissioner; this court being of opinion that the facts proved are such as clearly to charge the executor with a devastavit and breach of trust, and the purchasers with participation in and responsibility for the same.

The court is further of opinion that there is no error in the decree of said circuit

court, as assigned in the petition of appeal, that the court failed to allow the purchasers for the improvements put on the land.

Certainly there is no error to the prejudice of the appellants. No interest is charged against the appellants in these debts due since November 1861, and they are not required to account for rents and profits. These (interest and rents) would more than overbalance all the claims asserted for improvements by the appellants.

It is manifest that upon a settlement of accounts charging the purchasers with the interest or the rents and profits since November 1861, and crediting them with all the improvements they claim, they would be indebted to the appellees in a much larger amount than that decreed against them. If they elect to hold as purchasers, then they would be charged with interest. If they give up the purchase, they should be chargeable with rents and profits, which, in either case, would overbalance the improvements claimed.

Upon the whole case we are of opinion to affirm the decree of the circuit court.

Decree affirmed.

281 *Erwin & Wife v. Nichols & al.

March Term, 1876, Richmond.

Wills—Construction.—A testator having in term provided for an equal division of his personal estate among his three children, held, upon a consideration of the whole will, that he did not intend that certain land he gives to one of the children should be charged to him in the division of the personal estate.

Abel B. Nichols, of the county of Bedford, died in February 1868. He was a widower, and left three children, James L., George A. and Sally E., then married to Holmes Erwin. He left a will, wholly written by himself, which was duly admitted to probate in the county court of Bedford. So much of the paper as bears upon the only question in this case is as follows:

* * * * * Desiring to make some certain disposal of property which I own, not that I desire to discriminate among my children, but to equalize previous advancements, and perhaps make some donations that without a will would not be made. But owing to the late war and the present distracted state of the country cash donations cannot be made with much certainty, especially with the present inflated state of the currency. Now in setting forth the advancements made my children heretofore I shall not confine myself to any bill of items, for a great deal of money and property of various kinds have not been charges at all on my books. So I shall endeavor to state an account approximating as 282 near as I think *right and proper in all cases; and I trust the plan will be satisfactory to all parties interested; and as my decision will be final and not in any case to be altered, I shall require a new

set of books to be opened, for at all times for all persons interested to examine the same. * * * * *

Now, in the first place, I shall designate the several amounts to be charged to the several legatees, viz: Item 1st. To charge my oldest son, James L. Nichols, for various sums advanced him, as also several thousand dollars advanced to his different firms or partnerships, to-wit: Nichols, Moulton & Co., the partner was George Johnston, formerly in or near Alexandria, Va., the other firm of Nichols & Moulton, now or recently of Baltimore, Md., together with various land warrants—in all, I have estimated at twenty thousand dollars (\$20,000), which sum is much under the actual amounts, exclusive of interest. I charge my second —, Geo. A. Nichols, with the sum of ten thousand dollars (\$10,000), which will include all advances up to the date of my demise, such as stock, household and kitchen furniture, given him at his removal to the Harriss place, but no real estate has been given off, and no compensation for services will be allowed him at my death, except such as I shall annually devise for his services, &c. So my intention is, that there shall be no old back accounts to adjust after my demise. I also charge my daughter, Sally E. Nichols, with the sum of five thousand dollars for advances made to her and her husband, Holmes Erwin, since their marriage. I further desire my daughter Sally Erwin to have the benefit and rents of my property in Lynchburg—say one-half of the two stores on Main street, one of which is at present occupied by Geo. M. Rucker, and the other by 283 Pain & Brother, as a book store, also the house occupied by Button as a printing and binding office, the stable, yard, &c. My wish is that this property shall belong to my daughter Sally during her life, and then to the heirs of her body, to wit: her daughter Mary, and any other heir or heirs of her body, the one-half of this property I estimate at fifteen thousand dollars (\$15,000), which is designed to make her portion equal to her brother's, James L. Nichols. I desire my eldest son, James L. Nichols, to have the benefit and entire profits of my Harriss plantation, as also two parcels of land adjoining, bought of Johnson & Terry, and adjoining the main road from Little Otter to Liberty, as also a piece of twenty-seven acres or thereabout, bought of Webb, all in wood, and adjoining John F. Sales' and Thos. Leftwitch's land. Should my said son James L. Nichols, die without legal issue, then at his death, the land aforesaid is to revert back, and the profits from the date of his death, to the other children of Geo. A. Nichols and Sally E. Nichols. I design, however, a new line to be run, cutting off a small portion of the Harriss and other lands and adding the same to the home or Webb tract—to commence &c. * * It is my wish that this land so cut off, shall forever belong to the home or Webb tract. I also give and bequeath to my second son, George A.

Nichols, the use, profits and benefit of the home or Webb tract of land, as also the small piece, near Otter, on the east side of the main road. Also a small piece, bought of Watson, and a small piece of wood land, bought from William A. Hardy, to have and to hold, and take the benefit and profits of the same during his life, and then to the heirs of his body forever. My object and intention is, that no landed property shall be put in market and sold during the 284 life of my *children, but they are not restricted in regard to the personal effects of my estate, which are to be equally divided between the three legatees afore specified. I think the personal effects, good bonds, &c. will amount to perhaps over fifty thousand dollars, but great doubt exists in regard to their collection, as the stay law, bankrupt law, and the apparent general disposition to repudiate debts, all have a tendency to lessen the chances of realizing. I desire the horse power, mill, cutting box, cider mill, drill, reaper and mower, together with the threshing, not to be sold, or any inventory taken of them, but they are to be considered as a part of the freehold, and as belonging to my son George A. Nichols' tract. The real estate devised, or the profits, to George and Sally, I think will equalize their portions with James L. Nichols' previous advancements. I regard James L. Nichols' transfer of the lands heretofore mentioned, rather in excess of his proper portion; still I am unwilling to hamper him with debt. But I shall especially enjoin it on him that no wood is to be sold off from the estate, or timber of any kind; and I also enjoin it on George not to cut off from the Webb tract any wood or timber, except what the place absolutely requires.

The beneficiaries under the will having differed as to its proper construction, Erwin and wife instituted their suit in the circuit court of Bedford county against James L. and George A. Nichols, to have the construction settled. The sole question was, whether the real estate devised to the different children was to be estimated in making the division among them: or whether the equal division contemplated by the will had reference solely to the personal estate.

The cause came on to be heard on the 7th of February 1872, when the court made 285 the following decree: *It is the opinion of the court that one of the leading intents of the testator, Abel B. Nichols, in making the will in the bill mentioned, was to define the amounts of the advancements theretofore made by him to each of his children, and to adjust the inequalities in the amounts of the same by bequests or devises in his will, so as to make them all equal, or to "approximate equality as near as he thought right and proper," so that after his death there should be no accounts of advancements, or of any other kind (to use his own language 'no old book accounts'), to be charged to or to be settled and adjusted between his legatees. And the court is further of opinion, and doth decide, that by the devise to Mrs. Erwin of a life

estate in the property in Lynchburg (mentioned in said will), and to George A. Nichols of a life estate in the 'Home or Webb' tract of land, likewise mentioned in said will, with remainder in fee to their issue respectively, the said testator intended to make them equal with the said James L. Nichols in respect to the advancements previously made by him to his children, or to make them approximate equality as near as he thought right and proper, and by the said devise in his estimation did make them all equal, or as nearly equal, as he thought right and proper, and chose to do; and that although he thought the devise to the said James L. Nichols of a life estate in the 'Harris' tract of land, with a contingent remainder over to the issue of Mrs. Erwin and George A. Nichols, was somewhat in excess of his share of his estate, he did not intend that the said James L. should account for that excess; and that, according to the true construction of the said will (whether actual equality among his children has been attained or not), by this 'plan' or scheme of the testator, 286 yet that such was his will and *final disposition, and all who claim under his will must abide by it; and therefore there is to be no account taken of the advancements by the testator in his lifetime to his children, and the whole of his personal estate, after paying the debts of the testator and costs of administration, and satisfying the specific legacies given by the said will, is to be equally divided between the female plaintiff and the defendants. And the court doth further adjudge, order and decree, that the said executors do administer and distribute the estate of their testator in conformity with this decree upon the principles above declared. And, thereupon, Erwin and wife applied to this court for an appeal; which was allowed.

Kean and Thurman, for the appellants.

Jones & Bouldin and Burks, for the appellees.

Anderson, J., delivered the opinion of the court.

The testator, A. B. Nichols, left three children, James L., George A., and Sally E., who had intermarried with Holmes Erwin, to whom he had made unequal advancements, which he ascertains and determines by his will. The advancements to James he puts at \$20,000; to George, at \$10,000; and to Sally, at \$5,000. And then devises to Sally Erwin real estate in Lynchburg for life, remainder in fee to her daughter Mary and to any other heirs of her body, which he values at \$15,000. This devise he declares "is designed to make her portion equal to her brother's, James L. Nichols." He then gives to his eldest son, James, the benefit and entire profits of his Harris plantation and other lands mentioned; and provides, that should he die without legal issue (he was then thirty-eight years of age, and unmarried), the lands given to him 287 should *go to the children of George and Sally. He then gives to his son

George the use, profits and benefit of the home or Webb tract of land, and other lands mentioned, "to have and to hold, and take the benefit of the profits of the same during his life, and then to the heirs of his body forever." He says his object and intention is, that no landed property shall be put in market and sold during the life of his children; but they are not restricted in regard to the personal effects of his estate, which he says are to be equally divided between his three legatees. After putting his estimate upon the personal effects, good bonds, &c., which he says perhaps may amount to over fifty thousand dollars, but about which he thinks there is great doubt, from causes which he assigns; and after designating certain articles of property which are to be considered as part of the freehold and as belonging to his son George's tract, he says: "The real estate devised, or the profits, to George and Sally, I think will equalize their portions with James L. Nichols' previous advancements." And then immediately adds: "I regard James L. Nichols' transfer of the lands heretofore mentioned rather in excess of his proper proportion; still I am unwilling to hamper him with debt."

Upon the case thus made by the record, we have to determine whether an account of the advancements, and of the bequests and devises hereinbefore recited, shall be brought into the distribution of the personal estate. And that is the only question.

By the express terms of the will, the devise to Sally Erwin was designed to make her portion equal to her brother's, James L. Nichols. And the testator also declares that the devises he made to George and Sally he thinks will equalize their 288 portions with James L. *Nichols' previous advancements. The equalization of the advancements was therefore effected by the testator himself in the disposition he made of the real estate, and they were not left open, to be equalized out of the personal estate, or to be charged to account.

It only remains therefore to inquire: Is James L. Nichols chargeable, in the distribution of the personal estate, with the real estate devised to him for life, with contingent remainder in fee to the children of George Nichols and Sally Erwin, as an offset against his distributive share of the personal estate? Was such the intention of the testator? He says expressly, that the personal estate shall be equally divided between his three legatees. His language is peculiar. He says "the personal effects of my estate, which are to be equally divided between the three legatees afore specified." Did he mean to say that there should be an equal division of the personal effects of his estate between his three legatees, by adding thereto the value of the interest in his real estate which he had given to his son James, and charging him therewith? If he had so intended, he could easily have said it. But he did not. If he had, what account was to be taken of the valuable inter-

est in the same real estate which he had contingently devised to the children of George and Sally? Was no account to be taken of that? He does not expressly embrace the said real estate in the division of the personal estate, but directs an equal division of the latter, without any qualifying words. Nor can his intention to embrace it be implied by what is expressed, but rather the contrary, for, in the same paragraph, he acknowledges the inequality, but declines to change it. He says: "I regard James L. Nichols transfer of the lands, heretofore mentioned, rather in excess of his proper (equal) portion (he 289 will *not change it), "still I am unwilling (he says) to hamper him with debt." He directs an equal division of his personal estate between his three legatees, with the fact present to his mind, that the disposition he had made of his real estate in favor of his son James was rather in excess of an equal share to him, but adheres to an equal division of the personal estate notwithstanding, and assigns as a reason, that he is not willing "to hamper him with debt." So far from an implication arising from the language of the will, that whilst the testator directs his personal estate shall be equally divided between his three legatees, he did not mean that, but meant that James should not get an equal share of the personal estate, but should be charged with the value of the interest given to him in the real estate, and that his division of the personal estate should be less than an equal share by the value of his interest, or excess of equality in the real estate, we think the contrary is clearly implied.

The testator nowhere applies the same language of equality to the division of his estate generally, that he applies to the division of his personal estate. It does not seem to have been his aim to conform to exact equality in the division of his estate. In regard to the charges for advancements to his children, to which he seems to have special but not exclusive reference, he says "I shall endeavor to approximate (not equality, but) as near as I think right and proper in all cases, and I trust it will be satisfactory to all parties interested, as my decision is final, and cannot be altered." James was his eldest child, and had been unfortunate in business. He doubtless considered his losses, and that he would get much less of his estate at his death than his brother and sister; and that he had given to him only a right to the rents and profits of the 290 land "during his life, and that it would then go, in the event of his dying without issue, which he may have thought to be probable, to George and Sallie's children, and that after all the inequality would be inconsiderable. And it was one of his objects in making a will, that he might make some donations, which he could not make without a will. We regard the declaration made in a previous clause of the will to the effect, that no moneys shall be required to be paid over to legatees until their claims are equalized, relied upon by appel-

lant's counsel, as having reference to the equalization of the purchases which they might make at the sales, and consequently not at all militating against the foregoing construction given to other clauses of the will. We think there is no error in the decree, and are of opinion to affirm it with costs.

Decree affirmed.

291 *Sands v. Lynham, Escheator.

March Term, 1876, Richmond.

[21 Am. Rep. 348.]

I. *Allens—Real Estate of Escheat—H.*, of foreign birth, died in 1867, seized and possessed of real estate in R. Intestate and without any known heirs. The real estate of which he died seized vested in possession in the state without office found, or other proceedings at law.

II. *Same—Personal Representative of—Judgment against.*—After the death of H. G sued his curator S for a large debt, alleged to be due from H, and there was a judgment by default. G then sued S, the curator, in equity, to subject the real estate of which H died seized for the payment of the judgment. There was a decree for a sale, and a sale in pursuance of the decree, when J became the purchaser of a part of the property. **Held:**

1. *Same—Same—Same—Decree for Sale—Partia.*—The state not having been a party to the suit, the decree and sale are a nullity as to her, and gave J no title to the property purchased by him.

2. *Same—Same—Same—Rights of Bona Fide Purchaser.*—If J was a bona fide purchaser, he is entitled to be substituted to the rights of the creditor G; and upon showing that the claim of G is just, to have the real estate subjected to its payment.

III. *Same—Real Estate of Escheat—Injunction.*—After the death of H, an inquisition of escheat was executed in 1868; and the jury, after finding the death of H without known heirs seized of the real estate, stated that certain parties were in possession, claiming under said sale. The escheator returned the inquisition in June 1869, when the property was advertised as escheated. J then filed his petition in the proper court, stating he held the property under his purchase, and asking for an injunction. The escheator and register were made parties; but before the escheator answered, the court made a decree perpetuating the injunction. The escheator then filed a bill to review the decree. **Held:**

1. *Same—Same—Same—Same—Error.*—It was error to make a decree passing upon the rights of the purchaser of the property, and perpetuating

292 ing the injunction, "without the answer of the escheator. Code of 1860, ch. 113, § 8.

2. *Same—Same—Same—Proceedings by Escheator.*—As the title of the state does not depend upon the inquisition, it cannot be affected by any error or irregularities in the proceedings of the escheator.

3. *Same—Same—Same—Same.*—The decree of the*

*Bill of Review—Petition for a Rehearing.—The principal case is cited in *Kendrick v. Whitney*, 28 Gratt. 655; *Sturm v. Fleming*, 22 W. Va. 413. See also, *Laidley v. Merrifield*, 7 Leigh 346; *Mettert v. Hagan*, 30 Gratt. 231; 3 Enc. Pl. & Pr. 592.

court was a decree by default; and the bill of review by the escheator, may be treated as a petition for a rehearing of the decree.

4. Same—Same—Same—Same—Bill of Review.—But it was a proper case for a bill of review.

Solomon Haunstein, of foreign birth, died seized of an estate of inheritance in six houses and lots in the city of Richmond. He was unmarried and died intestate; and his estate was committed to Richard D. Sanxay, as curator. In March 1867 Wm. Gleason, as assignee of John W. Thompson, recovered a judgment by default against Sanxay as curator of Haunstein's estate, for \$7,000, with interest from April 1st, 1861; and in April in a suit brought by Gleason against Sanxay as curator, in the circuit court of Henrico, in which the bill and answer were presented at the same time, and the cause docketed by consent, the court made a decree appointing Sanxay a commissioner to sell the real estate of Haunstein, to receive the purchase money, and convey the property to the purchaser; and out of the proceeds of the sale pay off the judgment recovered by Gleason. A copy of the decree and of the judgment are the only parts of the record in that case which have been filed in this; but there are two deeds, one from Sanxay as commissioner, to Johnson H. Sands, as the purchaser of two of the lots of Haunstein, and the other from Mary J. Wilkinson, who had been a purchaser at the sale by Sanxay, to Sands of the lot so purchased by her.

In May 1868 an inquisition of escheat was

held by Samuel M. Page, escheator of the city of Richmond, *when the jury found Haunstein did die seized of an estate of inheritance in the said six lots; that he died intestate and without heirs, and that there was no person known to the jury to be entitled to said lots; but that they had been by a decree of the circuit court of the county of Henrico, sold to satisfy an office judgment obtained against the estate of Haunstein since his death; and that there were then at the time of the said inquisition certain parties in possession of said lots claiming them under said sale.

Page did not return his certificate of said inquisition to the register of the land office until June 1869; and the register then advertised the property as escheated.

On the 10th of July 1869, Johnson H. Sands filed his petition in the circuit court of the city of Richmond, in which he set up his claim to the three of the Haunstein lots which he had purchased as before stated; he pointed to certain irregularities in the proceedings to escheat the property, and he insisted that the jury having found the sale of the property under a decree of the court, and the actual possession by the purchasers at that sale, the inquisition was not in favor of the right of the commonwealth to the said lots. And he prayed that Page might be made a party defendant to his petition and required to answer the same; and that the register of the land office might be made a party and enjoined from advertising the property as escheated; that the court would declare the land not

ESCHEAT.

I. PROPERTY SUBJECT TO.

In General.—Where the property of a British subject was sold during the Revolutionary War, by his attorneys in this country, without deed, before the act of October 1779, relative to escheats of British property, the sale was valid, notwithstanding the purchase money was not paid, and an escheat had been taken after the sale, but before the passing of the act. *King v. Hanson*, 4 Call 250.

A testator devised his real estate in Virginia to his executors to be sold by them, and gave the rents and profits of said lands, which might accrue before the sale, to his alien sisters, subject to the payment of his just debts and of certain legacies to his executors. *Held*, that the title of the alien sisters was good against the commonwealth claiming the money for which the lands were sold; the testator having died without any lawful heirs, and his personal estate being sufficient to pay his debts. *Commonwealth v. Martin*, 5 Munf. 117.

Trust Estates.—Land was purchased by an alien, but the conveyance was made to a citizen, upon an express trust that he should hold the same for the benefit of the alien and his heirs. *Held*, that the interest in such trust estate belongs to the commonwealth. *Hubbard v. Goodwin*, 3 Leigh 492.

Where an agent for a company of British merchants, in the year 1771, purchased, on their behalf, a tract of land in Virginia, for a sum payable on demand, and received possession thereof for their use, and a credit for the money was entered in their books, the equitable title to, and possession of such

land was thereby completely vested in the company, and escheated to the commonwealth, under the act of escheats of 1779, subject, however, to the payment of so much only of the purchase money remaining unpaid as did not exceed the sum for which the land was sold by the escheator, the British company being still liable for the balance of said purchase money. *Day v. Murdoch*, 1 Munf. 460.

II. ENFORCEMENT.

Parties.—An *amicus curiæ* cannot move to quash an inquisition of escheat, unless he has an interest himself, or represents somebody who has. *Dunlop v. Commonwealth*, 2 Call 284.

Where an alien possessed of real estate died intestate without any known heirs, a sale of such real estate, to satisfy a debt against the alien, in a suit to which the state was not made a party, cannot affect the title of the state. *Sands v. Lynham*, 27 Gratt. 291, 21 Am. Rep. 248.

Irregularities.—As the title of the state does not depend upon the inquisition, it cannot be affected by any errors or irregularities of the escheator. *Sands v. Lynham*, 27 Gratt. 291, 21 Am. Rep. 248.

Number of Jury.—Upon an inquest of office respecting property escheated, prior to the Act of 1794, the jury might have been composed of twelve jurors or of a greater or smaller number. See Va. Code 1887, § 2376; *Bennet v. Commonwealth*, 2 Wash. 154.

Profits before Escheat.—Where land, which an alien had purchased and conveyed to a citizen to hold in trust for himself and his heirs, escheats to the commonwealth, equity will not give the commonwealth the profits thereof, which accrued before the

escheated to the commonwealth, and for general relief. The injunction was granted.

A copy of the order of injunction having been served on Page and the register, and Page not having appeared or made any defense, on the 17th of July, the court took up the case, and being of opinion that
294 *the verdict of the jury of inquisition shows upon its face, that the real estate mentioned therein was not liable to be escheated, and that the proceedings of the defendants under said verdict were wholly irregular and illegal, made a decree perpetuating the injunction.

In January 1870, Page, the escheator, by leave of the court, filed his bill to review the decree of the 17th of July 1869. He stated his excuse for not having filed his answer in the short time before the decree was made. He insists that the proceedings on the inquisition were regular, that the petitioner had no title to the property, and it was error to proceed to decree upon the petition until the escheator had filed his answer; as was expressly provided by the statute. Code ch. 113, § 8.

Sands demurred to the bill, and also answered; but the court overruled the demurrer, and set aside the decree of July 17th, 1869, on the last ground stated in the bill of review. And John A. Lynham having succeeded Page as escheator, he was substituted as defendant and directed to file his answer.

Lynham in his answer insisted that the matters stated in the petition were insufficient in law and equity to entitle the plain-

tiff to the relief he sought, or any other relief in the premises against the commonwealth or her officer or agents: that the finding of the jury as to the sale of the lots was wholly irrelevant to the proper finding in said inquisition, &c., &c.

The cause came on to be heard on the 16th of June 1874, when the court made a decree dissolving the injunction and dismissing the petition with costs. And thereupon Sands applied to this court for an appeal; which was allowed.

295 *Young and Meredith, for the appellant.

The Attorney General, for the appellee.

Staples J. delivered the opinion of the court.

The inquisition finds that Solomon Haunstein died seized of an estate of inheritance in the lots in controversy; that he died intestate and without heirs, and that there is no person known to the jurors to be entitled to the same; but that said lots have been sold by a decree of the circuit court of Henrico county to satisfy an office judgment obtained against the estate of Solomon Haunstein since his death, and that there are now certain parties in possession of said lots claiming under said decree.

It is proper further to state, though it is not part of the inquisition, that the decree referred to, was rendered on the 29th April 1867, in a suit brought, or purporting to have been brought, by William Gleason, assignee of John W. Thompson, against

decree executing the deed of trust for the benefit of the state. Hubbard v. Goodwin, 3 Leigh 402.

III. EVIDENCE.

In escheat proceedings between the heirs of the alien and the commonwealth, where both parties claim under the same person, and the inquisition refers to a deed to the alien for the land, recorded in a certain county, a copy of said deed is evidence, although it was not recorded upon proper proof. Flott v. Commonwealth, 12 Gratt. 564.

Presumption.—Where alienage has once been established, it is presumed to continue. Hounstein v. Lynham, 100 U. S. 483.

IV. EFFECT OF ESCHATE PROCEEDINGS—WHEN TITLE OF STATE VESTS.

General Rule.—Where an intestate of foreign birth dies seized and possessed of real estate and without heirs, the property vests *eo instante* in the state, and a judgment for debt and sale thereunder to which the state was not a party is a nullity, and the purchaser acquires no title. Sands v. Lynham, 27 Gratt. 291, 21 Am. Rep. 348.

Where Parties Are in Possession.—Inquisition of escheat for want of heirs vests possession in the commonwealth immediately, if the possession be vacant, but not otherwise; for if any one have adversary possession of the escheated land at the time of the office found, entry or seizure by the officers of the commonwealth is necessary to give it possession. And even when the possession is vacant at the time of the office found, the inquisition, in order to have the effect *per se* of vesting the possession in the com-

monwealth, must be duly returned to the proper courts, according to the statute. 1 Rev. Code, ch. 82, § 2. See Va. Code 1887, § 2308; Commonwealth v. Hite, 6 Leigh 588, 29 Am. Dec. 226.

Prior Sale.—The finding of an inquest of escheat in favor of the commonwealth will not take away the title of a purchaser claiming by a deed of bargain and sale, legally executed and recorded before the inquest was sealed, though without the knowledge of the bargainee till afterwards. Commonwealth v. Selden, 5 Munf. 100. See also, King v. Hanson, 4 Call 250.

V. DISPOSITION OF ESCHATEATED PROPERTY.

Recovery by Heirs.—The monstrant must show good title in himself in order to entitle him to a judgment of *amoveas manus* against the commonwealth. French v. Commonwealth, 5 Leigh 512, 27 Am. Dec. 613.

In a *monstrans de droit* to an inquisition of escheat, prosecuted under 1 Rev. Code 1819, ch. 82, § 7, the monstrant is plaintiff. French v. Commonwealth, 5 Leigh 512, 27 Am. Dec. 613.

Rights of Creditors.—Upon a petition under 1 Rev. Code 1819, ch. 82, § 14, by the creditor of a person whose lands have been escheated, where judgment has been rendered for the whole amount of the demand, when the whole is not proved to be due, and it is uncertain to what part the proof extends, an appellate court will reverse the judgment and dismiss the petition. Watson v. Lyle, 4 Leigh 236.

Upon such petition, the escheator, who is defendant, has the same right to plead the statute of limitations in bar of the petition, that a representative

Richard D. Sanxay, curator of the estate of Solomon Haunstein. No copy of the bill, or of any exhibit in the record of that suit is filed in this. It does not appear that any order of publication was ever made in the cause, or that there was any party defendant other than Sanxay the curator. It would seem that the bill and answer were filed on the same day, and on that day the cause was brought on for a hearing by consent, and a decree rendered for a sale of the lots now in controversy.

Upon this state of facts we are to determine what are the rights of the purchasers under that decree. In order to arrive at a satisfactory conclusion upon that point, it becomes necessary to inquire what was the precise status of the real estate of Solomon Haunstein *upon his dying intestate and without heirs. Was the title thereto immediately vested in the commonwealth, or was an inquest necessary to effect that object.

296 It is well settled that an alien may take lands by grant. But while he has capacity to take, he has none to hold, and the lands may at once be seized to the use of the state. But until they are so seized, the alien has complete dominion over them, and his title cannot be divested except upon office found.

And so if lands are devised to an alien, he acquires a complete though a defeasible title by virtue of the devise; and this title can only be taken away by an inquest of office, which must be perfected by entry or seizure where the possession is not vacant.

In these cases, and there may be others, it seems that the inquisition is necessary, to vest a complete and perfect title in the state.

An alien cannot, however, take by descent, because the law will never cast the freehold upon one who is incapable of holding, and as the freehold can never be kept in abeyance for an instant, in such cases it vests immediately in the state without inquest of office.

For the same reason, if an alien dies intestate, or a citizen dies without inheritable blood, his lands belong to the state. They rest immediately without office found. They sink back into their original condition of common property for the general benefit. The rule on this subject is thus laid down

by Chancellor Kent in 4 Vol. Com., page 423: "It is a general principle in the American law, and which I presume is everywhere declared and asserted, that when the title to land fails from a defect of heirs, it necessarily reverts to the people, as forming the common stock to which the whole community is entitled. Whenever 297 *the owner dies intestate, without leaving any inheritable blood, or if the relatives he leaves are aliens, there is a failure of competent heirs, and the land vests immediately in the state by operation of law. No inquest of office is necessary in such case.

In *Montgomery v. Dorion*, 7 New Hamp. R. 475, a well considered case, the following propositions are laid down.

"If an alien purchase lands and die, the lands instantly vest by escheat in the state, without any inquest of office. But while the alien lives, the lands cannot vest in the state without office found.

"In this state (New Hampshire) the lands of which a citizen dies seized, without heirs, revert in all cases to the state; provided he dies intestate. Upon principle, it would seem that lands must in such a case vest immediately in the state without any inquest of office, as they do in England in the crown when the king's tenant dies without heirs.

"There might be cases in which an inquest of office might be expedient, as where one person is found in possession, claiming as heir or otherwise; but an inquest of office is in no such case essential to vest the title in the state."

In support of these positions numerous other authorities might be quoted; but a simple reference to the cases is all that is necessary. *Mooers v. White*, 6 John. Ch. R. 360; *Jackson v. Beach*, 1 John. Cases 399; *Stevenson and wife v. Dunlap's heirs*, 7 Monr. R. 134; *Fry v. Tucker*, 2 Dana R. 38; *Johnson v. Hart*, 3 John. Cases 322; *Collingwood v. Pace*, 1 Sid. R. 193; *Stokes v. Dawes*, 4 Mason R. 268; *Fairfax's devisee v. Hunter's lessee*, 7 Cranch R. 663; *O'Hanlin v. Den*, 1 Spencer's R. 31; *White v. White*, 2 Metc. (Ken.) R. 185; *Hinkle's lessee v. Shadden*, 2 Swan's R. 46.

298 *The case of *Commonwealth v. Hite*, 6 Leigh 588, is not in conflict

of the debtor would have to plead the statute in bar of an action. *Watson v. Lyle*, 4 Leigh 286.

Grant of Escheated Lands by Commonwealth.—The commonwealth, under the existing laws, cannot grant escheated lands, without a previous inquest of office, and then not upon entries and surveys, as in the case of waste and unappropriated lands, but upon sales by the escheator. *Alexander v. Greenup*, 1 Munf. 134, 4 Am. Dec. 541.

VI. STATUTORY AND TREATY PROVISIONS.

Construction.—The statute, 1 Rev. Code 1819, ch. 86, § 40, declaring entries or locations of lands that have been settled for thirty years prior to the entry or location, etc., invalid, and releasing any title which the commonwealth may be supposed to have thereto, has no application to escheated lands. (It is other-

wise by the present statute. See Va. Code 1887, § 2374.) *French v. Commonwealth*, 5 Leigh 512, 27 Am. Dec. 618.

Where a citizen of Switzerland, who had removed thence to Virginia without denationalizing himself, leaves real estate in Virginia, his heirs, citizens of Switzerland, have by the treaty between the United States and the Swiss Confederation of the 25th of November 1850, the absolute right to sell said property, and to withdraw and export the proceeds thereof within such time as the laws of Virginia permit. *Hauenstein v. Lynham*, 100 U. S. 483, *reversing* *Hauensteins v. Lynham*, 28 Gratt. 62.

What Law Governs.—The law which was in force at the time of the descent governs with reference to the capacity to take and hold real property. *Hauensteins v. Lynham*, 28 Gratt. 62.

with these authorities. That was an information for intrusion on land of the commonwealth. Being in the nature of an action of trespass *quare clausam fregit*, it will not be maintained except in the case of actual possession. And the chief, if not the only question, was, whether the effect of an inquisition of office was to vest the possession in the state. It was held by this court, that when the possession of escheated lands is vacant at the time of office found, the effect of that proceeding is at once to vest the state with possession. If the possession is not vacant, it does not become so vested, and an entry or seizure by the state is essential in order to maintain an information for intrusion. This was the sole point decided by the court. It is very true that some expressions fell from Judge Tucker to the effect that the crown can only take by matter of record. All of which is strictly accurate as applied to an alien claiming by grant or by devise. He is in by title, having the freehold, which can only be divested by some act in the nature of a judicial proceeding: Because the king may not enter upon or seize any man's possession upon bare surmises, without the intervention of a jury.

But as, according to the common law, lands cannot be in abeyance or without an owner even for a single minute, it follows necessarily that upon the death of the person last seized, without heirs capable of inheriting, the title must immediately vest in the state without office found.

The doctrine of escheat is originally derived from the old feudal law. An inquisition does not constitute an escheat. It is simply the means by which the state furnishes authentic record evidence of her title.

The word escheat is derived from the French, and properly signifies the falling of the lands by accident to the lord of whom they are holden, in which case the fee is said to be escheated. It is a species of reversion by which, upon the death of the tenant without heirs, the lord becomes entitled to the estate. While at common law a writ of escheat was necessary to vest the estate in the lord, when the king became entitled upon the death of the tenant without heirs capable of inheriting, no office was necessary; but he might enter and seize without judicial proceeding, because in such cases the freehold was cast upon him by law in actual possession.

In this country the doctrine of escheat rests upon the broad principle, that when the title to land fails from defect of heirs, or when from any cause there ceases to be an individual proprietor of the land, it reverts back to the community. 1 Lomax's Digest 774, 777; 3 Green's Cruise on Real and Per. Property 213. In such cases, the title being in the state upon the death of the owner, no inquest of office is necessary.

If the possession be vacant at the death of the owner, both title and possession are at once transferred to the state. If, on the contrary, the land be held by adversary possession, the state must enter by her

officers. Such an entry may perhaps be necessary to enable the state to make a valid grant of the land, or to maintain an information for intrusion; but it is not essential to the title, any farther than possession is to be considered an element of title.

The state, of course, takes the lands subject to any liens created by the owner, and also to any valid debts contracted by him. But so does the heir, if there is one. This title is none the less complete, because perchance the land may be taken to satisfy the claims of creditors.

300 *In the case before us, upon the death of Solomon Haunstein intestate, without heirs, his real estate became vested *eo instanti* in the state; the possession being vacant, was also transferred along with the title. Whoever entered into the possession, did so in subordination to her title. When therefore the jury of inquest found that certain persons were in possession of the lots at the time of the inquisition, which was more than two years after the death of the owner, they found an immaterial fact, which did not affect the title previously acquired by the state.

It seems, however, that the appellant was one of the persons in possession, claiming title to the property under the decree of the circuit court of Henrico county. And it is insisted that this decree, having been rendered by a court of competent jurisdiction, is conclusive of every question decided by it until reversed by some proper proceeding instituted in the court which pronounced it.

No one will maintain that the decision of a court, having jurisdiction of the subject matter in a case before it, can be collaterally drawn in question for any errors therein, or in the proceedings which led thereto. But it is equally beyond controversy, that a decree, however regular in its forms, only binds parties and privies: It can not affect the title of a person not before the court. The exceptions to this rule are very few, and have nothing to do with the matter in controversy. It may be that a purchaser at a judicial sale is not affected by errors in the proceedings which led to the decree. He certainly is affected by a want of proper parties before the court. In this state he takes all the risks of the title. He is bound at his peril to see to it that the persons having title to the property are parties to the suit. Without this, no

301 act of the court can give him a valid title. The curator of Solomon Haunstein's estate was the only party defendant to the suit in which the decree of sale was rendered. He had nothing to do with the real estate; not the shadow of a title to, or interest in it. If the appellant acquired title by his purchase, whose title did he acquire? Certainly not Solomon Haunstein's, as all his interest terminated with his death; not that of any heirs, as there were none in existence. The title of the state? It is not pretended. Her rights could not be affected by any orders or decrees in a suit to which she was not a party. If authority were needed to sustain so plain a proposition, it

may be found in the case of *Hudgin v. Hudgin's ex'or et als.*, 6 Gratt. 320. The decision of this court in that case is conclusive upon this branch of the present case.

It is very questionable, to say the least, whether the general statutes, making real estate assets for the payment of debts, and authorizing suits in equity for the sale and administration of the same, apply to escheated lands. The design of those statutes was to give to creditors a remedy against heirs and devisees in the event of a deficiency of personal estate; and all the provisions have reference to lands which have been devised by will, or have descended upon heirs in cases of intestacy.

In cases of escheated lands, the 27th section of chapter 113, Code of 1860, prescribes the mode by which the creditor may enforce his demand against the realty, where there is no personalty. It is very true that this section only provides for those cases in which there has been an actual inquest of office. It has been argued, that the creditor may be delayed for years, if he is compelled to await an inquisition before instituting proceedings to enforce his

302 demand. It will be *seen, however, upon an examination of the various provisions in regard to escheats, that but little difficulty is likely to occur in this respect. Each commissioner of the revenue is required annually to furnish a list of lands in his district of which any person shall have died seized of an estate of inheritance, intestate and without any known heir. On receiving such list, or upon information from any person in writing and under oath, the escheator is required at once to hold inquest to determine whether the lands have escheated to the commonwealth. Code of 1860, chap. 113, sections 3 and 4. These provisions afford to the creditor the fullest means of enforcing prompt action on the part of the state in the assertion of his claim; while the 27th section gives to him adequate remedies for the recovery of his demand. Any small delay that may occur by this course bears no sort of comparison to the mischiefs which will result from the establishment of a contrary doctrine. To hold that upon the death of a person without known heirs, any one claiming to be a creditor may file a bill in equity, with a personal representative perhaps in the interest of the plaintiff as the only defendant, and obtain a decree for the sale of the real estate, and thus divest the title of the commonwealth, is to open the door to the perpetration of the grossest frauds and injustice. The claim may be wholly fictitious. The sale of the lands may be altogether unnecessary. And even if necessary, they may be sold at the most ruinous sacrifice. Who is to protect the interests of the state against abuses and frauds of this description? It is impossible to foresee the mischiefs that will ensue if this court shall establish a rule of this sort.

This identical question has been the subject of adjudication in other states.

303 In every case I have seen *it has been

held, that upon the death of the owner of lands, intestate, without heirs capable of inheriting, the title, eo instanti and before office found, vests in the state; and the title could not be divested by a sale made under the decree of any court, unless the state in some form is a party to the proceeding. *Hinkle's lessee v. Shadden*, 2 Swan's R. 46; *O'Hanlin v. Den*, 1 Spenc. R. 31-43; 1 *Zabriskie R.* 582.

If these views be correct, the appellant acquired no title by his purchase valid as against the state. As the title of the latter does not depend upon the inquisition, the alleged errors and irregularities in the proceedings of the escheator are not of the slightest consequence. The rights of the state are not affected by them. The appellant can derive no advantage from them.

The decree of the circuit court of the city of Richmond entered on the 17th day of June 1869, injoining the sale of the lots in controversy, was therefore manifestly erroneous upon its face. It was erroneous not only for the reasons stated, but for the further reason, that it was rendered without an answer for the escheator. The provisions of the 8th section are positive, that the escheator shall file an answer stating the objection to the claim; and the cause shall be heard without any unnecessary delay, upon the petition, answer, and the evidence. It was the duty of the court to require such an answer before adjudicating the rights of the state. The decree of the circuit court was a decree by default; and the bill of review subsequently filed by the escheator may be treated as a petition for a rehearing. Such an application is required in all cases of decrees by default before an appeal is taken. But even if it be treated as a bill of review, it was a proper case for such a bill for the reasons already stated.

304 *The decree of the 16th June 1874 is, however, erroneous in one respect. If the appellant was a purchaser in good faith, he had the right to be substituted to all the rights and remedies of the creditor whose debt was paid by the proceeds of sale of the lots in controversy. This was the course pursued by this court in the case of *Hudgin v. Hudgin's ex'or*, 6 Gratt. 320, already referred to. This court having decided in that case, that the devisees were not bound by the decree for the sale of their lands in their absence, was of opinion that the purchaser having bought in good faith, and the claim of the creditor being a just one, the former was entitled upon a disaffirmance of the sale, to be substituted to the rights of the creditor, and to charge the land with the amount of the debt paid by him.

This, of course, involves an inquiry into the validity of the claim asserted by William Gleason, as assignee of John W. Thompson. It may be, as is alleged, that this claim was utterly fraudulent. This record does not furnish any reliable or satisfactory information on that subject. This court cannot undertake to affirm positively that it is a fictitious claim. If such be its

character, neither the state nor the lands of which Haunstein died possessed can be made chargeable with it. It will devolve upon the appellant to show that the debt is a just one; and that must be done by evidence other than the judgment in question. This evidence he may be able to furnish. At all events, he should have an opportunity of doing so, if desired by him. The decree is therefore affirmed dissolving the injunction, but the same to be retained in the circuit court for the inquiry, if desired by the appellant.

The decree was as follows:

305 *The court is of opinion, for reasons stated in writing and filed with the record, that there is no error in the decree of the circuit court dissolving the appellant's injunction. It is therefore adjudged, ordered and decreed that said decree be affirmed, and that the appellant pay to the appellee his costs by him expended in the prosecution of his appeal here.

The court is further of opinion, that the appellant upon showing that he was a bona fide purchaser of the lots in controversy, and the claim asserted by William Gleason, assignee of John W. Thompson, is a valid debt, justly chargeable upon the estate of Solomon Haunstein, deceased, would be justly entitled to be substituted to all the rights and remedies of said Gleason against said estate. The cause is therefore remanded to the said circuit court, with instructions to retain the same a reasonable time in that court, to afford the appellant an opportunity, if desired by him, of establishing the facts upon which his right of substitution depends.

Decree amended and affirmed.

306 *Turnbull, for &c., v. Thompson & als.

Absent, MONCURE P.

March Term, 1876, Richmond.

1. **Practice—Process—Judgment by Default.**—A summons in debt is served on a defendant on the 3rd of February, and the judgment by default becomes final on the 8rd of March. Under the statute the day of the service of the process may be counted, and thirty days had elapsed between the service of process and the judgment, and it is a valid judgment.

2. **Same—Same—Same.**—In debt against four obligors, one of whom is the high sheriff, the process goes into the hands of his deputy, who serves it upon him as well as the other three, to which he makes no objection; and there is a judgment by default against all of them. The process is properly served and the judgment is valid.

3. **Same—Same—Same—In Military Service.**—There is

***Process against Defendant in Military Service.**—The principal case is probably the only adjudication on the subject of the exemption of persons in the military service. But the same doctrine was followed in the analogous case of *Neale v. Utz*, 75 Va. 486, where the principal case was cited. See also, *Prentiss v. Com.*, 5 Rand. 697; *M'Pherson v. Nesmith*, 3 Gratt. 237.

a judgment in debt, by default, against four defendants in March 1862. In August 1872 one of the defendants moves the court to set it aside, on the ground that at the time of the judgment he was in the military service of the country. It appears, however, that at the time of the service of the process, and at the time the judgment became final he was at home on furlough. The exemption of the defendant was a personal privilege of which the court could not *ex officio* take notice; and the objection should have been taken during the pendency of the proceedings.

On the 25th of January 1862 Lewis E. Turnbull, who sued for Randolph Dickinson, sued out of the county court of Franklin county a summons in debt against Giles M. Thompson, William P. Thompson and two others, the said writ being made returnable on the first Monday of the next February. This writ went into the hands of J. J. Lavinder, deputy of Wm. P.

Thompson, who was then the sheriff **307** of Franklin county, and it was served upon said Thompson on the 3d day of February, it having been previously served upon the other parties. None of the defendants appeared and pleaded; and at the next term of the court, viz. on the 3d day of March, there was a judgment by default against them for the amount of the bond declared on.

In August 1872 Wm. P. Thompson gave notice to Dickinson, that he would move the county court of Franklin to reverse the aforesaid judgment, on the grounds:

1st. Because the process was served on him on the 3d of February 1862, and the judgment made final on the 3d of March 1862; it thus becoming final within one month after the service of the original process.

2d. Because the process was served upon him by his deputy.

3d. Because the judgment was rendered against him whilst he was in the military service of the state of Virginia.

Upon this last ground it was proved on the hearing of the motion, that at the time of the service of the summons and the rendition of the judgment, Thompson was in the service of the country in the army of the Confederate States; that he had volunteered in the service of Virginia in the month of May 1861, and was ordered and transferred into the confederate service in the late war; that at or about the time the summons was executed and the judgment rendered, he was temporarily at home on furlough.

The motion to reverse the judgment came on to be heard in September 1872; when it was overruled by the county court. Thompson thereupon excepted, and took the case to the circuit court of Franklin county; and the case came on in that court on the

308 19th of October *1872, when the judgment of the county court of September 1872 was reversed; and the judgment of March 1862 was reversed and annulled. Turnbull thereupon applied to this court for a supersedeas; which was awarded.

Jones & Bouldin, for the appellant.

Barksdale, for the appellees.

Staples, J., delivered the opinion of the court.

The judgment of the county court against the defendant, Thompson, is objected to by him on various grounds. They will be severally considered in the order in which they are presented in the record.

The first objection is, that the original process commencing the suit was served on the defendant the 3d February 1862, and the judgment became final on the 3d March 1862, in violation of the statute, which declares that no judgment by default on scire facias or summons shall be valid if it becomes final within one month after the service of such process. The month indicated by the statute is of course a calendar month, and if the 3d day of February, the day of the service of process is to be included in computing the time, then the judgment did not become final within a month after the service of process.

Without undertaking now to discuss the doctrines of the common law in respect to the days to be included or excluded in the computation of time under statutes, it is sufficient to say that every difficulty in regard to that question has been removed by the provisions of the 8th clause of section 16, chapter 16, page 115, Code of 1860.

309 *That section declares, that "where a statute requires a notice to be given, or any other act to be done a certain time before any motion or proceeding, there must be that time, exclusive of the day, for such motion or proceeding; but the day on which such notice is given, or such act is done, may be counted as part of the time."

The second objection is, that the process was served on the defendant by his deputy, the defendant himself being then the sheriff of the county. This objection doubtless is founded upon the 20th section, chapter 49, Code of 1860, which declares that "when for any cause it is unfit for a sheriff or sergeant to serve any process, such process shall be directed to and served by a coroner of the county or corporation."

One of the objects of this statute was of course to prevent the execution of process by officers interested in the subject matter of the suit; and the plaintiff might well object that the defendant is not a proper person to execute the process. But if the plaintiff is willing that the process shall go into the hands of the defendant, and the defendant is willing to receive it and accept service, the latter cannot afterwards be heard to make any objection on the ground of irregularity. And so if the defendants' deputy receive the process and serve it upon the principal, and the latter does not make the objection in limine, he should not be permitted afterwards to say that his deputy had done an illegal act.

The third and main ground of objection is, that the judgment was taken against

the defendant while he was in the military service. It appears that the defendant first enlisted as a volunteer in the service of the state as early as May 1861, and that he was subsequently transferred to the con-
310 federate army; but at *the time the process was executed upon him, and at the time the judgment became final, he was at home on furlough. The objection now made was suggested for the first time on the 7th of August 1872, more than ten years after the judgment was rendered. Conceding that the objection was good if it had been made in time, the question is, whether it has not been waived by the failure of the defendant to insist upon it either before the judgment was entered, or within a reasonable period thereafter.

In *Prentiss v. Commonwealth*, 5 Rand. 697, the defendant was presented for unlawful gaming, process served upon him, and a judgment by default entered. He applied for a writ of error coram vobis, upon the ground that he was exempt from arrest or process as a member of the general assembly; and by operation of law all proceedings against him stood suspended during the continuance of his privilege.

The general court after a very careful examination of the authorities bearing upon the question, was of opinion, that the exemption claimed was in the nature of a personal privilege; that from its character it was such that the courts could not ex officio take notice of it, and that it ought to be claimed whenever relied on.

The court was further of opinion, that the privilege was not an incapacity like infancy and coverture, where consent cannot give jurisdiction; and there was not an example of the allowance of the privilege, but upon plea, or motion tendered or made at the proper period, to the court where proceedings are sought to be abated or suspended; and therefore the failure of the defendant to claim the exception until after judgment, was a waiver of his privilege.

Much of this reasoning applies to
311 persons in the *military service. The exemption in their favor is necessarily a mere personal privilege. The court cannot ex officio take notice of it. It cannot know unless the matter is brought to its attention, that the defendant is in such service, or that he may not prefer to waive his exemption. The rule applying in other cases of personal privilege must therefore apply to him. The objection must be taken during the pending of the proceedings, otherwise it will be considered as waived. If the defendant is in actual service, if he is so situated that he cannot assert his privilege, the rule would not apply. Under such circumstances it would be unreasonable and unjust to require the objection to be made while the disability exists. But when the disability is removed, certainly within a reasonable time thereafter the defendant ought to claim his privilege.

In the case before us the defendant was at home on furlough, both when the summons was received by him, and when the

judgment became final. It would have been very easy for him to claim his exemption. It was not necessary he should attend the court, or even employ counsel to do so. His own deputy served the process upon him: a simple notification to him, or an endorsement on the writ at the time, would no doubt have affected the object. A letter to the clerk, or to the court, at any time before the judgment became final, would have been sufficient. The defendant knew that the other obligors were joined in the suit with him. It may have been a matter of vital importance to the plaintiff to obtain judgment against them. In doing so, he was bound to include the defendant also in the suit. If the defendant had claimed his exemption, the action would have proceeded against the others, as it does not appear they were sureties; *and judgment would have been recovered against them. Thirty days after the expiration of his term of service the defendant's exemption would have ceased, and then judgment might have been obtained against him also. The reversal of the judgment now as to the defendant carries with it the reversal of the judgment as to all the defendants: and so the circuit judge has held. The result, therefore, is, that the defendant, by failing to insist upon his privilege, obtains an exemption, not only for himself, but for his co-obligors, for more than seven years after his term of service has expired. It is unnecessary to consider the effect of the several statutes of limitation in respect to a motion to reverse a judgment upon the ground relied on in this case. The failure of the defendant under the circumstances to claim his exemption, or to make any objection whatever before the judgment was rendered, followed by the long delay that has since occurred, must be considered as conclusive evidence of his intention to waive his exemption.

For these reasons the judgment of the circuit court must be reversed, with costs; and that of the county court affirmed.

Judgment reversed.

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*Cody v. Conly & als.

March Term, 1876, Richmond.

1. *Wills—Letter Purporting to Be.*—A paper writing purporting to be a will, commences—Lewinsville, August 19, 1862, Dear wife—I am going away; I may never return. I leave my property to &c. Held on a view of the language and the circumstances surrounding the writer at the time, not to be conditional on his going away and not returning.
2. *Same—Evidence as to Handwriting.*—A witness as to the handwriting of C, states that some thirteen

**Wills—Letters as Testamentary Papers.*—For instances of letters being held to be testamentary, see 29 Am. & Eng. Enc. Law 141; 4 Va. Law Reg. 525; French v. French, 14 W. Va. 481, in which last case the principal case is cited and fully discussed; McBride v. McBride, 26 Gratt. 476, and *note*.

**Evidence as to Handwriting.*—As to the admissibility of evidence to prove the genuineness of the

years previous, C dug a well for him, and drew several orders on him for money which he paid, and which C recognized afterwards. He never saw C write, but from his recollection of these orders, he believes the paper to be in the handwriting of C. This is competent testimony.

3. *After-Discovered Evidence.*—A verdict should not be set aside on the ground of after-discovered evidence, where it is only cumulative and corroborative, and which ought not to be productive on another trial of a different result.

The case is stated by Judge Moncure in his opinion.

M. Dulany Ball, for the appellant.

Thomas & Wells, for the appellees.

Moncure P. delivered the opinion of the court.

This is an appeal from a decree of the circuit court of Fairfax county, declaring a certain paper writing therein mentioned, admitted to probate as the last will and testament of Edmund Conly deceased, to be his true last will and testament.

In the county court of Fairfax county, September court 1868, the said paper writing was presented to the court; and the same being proved to be wholly in the handwriting of the said Conly, and the signature thereto his genuine signature, by the oath of Samuel Farnsworth sworn in open court, was admitted to probate and ordered to be recorded.

The said paper writing was in these words:

“Lewinsville, August 19, 1862.

Dear wife:

I am going away; I may never return. I leave my property to Gaines and Dan; dispose of it as you think fit; don't forget sister Mary and Bridget. Pay William McCauley twenty dollars; Patrick Sullivan, twenty-five dollars.

Edmund C. Conly.”

Witness: Samuel Farnsworth.

In September 1869, Mary Cody, a sister of the alleged testator, brought her suit in the circuit court of said county, to invalidate the said probate. In her bill she alleged, in substance, and among other things, 1st, that said Edmund C. Conly, late of the county aforesaid, died in said county in the year 1868, leaving a considerable real estate and personal estate in said county; leaving

handwriting of another, see *Chaboon v. Com.* 3 Gratt. 738; *Pepper v. Barnett*, 22 Gratt. 465; *Barton's Ch. Pr.* (2d Ed.) 605; *Flowers v. Fletcher*, 40 W. Va. 117, 20 S. E. Rep. 871; *Hanriot v. Sherwood*, 82 Va. 14.

**After-Discovered Evidence.*—See *Connolly v. Connolly*, 22 Gratt. 657, and *note*; also, *Thompson v. Com.* 8 Gratt. 637; *Great Falls, etc. Co. v. Henry*, 32 Gratt. 467, and *note*; *Baccigalupo v. Com.* 33 Gratt. 567, and *note*; *Brown v. Speyers*, 20 Gratt. 296; *Read v. Com.* 22 Gratt. 924; *Whitehurst v. Com.*, 79 Va. 556; *Wynne v. Newman*, 75 Va. 811; *Adams v. Hubbard*, 25 Gratt. 129; *Carder v. Bank*, 34 W. Va. 38, 11 S. E. Rep. 77; *Hall v. Lyons*, 29 W. Va. 410, 1 S. E. Rep. 582; *Sayre v. King*, 17 W. Va. 502; *Gillilan v. Ludington*, 6 W. Va. 128.

also a widow, Margaret Conly, with no children; and as his heirs at law, the complainant, his sister; James Conly and Rose Conly, children of John Conly, a deceased brother; James Conly, a brother; and Joanna Powers, a sister, who had married Pierce Powers; and that the estate of said Edmund C. Conly had been committed to the hands of Walker R. Millan, late sheriff of said county, for administration. 2dly, That the said Edmund C. Conly, in the year 1862, a resident of said county, and possessed of some lands and personal estate, in view of the civil war then raging, contemplated leaving his residence

315 *and going abroad, and wrote a letter, as is alleged, to his wife, the said Margaret Conly, which letter is the paper writing aforesaid. 3dly, That the said Edmund Conly never left his home, but continued to reside in Fairfax county until his death in 1868; that during his life he purchased a farm in said county, near Lewinsville, and placed the complainant, Mary, his sister, in possession of the same, for the use and benefit of herself and family, free of rent, and of which property she was still in possession. 4thly, That after the death of said Edmund C. Conly, the letter aforesaid was admitted to probate in the county court of said county, as the last will and testament of said Edmund C. Conly, on the oath of said Samuel Farnsworth, who testified that said paper was wholly in the handwriting of said Edmund C. Conly, and his signature thereto was his genuine signature. Full proof was required of the genuineness of the letter; and even if genuine, complainant denied that it was the last will and testament of said Edmund C. Conly, or that he ever intended it to operate as such. Moreover, even if said paper might be regarded as testamentary, complainant contended that it would be void for vagueness and uncertainty; and that the probate was also void, the said paper having been proved only by one witness. She therefore prayed that the said widow, and other parties concerned, who were enumerated by name, might be made defendants to the bill; that an issue might be ordered to ascertain whether the said paper, &c., was the will of said Edmund C. Conly; that the said will and probate thereof might be cancelled and declared void; that the estate of said Edmund C. Conly might be distributed among the parties entitled thereto according to law; and that general relief might be decreed in the premises.

316 *The bill was taken for confessed as to all the defendants except the infants James Donovan and Daniel Donovan who answered by a guardian ad litem assigned by the court; and except also the widow Margaret Conly, who filed her answer, in which, among other things she stated the following facts in substance: That her said husband died in February 1868, leaving a small personal estate, worth some five or six hundred dollars, and two small tracts of land containing sixty-three and one hundred acres, which latter he purchased four or five

years before his death and rented to the complainant for one third of the crop, and she has never had any other possession of it than as tenant; that he died without children; and that his heirs at law might be correctly named in the bill. She averred, however, that the paper referred to in the bill as having been admitted to probate, did contain the disposition of his property as he had frequently expressed to her. The two boys named therein, James and Dan, were the children of her brother John Donovan, whose wife at her death left two small children, the boys above named, and at the instance and request of respondent's said husband, these two children were taken by her to their house, where they have remained ever since, a period of upwards of sixteen years. The said boys were then (in October 1869) nineteen and seventeen years of age. She further averred that she had frequently heard her husband say, both before and after the date of his will, that the two boys should have whatever he had to leave; that having been raised by him, they felt like his children and should stand in the place of children to him; that in reference to the paper admitted to probate as aforesaid, he informed her, in a conversation held with her a short time previous to his

317 death, *that his will was among his papers, that he had written it when he expected to be taken prisoner by the soldiers, who, about that time, were infesting the neighborhood, but that it was all that was necessary, &c., &c.

In November 1869, the cause coming on to be heard in the said circuit court a decree was made that there should be a new trial by a jury on the common law side of the court, to ascertain whether any, and if any, how much, of the said paper writing in the bill and proceedings mentioned, offered in the county court of Fairfax and there admitted to probate, as the will of Edmund C. Conly dec'd, was the will of the decedent; and that on the trial of the issue, the bill, answer, and exhibit might be read.

In November 1871, the issue was accordingly tried by a jury, which found a special verdict in these words: "We the jury, sworn to speak the truth, upon our oaths say that the paper writing headed 1862, Lewinsville, August 19, and which was admitted to probate in Fairfax county court September, 1868, as the last will and testament of Edmund C. Conly is in the hand-writing of Edmund C. Conly; and we find that at that time, that portion of the county of Fairfax in which Edmund C. Conly resided, was alternately in the possession of the federal and confederate forces, and that said Edmund C. Conly expressed fears of being taken away by the federal forces; that Edmund C. Conly resided at Lewinsville during the war, and never abandoned his home, but continued to reside there up to the time of his death, and that the citizens of that portion of the country were generally apprehended and carried away as prisoners, with the exception of the said Conly and James Magarity. But whether or not, upon

the whole matter aforesaid, the said paper writing herein set forth be the said
 318 last will *and testament of the said Edmund C. Conly, the jury do not know. Therefore they pray the advice of the court. And if upon the whole matter, it shall seem to the court that the said paper writing is the last will and testament, in whole or in part, of the said Edmund C. Conly, then the jury find that the said paper writing is the last will and testament of the said Edmund C. Conly; but if, upon the whole matter aforesaid, it shall seem to the court that the said paper writing is not, in whole or in part, the last will and testament of the said Edmund C. Conly, then we find that it is not the last will and testament of the said Edmund C. Conly."

The case being heard and considered by the court upon the special verdict, and it seeming to the court that, upon the facts therein, the paper writing therein referred to is the last will and testament of Edmund C. Conly it was afterwards, to wit: on the 6th day of December 1871, decreed by the said court accordingly. Three bills of exceptions were taken by the parties respectively, to rulings of the court on the trial of the issue, which, or such of them as are material, will be noticed hereafter.

From the decree aforesaid, declaring the said paper writing to be the last will and testament of the said Edmund C. Conly, the complainant Mary Cody applied to this court for an appeal; which was accordingly allowed.

The appellant, in her petition for an appeal, assigns three errors in the several rulings of the court below in the case. We will consider these assignments of error in the order in which they are made. The first and principal one is:

1. "The said paper is not to be regarded as the last will and testament of the
 319 said Edmund C. Conly, the *same being a devise (if so to be construed at all) contingent upon the happening of an event which never occurred, whereby the whole disposition intended by said writing becomes inoperative and ineffectual."

That the said paper is in the form of a letter from the supposed testator to his wife, and not in the usual form of a will, does not prevent it from being a will, if so intended by the author. A will, intended and duly executed as such, may be in any form which the testator may choose to adopt. Indeed, this is not denied by the counsel for the appellant; who contends, however, that the intention of the author, as declared on the face of the paper, was that it should be his will only on a certain contingency, which never happened; and therefore that it is not his will, and ought not to have been admitted to probate as such.

If it were true that the paper was not intended to be a will, except upon a contingency which never happened, the conclusion drawn therefrom by the counsel would be inevitable.

But is it true?

The supposed contingency is contained only in these words, at the beginning of the will: "I am going away; I may never return." Do these words make the will conditional, to take effect only in the event that the testator should, in fact, go away and never return? Or do they merely indicate the motive which induced the testator to make his will at the time he did, which will he intended to operate as such unless afterwards duly cancelled or revoked, without reference to the contingency of his going away and never returning?

We must construe these words by the light of the surrounding circumstances, as found in the special verdict; which are: "that

at that time (to-wit, the date of
 320 *the will) that portion of the county of Fairfax in which Edmund C. Conly resided was alternately in the possession of the federal and confederate forces; and that said Edmund C. Conly expressed fears of being taken away by the federal forces; that Edmund C. Conly resided at Lewisville during the war, and never abandoned his home, but continued to reside there up to the time of his death, and that the citizens of that portion of the county were generally apprehended and carried away as prisoners, with the exception of the said Conly and James Magarity." And also the facts stated in the bill and answer, that the testator never had any children, that his heirs at law were numerous collateral relations, and that the chief objects of his bounty, besides his wife, were two nephews of his wife described in the will as "Gaines and Dan," whom he had adopted as his children, and who had long lived with him. His estate was comparatively of little value, consisting of two small tracts of land, and of some personal property. He certainly could not have intended to die intestate, and he never made any other will than the one in question. The presumption, therefore, is, that he intended the one in question to be his absolute and unconditional will. There is not a word in the will which is inconsistent with this construction. Not a word in it, which is not perfectly consistent with the idea, that the words, "I am going away; I may never return," were used only to indicate his reason for then making his will, and not to express or imply a condition on which it should have effect.

The cases on this subject show, that while a person may, certainly, make a conditional will, his intention to do so must appear very clearly on the face of the will; and if such an intention do not so appear,
 321 the *will must be regarded as unconditional. Indeed, in some of the cases, the form of expression used in the will was conditional, and yet the construction of the will was otherwise.

The cases referred to by the counsel for the appellant were cases, in which the court deciding them, considered that the intention to make conditional wills plainly appeared. Without noticing all of them, such was the case in *Parsons v. Lanoe*, 1 Ves. Sen. 189,

decided by Lord Hardwicke in 1748, which is a leading case on this subject, and which is mainly relied on by the counsel for the appellant as being almost identical with this case, in regard to the words of the paper in controversy. The important difference between the two cases is, that there, the form of expression is contingent and conditional: "If I die before my return from Ireland" &c. Whereas here, the form is otherwise: "I am going away; I may never return." There the surrounding circumstances corroborated the apparent import of the words, that the will was intended to be conditional. Here they show the contrary.

The doctrine on this subject is laid down in Redfield on the Law of Wills, part 1, §§ 178 and seq., where the cases, or most of them, are referred to in the notes. Among those cases is that of *Tarver v. Tarver*, 9 Pet. R. 174, in regard to which the author says: "Where the testator stated, that, 'being about to take a long journey, and knowing the uncertainty of life, he deemed it advisable to make a will,' it was held, that this was not a conditional will. The instrument taking effect as a will, is not made to depend upon the event of the return, or not, of the testator from his journey; there is, therefore, no reason for annulling the will on the ground that it was conditional."

The learned author, after referring 322 to some of the *cases, proceeds to state the law thus: "As questions of a very embarrassing nature often arise in regard to the proper testamentary character of papers left in the form of a will, but expressed in terms more or less contingent, it must be borne in mind, that in that class of instruments the question must turn upon the point whether the contingency is referred to as the occasion of making the will, or as the condition on which the instrument is to become operative. Ordinarily where the instrument is executed with all the requisite formalities, it will be presumed to have been done *animo testandi*, notwithstanding that it may be expressed to have been made to avoid the contingency of dying intestate, in case the testator should not return from a contemplated journey. In such a case, in order to render the instrument contingent in its operation, it should clearly appear by its language that it was not intended to remain as an operative will, except in the event of the failure to return."

In *Skipwith &c. v. Cabell's ex'or &c.*, 19 Gratt. 758, 782, this subject was considered by this court in an opinion delivered by Judge Joynes, and the law on the subject was laid down to the same effect as before stated. In that case, the words of the devise were conditional in form: "In case of a sudden and unexpected death," &c.; and yet it was held to be unconditional in effect. Two important recent English cases are there referred to, which are very strong to the same effect. They are, *Porter's case*, Law Rep. 2 P. & D. 22; and *Dobson's case*, Law Rep. 1 P. & D. 88. But it is unnecessary

to state these cases, as they are stated in the opinion of Judge Joynes. We will state, however, that, in *Dobson's case*, the language of the will was this: "In case of any fatal accident happening to me, being about to travel by railway, I hereby 323 leave *all my property," &c. It was held that the will was not conditional, and it was admitted to probate, although the testator returned unhurt from the travel by railway alluded to in the will.

We are therefore of opinion, that the said paper, admitted to probate as aforesaid, is not inoperative and ineffectual upon the ground that it was contingent upon the happening of an event which never occurred, as insisted in the first assignment of error; and that there is no error in the decree in that respect.

2. The second assignment of error is, that "the testimony of one who had never seen the alleged author of the paper write, and whose impressions were drawn from recollections of orders seen by him casually in the way of business thirteen years before, should not have been allowed."

This assignment of error is based upon a bill of exceptions taken by the appellant to the ruling of the court, in admitting before the jury, on the trial of the issue, the evidence of H. W. Thomas, who testified "that Edmund Conly dug a well about 1858 for witness; he gave several orders on me for money, and from my recollection of his hand-writing, I think the paper shown is his. I never saw him write. I paid the orders, and they were recognized by Conly in our settlement."

We think this evidence was clearly admissible (its weight being a subject for the consideration of the jury), as is shown by the authorities referred to by the counsel for the appellees. We therefore think the court did not err in admitting it.

3. The third and last assignment of error is, that "the after discovered evidence was such as might have entirely changed the verdict of the jury, and should have been allowed."

324 *We are, clearly, of opinion, that the court did not err in overruling the motion of the appellant to set aside the verdict on the ground of after discovered evidence; which, to say the most of it, was merely cumulative and corroborative, and was certainly not such as ought to produce on another trial an opposite result on the merits. See the cases on this subject referred to by the counsel for the appellees; *Read's case*, 22 Gratt. 924, 946; and *Adams v. Hubbard*, 25 Id. 129, 135.

Upon the whole we are of opinion that there is no error in the decree appealed from, and that it ought to be affirmed.

Decree affirmed.

325 *Ball & als. v. Ball & als.

March Term, 1876. Richmond.

Descents.—B dies intestate, leaving as her heirs five children of her deceased son S, six children of her

deceased son W, and a grandchild of W, the only child of a deceased daughter of W. B's real estate is to be divided into twelve equal parts, of which the five children of her son S, the six children of her son W, and the grandchild of W, representing her deceased mother, are each to take one part.

Martha C. Ball died intestate in March 1865. Her heirs were the children and a grandchild of her two deceased sons. Her son, S. M. Ball, left five children, and her son, W. W. Ball, left six children and a grandchild, the only child of a daughter who was dead.

The five children of S. M. Ball filed their petition in the circuit court of Fairfax county for a division of the estate of Martha C. Ball, to which the other heirs were made parties; and the only question before this court was, whether the estate should be divided into two equal parts, of which the children of S. M. Ball should have one part, and the children and grandchild of W. W. Ball should have the other, or whether they should all take per capita. The court below held that the estate was to be divided per capita among all the children and the grandchild. And thereupon the children of S. M. Ball applied to this court for an appeal; which was allowed.

M. D. Ball, for the appellants.

326 *J. D. Ball, for the appellees.

Moncure, P., delivered the opinion of the court.

The question which this case presents to us for our decision is, how the estate of Mrs. Martha C. Ball should be divided among her heirs at law; that is, in what shares and proportions.

She died intestate in the county of Fairfax, seized of real estate, and leaving as her only heirs at law, five children of a deceased son, six children of another deceased son, and a grandchild of the latter son. The question is whether her estate should be divided into twelve equal parts, and one of said parts be allotted to each of the said eleven living children, and the remaining part to the said grandchild as representing or standing in the place of its deceased parent; or should be first divided into two equal parts, and one of said parts be allotted to the said five children of one of the sons, equally to be divided among them; and the other of said two equal parts be allotted to the said six children and said grandchild of the other son equally to be divided among them.

The court below decided that the former is the true legal mode of apportionment in this case; that is an equal division among all the said eleven children and the said grandchild, allotting to each, one equal twelfth part of the inheritance.

The appellants, who are the said five children of the said first named deceased son, complain of the said decree as being prejudicial to their rights, and insist that the other mode of division and allotment before mentioned ought to have been pursued.

The court is of opinion that there is no error in the said decree of the court 327 below, and that the mode of *division and allotment adopted by that court is the true and legal mode, and accords with the true intent and meaning, if not the literal terms, of the law of descents. If one of the said two sons of the intestate had been living at her death, and the other dead, then the mode of division and allotment contended for by the appellants would have been the true mode. But as both were then dead and their respective children then living were all in the same degree of kindred to the intestate, the said children were entitled in their own right to equal shares of the estate; and the other child being then dead, its only child was entitled to an equal share, per stirpes, to wit: to the share which the deceased parent if living would have taken.

The intestate having left descendants, her estate descended to them by the express provision of the first clause of the first section of the statute of descents, Code, p. 96, ch. 119, § 1; and the third section of the same statute, p. 917, prescribes when the division and allotment shall be per capita and when per stirpes. Whenever those entitled to partition are in the same degree of kindred to the intestate, they shall take per capita or by persons; and where a part of them being dead and a part living, the issue of those dead shall take per stirpes. And the same rule applies to the living descendants however remote may be their degree of kindred to the intestate. While the statute does not expressly enumerate all the degrees of kindred of the remote descendants, it expressly includes all and plainly provides a rule for all.

There is nothing in the decision of the case of Davis v. Rowe, 6 Rand. 355, which is at all in conflict with the foregoing opinion. On the contrary the principles of that decision seem fully to accord with 328 *what has been said in this case.

But it is deemed unnecessary to make any further comments upon that case or refer to any other.

We think the decree of the court below ought to be affirmed.

Decree affirmed.

329 *Supervisors of Bedford v. Wingfield, Judge.

March Term, 1876, Richmond.

1. Writs of Prohibition.—For the purposes for which and the principles upon which writs of prohibition will be awarded, see the opinion of CHRISTIAN J.
2. Circuit Judges—Control of Court-House.—A judge of a circuit court has authority to control the court-house in which he administers justice, to the ex-

*Writs of Prohibition.—For instances when this extraordinary remedy was held not applicable, see Hogan v. Guilgon, 29 Gratt. 713, and note; also, McConiha v. Guthrie, 21 W. Va. 140, where the principal case was approved.

In the following cases prohibition was held to be

tent, at least, of preventing any interference with the discharge of the public business, and of having necessary jury rooms and other conveniences for that purpose.

3. Same—Same—Erroneous Exercise of—Remedy.—

Where there is any such interference by the board of supervisors of a county, or any one else, the judge certainly has the right to enquire into it. If in doing so he violates the law or infringes upon the rights of others, his action may be corrected by a writ of error. But it is not a case in which prohibition will lie.

4. Same—Same—Same—Same.—

The board of supervisors of a county order that one of the jury rooms attached to the court-houses shall be prepared to be used as a part of the clerk's office of the county court, and this order is approved by the county court. The judge of the circuit court thereupon makes a rule upon the board of supervisors to show cause why they shall not be restrained from making the changes in the room. This court will not restrain him by prohibition from proceeding under the rule; but the board should make their defense in the circuit court; and any error of the judge in that proceeding may be corrected by writ of error to this court.

This was a rule upon the Honorable G. A. Wingfield, judge of the circuit court of Bedford county, made on the motion of the board of supervisors of that county, to show cause why a writ of prohibition should not be issued, forbidding him to interfere with the board in making certain alterations in the court-house building for the enlargement of the accommodations* for the clerk's office of the county. The case is stated by Judge Christian in his opinion.

Sale and Thurman, for the petitioners.

Christian J. delivered the opinion of the court.

Application is made to this court by the board of supervisors of Bedford county, invoking its original jurisdiction by way of prohibition, to restrain and prohibit the Hon. G. A. Wingfield, judge of the circuit court of Bedford county, from awarding a writ of prohibition, or otherwise interfering with the board of supervisors of said county, so as to prevent said board from making certain contemplated changes in the court-house of said county.

In the petition filed by said board it is alleged, in substance, that upon application to the board at its meeting in June 1875, by the clerk of the county court, requesting that additional room be provided for the records of the county, the board made an order requiring that a room adjoining the county court clerk's office, which had been used as a lawyer's office, should be fitted

up as a part of said county court clerk's office; and that a doorway be cut in the partition wall between said room and the clerk's office, for the more convenient use of said room as a part of said clerk's office. The petition further alleges, that the county court, by its order entered on 3d June 1875, declared that "the court doth approve, ratify and confirm said order of the board of supervisors," and "that the same be done in accordance with the order of the board of supervisors."

The petition then exhibits the following order of the circuit court of Bedford, 331 entered on the 4th September *1875, to wit: "It being suggested to the court that the supervisors of this county are about to proceed to cut the walls of the court-house, for the purpose of making an entrance into it from the county court clerk's office, and to connect a part of the court-house with the clerk's office, and have authorized one Robert S. Quarles to cut the same and connect it with the clerk's office; and this court deeming it improper so to mutilate the court-house, and change it into a clerk's office, doth therefore order that the said supervisors and the said Robert S. Quarles be summoned to appear here on the first day of the next term, to shew cause, if any they can, why a writ of prohibition should not be issued against them, to prevent them from so mutilating and changing the court-house of said county."

Setting out these facts, and presenting certain considerations why the circuit court had no jurisdiction in the case, the petition closes with the prayer that this court will award the commonwealth's writ of prohibition against the said circuit judge of the county of Bedford, prohibiting him "from the exercise of unlawful jurisdiction" in the premises, and from further proceedings against said board, "and from in any manner hindering or interfering with the said board in the exercise of their jurisdiction in the matter aforesaid."

Upon the presentation of the petition this court awarded a rule nisi upon the Hon. G. A. Wingfield, to shew cause why the writ of prohibition should not be awarded by this court.

To this rule Judge Wingfield filed his answer, in which he alleged that the room proposed to be converted into a clerk's office of the county court, by order of the board of supervisors, was one of the jury 332 *rooms of the circuit court, and that while it had been used by permission of the court as a lawyer's office, such use had always been subject to the right of the court to use it as a jury room. "That in the large county of Bedford, with a population of 30,000 or more, when the courts are in session with grand juries, venires in criminal cases, and juries in civil cases, of necessity the case must often arise, when the use of all the jury rooms will be required for the convenient dispatch of the public business, and that if the circuit court is to be deprived of the use of this room (which the board of supervisors propose to convert

the proper remedy: Board v. Gorrell, 20 Gratt. 484; French v. Noel, 22 Gratt. 454; Hein v. Smith, 13 W. Va. 358; Swinburn v. Smith, 15 W. Va. 501, where the principal case is distinguished; Ensign, etc., Co. v. McGinnis, 30 W. Va. 545. 4 S. E. Rep. 780, also citing but distinguishing from the principal case; Jelly v. Dils, 27 W. Va. 267; County Court v. Boreman, 34 W. Va. 87, 11 S. E. Rep. 747. See also, 4 Min. Inst. (2d Ed.) 348-9; 19 Am. & Eng. Enc. Law 268, 273; Va. Code, ch. 144.

into a clerk's office), the administration of public justice will be greatly impeded and obstructed." He further alleges that by the proposed change the danger of destruction of the court-house by fire will be greatly increased.

He further submits, that by virtue of the statute law he, as judge of the circuit court, had control, to a certain extent, of the court-house building, and that he might, under his authority and duty as circuit judge *ex officio*, have made a peremptory order preventing this change, if, in his opinion, such change interfered with the discharge of his public duties as judge of said circuit court, or in any way obstructed the administration of public justice in his said court; but he preferred, instead of issuing such peremptory order, as he had the right to do, to award a rule against the board of supervisors, in order that it might be seen upon the return of the rule whether the room could be used both for the purpose of a jury room as heretofore, and at the same time for the purposes as designed of additional room for the records of the county court.

The case was heard by this court upon the petition, and the return made by Judge Wingfield, and the arguments of counsel for the petitioners; and the question we now have to decide is whether, upon the case made by the petition and return, this court should award the writ of prohibition against Judge Wingfield.

This question is to be determined by certain general principles of law governing writs of prohibition, which it is necessary to refer to in order to determine this question.

1. The power of this court to award writs of prohibition is conferred by the constitution, and will always be exercised in a proper case; and when the proper case is made by the pleadings and evidence, the power to award the writ is unquestioned.

2. But, like all other extraordinary remedies, prohibition is to be resorted to only in cases where the usual and ordinary forms of remedy are insufficient to afford redress. And it issues only in cases of extreme necessity; and, before it can be granted, it must appear that the party aggrieved has no remedy in the inferior tribunals. The jurisdiction is exercised by appellate or superior courts, to restrain inferior courts from acting without authority of law where damage or injustice are likely to follow from such action.

3. It is not a writ of right granted *ex debito justitiæ*, but rather one of sound judicial discretion, to be granted or withheld according to the circumstances of each particular case. And being a prerogative writ, it is to be used like all other prerogative writs, with great caution and forbearance, for the furtherance of justice, and to secure order and regularity in judicial proceedings, where none of the ordinary remedies provided by law are applicable.

4. It is a principle of universal application, and one which lies at the very foun-

334 *that the jurisdiction is strictly confined to cases where no other remedy exists; and it is always a sufficient reason for withholding the writ, that the party aggrieved has another and complete remedy at law.

5. Another fundamental principle, and one which is to be constantly borne in mind in determining whether an appropriate case is presented for the exercise of this extraordinary jurisdiction is, that the writ is never allowed to usurp the functions of a writ of error, and can never be employed as a process for the correction of errors of inferior tribunals. High on *Ex. Remedia* 551, 556, and cases there cited.

Let us now apply these general principles to the case before us.

It will be conceded that the circuit court of Bedford, as all circuit courts, is invested by law with jurisdiction to issue writs of prohibition. Whatever irregularities may have been committed by said court in the exercise of its general jurisdiction, in this particular case, was a subject of defence in answer to the rule. For instance, if, as is urged here, there was no relator, at whose instance the rule was made by Judge Wingfield; or if, as was insisted in argument, the county court having concurrent jurisdiction of the subject matter had already control of it, and had passed upon it, these are matters of defence upon an answer to the rule, and ought to have been made in the circuit court, and are not proper grounds for a writ of prohibition from this court.

The process awarded by Judge Wingfield, while called in the proceedings a writ of prohibition, was a mere rule awarded by him, *ex mero motu*, upon the board of supervisors, making inquiry of them why they proposed to convert one of the jury rooms of the circuit court into a clerk's office of the county court, and to show cause why they should not be prohibited from so doing. We think, as judge of the circuit court, he had a right to make this inquiry. The statute law confers upon the circuit judge control of the court-house in which he administers justice, to the extent, at least, of preventing any interference with the discharge of the public business, and of having necessary jury rooms and other conveniences for the purpose.

When there is any such interference by the board of supervisors, or any one else, he certainly has the right to enquire into it. If in that enquiry he violates the law, or infringes upon the rights of others, his action is subject to be corrected upon a writ of error. But it is not a case in which prohibition will lie. All the objections made here to the action of Judge Wingfield, and urged as grounds of prohibition, could properly be made, and ought to be made, upon the return of the rule made by him.

This court will certainly not interfere, by the extraordinary remedy of prohibition, to prevent him from making an enquiry, which he has a right to make, especially when all the grounds of objection urged to

his action may be made as matters of defence in answer to the rule, and the whole question more properly adjudicated in the circuit court. We say more properly in the court below, because the whole case can be there fully heard upon the facts; and the orders made by the board of supervisors, and the county court, if ex parte, as they may be, can be reviewed and fully considered.

To grant the writ of prohibition in this case, would be to establish a new practice, and to lend the aid of this high prerogative writ, which is always issued with

336 *caution, and when there is no adequate remedy, in a case where the parties have ample remedy in the court below, and by writ of error to this court. This court will always discourage and put its seal of disapprobation upon every attempt to use the writ of prohibition to usurp the functions of a writ of error, and to employ it as a process to correct the error of inferior tribunals, instead of the regular modes by appeals and writs of error. The rule awarded against the respondent, Hon. G. A. Wingfield, judge of circuit court of Bedford, is discharged.

Rule discharged.

337 *Penn, Assignee, v. Hamlett & als.

March Term, 1876, Richmond.

1. **Bonds.**—A blank paper is signed and sealed by a principal and three others who intend to be his sureties, and it is left with the principal to be filled up and delivered by him. He does fill it up and deliver it to the obligee named therein. It is not the bond of the three, and does not bind them. But the principal having filled it up, and delivered it when thus complete, it is his bond, and binds him.

This was an action of debt in the circuit court of Henry county, brought by Susan S. Penn, assignee of H. C. France, against John T. Hamlett, Wm. S. Reed, George S. Hairston and M. F. Gravely. On the trial there was a judgment in favor of the defendants; and the plaintiff applied to this court for a writ of error and supersedeas; which was awarded. The case is stated by Judge Christian in his opinion.

Ould & Carrington and J. E. Penn, for the appellant.

Jones & Bouldin and Cabell & P., for the appellees.

Christian, J., delivered the opinion of the court.

This case is before us upon a writ of error to a judgment of the circuit court of Henry county.

The action was a debt upon a bond signed, or purporting to be signed, by four obligors. The bond was payable to H. C. France, who assigned it to Mrs. Susan S. Penn, the appellant here.

338 *The bond is in the following form:

On or before the 10th day of October, 1867, with interest from date, we promise to pay H. C. France the just and full sum of seven hundred dollars, for value received.

Witness the following signatures and seals, this the 23d day of November, 1866.

Jno. T. Hamlett, [Seal.]

Wm. S. Reed, [Seal.]

Geo. S. Hairston, [Seal.]

M. F. Gravely, [Seal.]

To the action on this bond, two of the defendants, Geo. S. Hairston and M. F. Gravely, pleaded non est factum.

Upon the trial of the issue made on this plea, the jury found a special verdict in the following words:

We, the jury, do find the following facts proved, viz: That the defendant, John T. Hamlett, in a negotiation with France, the obligee, for the purchase of several mules at a price which was not agreed on, said Hamlett was required by said France to give a bond with good security for whatever might be agreed upon as the price; which Hamlett promised to procure and deliver to him. That the said Hamlett sometime afterwards applied to the defendants, George S. Hairston and William S. Reed, to become securities on such bond; and at a meeting of said Hamlett, Reed and Hairston, all present, Hamlett stating that he wished to show to France that he could give as good a bond as any man in Henry, that the prices of the mules had not been agreed on, but would not exceed seven hundred and fifty dollars, and he thought might

339 *be seven hundred dollars; and assuring said Hairston and Reed that if they would become sureties, he would procure Mrs. Matilda Gravely, Benjamin Gravely, C. Y. Thomas, and D. W. Reamy, to join as sureties on the bond, the said Reed and Hairston did then, on the — day of —, sign their names with said Hamlett on a blank piece of paper, with only the names of Hamlett, Reed and Hairston, with seals to each name, with the express agreement and assurance of said Hamlett that he would fill out or write the body of the bond for an amount not exceeding \$750, and would procure the names of B. F. Gravely, C. Y. Thomas, and D. W. Reamy, and that the paper with the said three names and seals was delivered to the said Hamlett, to be delivered as their bond only when said names were added; that said defendant, Matilda Gravely, afterwards signed said blank with a seal to her name, with the understanding and upon condition that the said Hamlett add the names of C. Y. Thomas and B. F. Gravely, which he promised to do; but said Hamlett took said paper and saw said France, made a satisfactory arrangement with said France, and then wrote the body of said paper over the names and seals of said Hamlett, Reed and Matilda Gravely, and delivered it to said France. That after the bond had been filled out and delivered to France, Hamlett voluntarily and without the knowledge of the defendants executed a deed of trust to indemnify the defendants,

under which nothing could be realized for the purposes of the deed. But whether or not, upon the matter aforesaid, the issue joined be for the plaintiff or for the defendants, the jury do not know, and therefore they pray the advice of the court; and if upon the whole matter it should seem to the court that the issue is for the plaintiff, then the jury find for the plaintiff upon said issue the debt in the declaration mentioned, with interest from the 23d of November, 1866. But if upon the whole matter aforesaid it seems to the court that the issue is for the defendants, then the jury find for the defendants upon the said issue.

Upon this special verdict the circuit court held that the matters of law arising thereon was for the defendants Hairston and Gravely, and accordingly gave judgment for these defendants upon the plea of non est factum.

It is to this judgment that a writ of error was awarded by this court.

The court is of opinion that there is no error in this judgment of the circuit court.

The appellees, Hairston and Gravely, with the other two obligors, not only signed their names upon condition that three others should sign with them, but it appears by the special verdict that when they signed their names and affixed their seals, it was upon a blank piece of paper, with no obligation or writing of any kind above their signatures. Such a paper was not the deed of the parties. It was a mere nullity. In *Shepherd's Touch-stone*, page 54, the ancient rule of the common law is thus declared: "Every deed well made must be written; i. e., the agreement must be all written before the sealing and delivery of it; for if a man seal and deliver an empty piece of paper or parchment, albeit he do thereinwithal give commandment that an obligation or other matter shall be written in it, and this be done accordingly, yet this is no good deed." See also 4 Comy. Digest 157; Plowd. 308; Coke Lit. 171. We know of no decision by which this ancient doctrine of the common law has been overruled.

341 *On the contrary, this rule of the common law has been often reaffirmed by this court as well as by the supreme courts of other states of the Union. *Asberry v. Callaway*, 1 Wash. 72; *Harrison v. Tiermans*, 4 Rand. 177; *Rhea v. Gibson's ex'or*, 10 Gratt. 215; *Ayres v. Hayne*, 1 Ohio R. 368; *Gilbert v. Anthony*, 1 Yerger's R. 69 Tenn.; *Byers v. McClanahan*, 6 Gill. & John. 250 Maryland. See also 2 Rob. Prac., new ed. 17, and cases there cited; *Preston v. Hull*, 23 Gratt. 600. These decisions (and there are none to the contrary) follow the ancient rule of the common law, and are founded on the following principles: Deeds are of a higher nature than parol contracts, and there are great and important distinctions between the operations and effect of these different species of contracts. The reason of which is, that the first are supposed to be made upon greater deliberation and with greater solemnity: they are first to be written, by which they are exempted

from that uncertainty arising from the imperfection of memory, to which unwritten contracts must always be exposed; they are then to be sealed by the party bound; and, lastly, to be delivered, which is the consummation of his resolution. None of this deliberation and little of this solemnity is to be found in the signing and sealing of a blank piece of paper on which anything may afterwards be written, and whether with or without the consent of the party who signed it, must depend entirely on oral testimony, subject not only to the uncertainty arising from the imperfection of human memory, but exempted from those checks on perjury which would exist in a deed regularly executed, and which could only be altered by erasure or interlineation.

One of the essential requisites constituting a deed is, that it should be written, as well as signed, sealed *and delivered.

The appellees in this case having (according to the special verdict) signed and sealed a blank piece of paper, were not bound, and the plea of non est factum was a good plea. What was written over these signatures and seals did not bind them, unless it could be shown that the authority to execute the writing and deliver the paper was given to another under seal. Nothing of this sort is pretended. The signing and sealing of a blank was not their deed, but was a mere nullity, which could not bind them.

This view of the case makes it unnecessary to consider the argument or the authorities relied on by the learned counsel for the appellants. The cases of *Ward v. Churn*, 18 Gratt., and *Nash v. Fugate*, 24 Gratt., and other cases referred to by him, were decided on very different principles, which have no application to the case before us. We have here the simple case of a blank piece of paper signed and sealed by the appellees, and written over by another, and delivered by another without authority under seal to make such writing and delivery.—such a paper is no deed; and the circuit court did not err in so declaring.

In the recent case of *Preston v. Hull*, cited supra, Judge Staples, in an elaborate opinion, in which he reviews many of the English and American cases, conclusively shows that the law is well settled, that a paper not complete on its face, to the extent of having a blank which is essential to be filled in order to make it a perfect deed, is not the deed of the parties; and that authority by parol to an agent to fill such blank does not make the instrument a valid deed. Such authority must itself be under seal.

This case is decisive of the one under consideration. If, as was held by this court in *Preston v. Hull*, a bond in which the name of the obligee was blank when *it was signed by the parties, was not their deed, and that no authority by parol to fill the blank could make it valid, certainly a signature and seal on a blank piece of paper, afterwards written over without authority, or by parol authority, is not a good deed.

But the court is further of opinion, that the said circuit court erred in entering a judgment in favor of the defendant Hamlett. As to him the bond was a valid instrument, —it having been written, signed, sealed and delivered by him. He is therefore bound by it though the other defendants cannot be held liable.

Judgment reversed as to Hamlett, affirmed as to the other defendants.

344 *Commonwealth v. Ches. & Ohio R. R. Co.—Four cases.

March Term, 1876, Richmond.

1. **Railroad Companies—What Property Taxable.**—The state has not, either by statute or contract, relinquished her right to tax that portion of the Chesapeake and Ohio railroad which lies between the city of Richmond and the town of Covington, and all the property of the company, real and personal, belonging to that part of the road, and a fair proportion of its rolling stock, and of the earnings of the company, to be ascertained and apportioned in such mode as may be prescribed by law. But she has relinquished the right to tax the property of the company lying west of Covington.

2. **Same—Same—Bonds.**—A state cannot tax the bonds of a railroad company held by persons living out of the state.

These were motions by the commonwealth, in the circuit court of the city of Richmond, against the Chesapeake and Ohio Railroad Company, for fines upon the company for their failure to comply with the laws of the state in relation to the taxation of such corporations. The company appeared and defended the motions, on the grounds that, under their contract with the state, their property could not be taxed until their profits amounted to ten per centum per annum on their capital; and it was agreed that the profits of the company had not at any time amounted to ten per cent. a year on its capital.

The parties agreed a case, and, dispensing with a jury, submitted the whole matter of law and fact to the judgment of the court: and the court held that there was no liability on the part of the defendant, and dismissed the motions. And thereupon

345 the Attorney *General applied to this court for a supersedeas; which was allowed. The cases are sufficiently stated by Judge Anderson in his opinion.

The Attorney General, for the commonwealth.

H. Wickham and Wm. J. Robertson, for the appellees.

Anderson J. delivered the opinion of the court.

The important question in each of these causes is as to the right of the commonwealth to impose a tax upon property of the Chesapeake and Ohio Railroad Company when the profits of the company have not

amounted to ten per centum a year upon its capital. There is no question that corporations are in general like natural persons, liable to taxation. Their capital stock or their property, both real and personal, is taxable to the corporation itself. But this company claims an exemption by contract with the state from taxation.

The question as to the power of a state legislature to grant to a corporation the immunity of an exemption from taxation has been much debated, and decisions have been conflicting. In *Thorpe v. The Rutland and Burlington Railway* (27 Vt. R. 140) a doubt is expressed as to the entire soundness of the principle of legislative exemptions of corporations from taxation. The power of taxation is an important and essential prerogative of sovereignty, and it has been questioned how far the legislature can divest itself of the right and power to exercise so important a function of sovereignty, or how one legislature can abridge the general power of every sovereignty to

impose taxes for the support of government. *Brewster v. Hough*, 10 New Hamp. R. 138; *Mechanics and Traders Bank v. Debolt*, 1 Ohio St. 591; *Toledo Bank v. Bond*, Id. 622.

Numerous cases might be cited which maintain the want of power in the legislature to exempt corporations or property perpetually from taxation. Mr. Redfield seems to think that there is ground to question the right of a legislature by one act to extinguish this essential right of sovereignty. And in a note on page 385-6, of his valuable work on the Law of Railways, he says: "We should not be surprised hereafter to find this whole subject of the right of a state legislature to exempt corporations by their charter from taxation brought in question. But" he adds, "the law at present is probably otherwise." And in this opinion Mr. Cooley concurs, and is more decided. He says: "So far as the power of taxation is concerned, it has been so often decided by the supreme court of the United States, though not without remonstrance on the part of the state courts, that an agreement by a state for a consideration received, or supposed to be received, that certain property rights or franchises shall be exempt from taxation, or taxed only at a certain agreed rate, is a contract protected by the constitution, that the question can no longer be considered an open one." He adds: "In any case, however, there must be a consideration, so that the state can be supposed to have received a beneficial equivalent; for it is considered on all sides that if the exemption is made as a privilege only, it may be revoked at any time." *Cooley's Const. Lim.*, p. 280-1, and cases cited.

Supposing the question of law to be settled, as thus indicated by Mr. Cooley, we will proceed to inquire: Has the state of Virginia by contract relinquished her right of taxation to any extent as involved in these *causes? She claims the right to tax only that portion of the property and interests with which the Chesapeake

and Ohio Railroad Company is invested, which it derived from the Virginia Central Railroad Company, and also which it acquired by purchase from the state since its incorporation, which she contends has not been relinquished by any act of the legislature, or by contract.

The Virginia Central railroad was a company chartered by the state of Virginia, and it constructed the railroad between Richmond and Covington, with the exception of that portion which is known as the Blue Ridge railroad, extending from the eastern to the western base of the Blue Ridge, a fraction over sixteen miles, which was constructed by the state of Virginia, and the said company was operating the whole line of road between Richmond and Covington when it entered into the contract referred to. The states of Virginia and West Virginia, as authorized by acts of their several legislatures, contracted with the said Virginia Central to construct and operate a railroad from Covington to the Ohio river, which would be a continuation or extension of the Central railroad, and authorize the said company to change its name from the "Central" to the Chesapeake and Ohio Railroad Company. And the said company claims that all its property is now exempt from taxation under the following clause of the contract, viz: "And the said Virginia Central Railroad Company having undertaken and contracted to construct the said railroad on the terms and conditions aforesaid, it is hereby declared and certified that the said company shall hereafter be known as 'The Chesapeake and Ohio Railroad Company,' and is entitled to all the benefits of the charter of the Covington and Ohio railroad, and to all the rights,

348 interests *and privileges which, by the statutes aforesaid, are conferred upon the Chesapeake and Ohio Railroad Company when organized."

To divest a state of such an essential attribute of sovereignty, of such an important function of government, the terms of relinquishment should be clear and unequivocal. In *Richmond Railway Co. v. The Louisa Railway Co.*, Mr. Justice Grier refers to former decisions of the court with approbation, "that public grants are to be construed strictly; that any ambiguity in the terms of the grant must operate against the corporation and in favor of the public, and the corporation can claim nothing but what is clearly given by the act"—quoted by Redfield, *supra*, in note on page 432. And that eminent jurist says: "The language of Taney Ch. J. in *Charles River Bridge v. Warren Bridge*, 11 Peters. R. 420, 548, is still more specific, and, in my opinion, eminently just and conservative: 'the continued existence of a government would be of no great value, if by implications and presumptions it was disarmed of the powers necessary to accomplish the ends of its creation, and the functions it was designed to perform transferred to privileged corporations.'" "The conclusion of the learned judge and eminent jurist is," says C. J.

Redfield, whose own opinion carries with it almost the weight of authority, "that no claim in any way abridging the most unlimited exercise of the legislative power over persons, natural or artificial, can be successfully asserted, except upon the basis of an express grant, in terms, or by necessary implication'" (note on p. 433). The express grant here is, "to all the benefits of the charter of the Covington & Ohio railroad," and "to all the rights, interests and privileges which by the statutes are conferred upon the Chesapeake and Ohio Railroad Company when organized."

349 *Was the immunity of exemption from taxation upon the entire line of its road from Richmond to the Ohio river, now claimed by the defendant in error, conferred by the charter upon the Covington and Ohio Railroad Company, or by statute upon the Chesapeake and Ohio Railroad Company when organized? If it was not, the defendant cannot claim the immunity under the contract before recited.

By an act of the 15th of February 1853 the legislature of Virginia had authorized the construction of a railroad from Covington to the Ohio river, entirely on state account. Appropriations had been made to the work and large sums expended upon it, when it was arrested by the late war. Soon after the conclusion of the war, a portion of the projected road falling within the limits of the new state of West Virginia, which had been carved from the state of Virginia by the sword, the legislatures of both states enacted laws, the same in terms, to construct the railroad between Covington and the Ohio river, by an incorporated company, to be styled the Covington and Ohio Railroad Company; and the law declared that no taxation upon the property of the company, that is, of the Covington and Ohio Railroad Company, shall be imposed by the state, until the profits of the company shall amount to ten per centum a year upon its capital. The property and rights and franchises of the Central Railroad Company were taxable to the company by the state at the date of this act. The state surely will not be held to have surrendered that right by the act aforesaid providing for the organization of a company, to be styled "The Covington and Ohio Railroad Company," and exempting its property from taxation. There is no such relinquishment by express terms, or by the remotest implication.

350 *And by the terms of the contract we have seen that there is no express grant to the Central Railroad Company, either by its old or its new name, of an exemption from taxation at all. It was only an agreement that the Central Railroad Company should have all the benefits which were given by the charter to the Covington and Ohio Railroad Company, which were, that no taxation upon the property of the Covington and Ohio Railroad Company shall be imposed by the state. Was the property, which the state now asserts the right to tax, ever property of the Covington and Ohio Railroad Company? Never! Then it

was not exempted from taxation by the charter of the Covington and Ohio Railroad Company; and the benefit of no such exemption is conferred by the terms of said contract. Nor can it be implied that because the state was willing, that any party who would construct and operate a railroad from Covington to the Ohio river should be relieved from all tax upon the road and its rolling stock or its earnings; that if the Central Railroad Company should construct and operate it, the said company should have that immunity, and in addition exemption from all taxation upon its road from Richmond to Covington (then taxable), its rolling stock and all its property, real and personal, and its earnings. Surely it could not be claimed that such was a necessary implication. The reverse is a more reasonable inference, to wit: that the state did not intend to relinquish a subsisting right of taxation upon a road which was already completed and in operation, and upon a work which was then the exclusive property of the state, which the new company had the privilege of purchasing, but for the purchase of which it does not appear that even a proposition was then pending, and which it did not until some time afterwards *acquire, and then by a separate contract, in which it does not appear that there was any stipulation for exemption from taxation.

Is exemption from taxation, conferred by the statutes referred to in the contract, upon the Chesapeake and Ohio Railroad Company when organized? There is a provision in section 14 of the act of March 1st, 1867, that it shall have the right any time within two years after its organization to purchase the stock held by the state in said company, and that it may also purchase the right of the state in and to the Blue Ridge railroad in the way prescribed by the act. But we have been unable to find any provision in the statutes referred to exempting the Chesapeake and Ohio Company when organized from taxation.

We are therefore clearly of opinion that the state has neither by act of the legislature nor by contract relinquished her right to tax that portion of the Chesapeake and Ohio railroad which lies between the city of Richmond and the town of Covington, and all the property of the company, real and personal, belonging to that part of its road, and a fair proportion of its rolling stock and of the earnings of the company, to be ascertained and apportioned in such mode as shall be prescribed by law; and that to this end it was entirely competent for the legislature to call for the information required by the several acts referred to in these proceedings.

But these acts require not only reports from the companies of the several matters designated therein; they also provide that the several companies shall be collectors for the state of the taxes imposed on them respectively, and shall at the time fixed for making their several reports pay into the

treasury the taxes imposed thereon by law.

352 *The first of these causes, No. 1, is a motion against the defendant for a fine for failing to make report as required by the act, and to pay the tax imposed by section 8 of the act, approved July 9, 1870; that is, two and one-half per centum of its net earnings for each quarter of a year, to be ascertained and paid into the treasury as prescribed by section 48 of the act for the assessment of taxes approved June 29, 1870. That section provides, that if the road is only in part within the commonwealth, the report shall show what part is within the commonwealth, and what proportion the same bears to the entire length of the road. The said eighth section can therefore be fairly construed to impose a tax only upon the proportion of the net earnings of that portion of the road which is within this commonwealth. But as we have seen, a small portion of that is part of the Covington and Ohio portion of the Chesapeake and Ohio road, and which was exempted by contract from taxation until the profits of the company shall amount to ten per centum a year upon its capital, which has not yet been realized. The court is of opinion, that the tax imposed by this section on that portion of the defendants' road which lies between Richmond and Covington is valid, and binding upon the company. But if it can be construed to impose a tax upon any part of the company's road west of Covington, or upon the net income derived therefrom, which probably was not intended by the legislature, being embraced in the contract of exemption, it would be unconstitutional and void.

No. 2 is a motion for a fine for failing to report, as required by section 91 of the act of February 1871, and to pay the tax imposed by section 8 of act of March 24, 1871. The tax imposed by this section is fifty cents on every hundred dollars of the 353 estimated *value of the real and personal property of the company, and one-half of one per centum upon the net earnings of the company per annum in excess of \$1,000, to be ascertained and paid into the treasury as prescribed in section 91 of the aforesaid act. This act is obnoxious to the objection made to the act of the previous year, so far as it imposes a tax upon any part of the Covington and Ohio portion of the defendants' road.

No. 3 is a motion for a fine for failing to report, as required by section 91 of the act of March 15, 1872, and to pay the tax imposed by section 8 of the act of April 3, 1872. The tax imposed by this section is the same imposed by the act of the previous year upon the real and personal property of the company, and so far as it is a tax upon the property of the company, belonging to that portion of the road lying west of Covington, for the reasons already stated, it is invalid. But it is provided, that in lieu of the property tax there shall be paid upon the indebtedness of the company, out of all interest due and payable upon such indebt-

edness after the passage of said act, a tax equivalent to fifty cents upon the one hundred dollars of the market value of the bonds upon which such interest shall accrue, the market value of such bonds to be ascertained as of the first day of May in each year. And the company is required to retain and collect for the state the said tax out of the interest upon its indebtedness, as well as to bonds held and owned by non-residents as residents of this state, and deducting the tax from the interest, to pay the same into the treasury, to the credit of the auditor of public accounts, within thirty days after such interest shall have become due or payable. And the tax so retained and paid over shall

be pro tanto a just and proper credit 354 and *offset in favor of said company against any claim for such interest. And it is further provided, that the bonds, out of the interest upon which such tax shall be retained, shall be exempt in the hands of their owners from the tax imposed by this state upon property and from assessment. It is contended by the learned counsel for the defendant that this tax is unlawful. It is obviously a tax upon the creditor, whether resident or non-resident, which is required to be paid by the debtor, whose domicile is within the state.

It seems to be pretty well settled by judicial decisions, that the stock or bonds of a corporation of this state, which are owned and held by inhabitants of another state, are not liable to taxation here. Judge Redfield says: "As to shareholders' interest, and all choses in action, they are personal to the creditor, and only taxable in the place of his domicile. The creditor cannot be taxed in the place of the domicile of the debtor, unless he resides there; nor can the debtor be taxed for the debt, and allowed to deduct the tax from it; nor can a tax against the creditor be imposed upon the property which is pledged or mortgaged to secure a debt, and thus made to apply towards the payment of the debt. The legislature has no power to tax choses in action held by non-residents. They are altogether beyond their jurisdiction. Redfield's Law of Railw., p. 461. Angel and Ames on Corp. § 458, is in accord. Judge Cooley says in his recent work on Taxation, page 15, "corporations, it is conceded, may be taxed like natural persons, on their property and business. But debts owing to foreign creditors, by either corporations or individuals, are not the subject of taxation. The creditor cannot be taxed, because he is not within the jurisdiction, and the debts cannot be taxed

in the debtor's hands, through any 355 fiction of the law, *which is to treat them as being for this purpose, the property of the debtors." And the doctrine as thus laid down is supported by the current of decisions. We must conclude, therefore, that so much of the said act as imposes a tax upon the indebtedness of the company, which is held and owned by non-residents, is invalid and void.

No. 4 is a proceeding under the same acts of assembly last named, which continued in

force for the year 1873, and must be disposed of in the same way.

The tax upon the indebtedness of the company is not continued by the act of 1874. The tax imposed is a tax upon the real and personal property within the commonwealth, and an income tax, and if the same is confined to the portion of the Chesapeake and Ohio Company's road which lies between the city of Richmond and the town of Covington, the court is of opinion that the act by which it is imposed is constitutional and valid. We are of opinion, therefore, to reverse the judgment of the circuit court with costs in each case.

Judgment reversed.

356 *Hatorff v. Wellford, Judge.*

March Term, 1876, Richmond.

Homestead Exemption—Rights of Widow.—A homemaker dying leaving a widow, without having had a homestead assigned him in his lifetime, his widow remaining unmarried, is entitled to claim the same and have it assigned to her.

This was an application to this court by Mrs. — Hatorff, widow of — Hatorff, deceased, for a mandamus to compel the judge of the circuit court of the city of Richmond, to allow her a homestead out of the estate of her deceased husband. The case is sufficiently stated by Judge Staples in his opinion.

Don P. Halsey, for the petitioner.

Wm. Green, Esq., at the request of the court, presented his views in writing on the constitutionality of the homestead act.

Staples, J. The petitioner filed her application in the circuit court for the city of Richmond, stating that her husband was in his lifetime a householder and the head of a family; that he died on the 13th of January 1875, leaving the petitioner, his widow, and five infant children surviving him; that her said husband was possessed only of personal estate at the time of his death, and that he had not selected or claimed the homestead to which he was entitled. The

petitioner therefore prayed the court 357 to appoint commissioners to *assign the same to her in said property in the manner prescribed by law.

The circuit court refused the application, and thereupon the petitioner applied to this court for a mandamus. In response to the rule issued against him, the judge of the circuit court has filed an answer stat-

*For monographic note on Homestead Exemption, see end of case.

†Homestead Exemption—Rights of Widow.—See Helm v. Helm, 30 Gratt. 404, and note, citing the principal case; Reed v. Bank, 29 Gratt. 719, and note, where the principal case is again cited. Scott v. Cheatham, 78 Va. 82, quoted the following proposition from the principal case: "A householder dying leaving a widow, without having had a homestead assigned him in his lifetime, his widow remaining unmarried is entitled to claim the same and have it assigned to her." See also, Strange v. Strange, 76 Va. 304.

ing at length the ground upon which his refusal was based. It is necessary to a proper understanding of these grounds we should have before us so much of the act of 1870 as relates to the subject-matter of inquiry. That act is contained in chapter 183, Code of 1873, page 1168. The tenth section under which this question arises is as follows:

"If any such householder or head of a family shall have departed this life since the adoption of the present constitution, leaving a widow or infant children, and such homestead shall not have been selected or assigned in the lifetime of said householder, she, if remaining unmarried, or they, if she marry or die before such selection, shall be entitled to claim the same, and the court shall appoint commissioners to assign the same in the same manner that commissioners are appointed to assign dower."

There are other provisions in this section, but it is unnecessary to cite them, as they have no immediate connection with the matter before us.

The learned judge of the circuit court is of opinion that this section applies only to the case of a husband or head of a family dying between the adoption of the constitution and the date of the act of July 1870. According to his view, until the passage of that act, or some legislation by the general assembly, the provisions of the constitution on the subject of the homestead were wholly inoperative. If, therefore, the householder

or head of the family had died between *the two periods mentioned, his widow or minor children would be deprived of the benefit secured by the constitution. To obviate this difficulty, the section already quoted was adopted, authorizing them to do what the householder or head of a family might and probably would have done had he been allowed to assert his claim to the homestead exemption.

But where the householder or head of the family lived until after the passage of the act, and refused or declined to avail himself of the provisions intended for his benefit, his widow and minor children, claiming only through him, cannot be permitted to appropriate his estate to the exclusion of creditors and the adult children. And so the legislature must have intended in adopting the section under consideration. The peculiar phraseology of that section furnishes very persuasive evidence of this intention: "If any such householder or head of a family shall have departed this life since the adoption of the present constitution;" words obviously referring to some antecedent period. Whereas if the design had been to give the law a prospective operation, the additional words, "or shall hereafter die," would have been inserted, thus placing the legislative intent beyond all cavil or controversy.

This is the construction given to the statute by the learned judge of the circuit court, and in support of it he has presented a very elaborate argument. We are however of opinion that this is not the correct con-

struction. The question is one of the first impression in this state, and from its general importance deserves careful consideration. The phraseology of the section under consideration, it must be confessed, is somewhat peculiar, but the difficulty of ascertaining its precise meaning is more apparent than real.

The learned counsel for the petitioner has called our *attention to several statutes in the Code of 1860, in which the same peculiarity of language is employed. For example: In the first section of chapter 174 it is provided that "where any suit, motion, or other proceeding shall have remained pending a year," &c. There are other instances of the same kind not necessary to be quoted, all of them manifestly having a prospective operation. Similar examples may be found in the chapter relating to the homestead exemptions, as in the sixteenth section, wherein it is provided that "Any householder or head of a family who shall have failed to select and set apart a homestead and personal property according to the provisions of the foregoing sections, and who desires to avail himself of the benefit of the exemptions provided for in this act," &c. These examples are sufficient to show that the peculiar phraseology used in the tenth section has been adopted in the other sections—that it has no special significance, certainly none restricting its operation to the case of the death of the householder before the passage of the act. That very section (the tenth), in connection with the twelfth section, furnishes unmistakable evidence that it was designed to extend to cases occurring after its adoption. After declaring, as already stated, that if the householder or head of a family shall have departed this life since the adoption of the present constitution, leaving a widow or infant children, it proceeds as follows: "And such homestead shall not have been selected or assigned in the lifetime of said householder." Now this section is not only superfluous but senseless, if the section is to be confined to the case of the householder dying before the passage of the act, because until that act was passed it was impossible for the householder to make selection or assignment of the homestead. It will also be

360 observed that the *twelfth section, after making provision for the terms and conditions upon which personal estate may be held in the place of the homestead, declares, "And in case no such selection (that is of personal property) shall have been made, and the householder be dead, leaving a widow or infant children, she may, if unmarried, make such selection, or if she be dead or married, the infant children may, &c., by their guardian or their next friend make the same." This is the law which controls when there is no real estate. It is the law under which the petitioner claims. It omits the words, "since the adoption of the present constitution," used in the tenth section, upon which so much reliance is placed. The language is substantially the

same as that of the sixteenth section, which confessedly extends to every class of cases.

And it would seem impossible to resist the conclusion that the object of the provision was to give to the widow and infant children the privilege of selection in all cases where the husband or father had failed to exercise it in his lifetime. If we construe these sections (the tenth and twelfth) as speaking, not from the date of their enactment, but as at the death of the householder or head of a family, and as applying to all cases arising since the adoption of the constitution, whether the death occurred before or after those sections were adopted, we have some explanation of the peculiar phraseology just adverted to.

This construction is much strengthened by a careful consideration of the policy which has dictated these homestead exemptions—a policy suggested by considerations both of a political and a benevolent character. Political, because the homestead is regarded as tending to foster views of manly independence in the citizen, and as contributing to the settlement of a

361 country *by inviting immigration, and by holding out inducements to the improvement of property. Benevolent, because the possession of the homestead is the security of the family against the improvidence, the follies and the imprudences of the husband or father. Householder, or head of a family, are the terms pervading these homestead enactments—a home for the destitute and helpless, secure from financial ruin and the pursuit of creditors. These objects cannot, in many cases, be accomplished. They may be, and often are, defeated by the act of the owner himself, because the legislative power cannot interfere with a man's dominion of his own property while he lives. Homestead laws prevail, perhaps, in a large majority of the states. No one can look through their various statutes without at once seeing that "protection of the family" is one of the leading ideas upon which these exemptions are founded. In some of the states the claim of the widow and minor heirs to a homestead in the estate of the father has been the subject of animated discussion, and in every instance it has been sustained by the courts. *O'Docherty v. McGloen*, 25 Texas R. 67; *Hode v. Johnson & Heath*, 40 Georgia, 439; *Roff, Sims & Co. v. Johnson*, *Ibid*, 555.

Are we to suppose that the legislature of Virginia intended to depart from the policy of the other states in this particular?

There is nothing in the various statutes on the subject to indicate that purpose. On the contrary, upon looking through them, we find everywhere the evidences of a design to confer upon the family the benefits of these exemptions in the lifetime and after the death of the owner of the estate. It is a great mistake to suppose that the husband or father, because he fails to claim

the homestead in his lifetime, thereby
362 *manifests a purpose or wish that his estate shall be appropriated to the

claims of his creditors. His failure to assert his claim may, and often does, proceed from very different causes—want of intelligent counsel, or sudden death, or from a spirit of procrastination, the besetting infirmity of many minds. But whatever may be his motive, if he has done no act to encumber or charge his estate, it is competent for the legislature to prescribe how and to whom the estate shall go after the death of the owner, and the terms and conditions upon which it is to be used and enjoyed. If the homestead laws be founded upon considerations of sound policy and humanity, there is as much reason for extending their benefits to the widow and minor children, where the householder has failed to claim the exemption, as in those cases in which he has asserted his claim. Deprived of the protection and the support of the head of the family, the widow and minor children have but stronger claims to the benefits of the homestead. In many cases there is no real estate, and of course no dower, as in the case before us, and the little pittance is often swept away by the claims of creditors, while the widow, with a family of helpless children, is turned adrift to struggle with poverty and misfortune. It is difficult to believe that the legislature could ever have designed so palpable a departure from the spirit of the constitution and the whole object and policy of the homestead exemptions. If the householder has waived his privilege, that, of course, presents an entirely different question. But if he has not waived it, and has merely failed to claim it while he lived, his widow and children should be permitted to assert the claim, as he would probably have done under different circumstances. At all events, the court ought so to decide until the legislature

363 shall otherwise provide in *terms plain and unmistakable. Such intention cannot be gathered from doubtful and obscure phrases of equivocal import.

No one can justly complain of this, certainly not the creditor, as he trusted the debtor with full notice of the consequences which might result from the credit he was extending. It is said, however, that the effect of this construction is practically to exclude the adult children from their share of the ancestor's estate, and to give it to the widow and minors, when there are no debts, and in many instances contrary to the wishes of the head of the family. It is sufficient to say that the mere appointment of commissioners settles nothing, except perhaps that the widow and minor children are entitled to select and set apart a homestead in the estate of the father or head of the family. It certainly does not adjudicate the rights of the creditors or the adult heirs unless they are parties to the proceeding. Whether the homestead when assigned is good against them, depends upon a variety of questions to be determined in some direct proceeding for that purpose. It has been held in Georgia and North Carolina certainly, and probably in other states, that the object of the homestead laws is the se-

curity of the debtor and his family against the demands of the creditor, and where there are no debts the homestead cannot be held against the adult children, and the assignment does not preclude them from asserting their title to a share of the estate. *Kemp v. Kemp*, 42 Georgia 523; *Hager v. Nixon*, 69 North Car. 108.

Upon these questions this court is not now called on to express any opinion. It is sufficient to say that the petitioner and her children are entitled to have assigned them, and to hold exempt from levy, seizure or sale so much of the personal estate of the father or *head of the family as he himself would be entitled to select and set apart were he now living and asserting his claim to the homestead. They stand, with reference to his creditors, in the same position they would have occupied had the householder himself asserted his claim, and then died, leaving the petitioner and the minors surviving him.

In regard to the constitutional question the court had at one time some difficulty. The doubt was, whether it was competent for the legislature consistently with the constitution to allow the widow and minor children a homestead in the property of the householder, when he himself had failed to claim an exemption in their behalf. It is proper to say that this difficulty has been removed by a more careful consideration of the subject, and more particularly by the arguments of the learned gentlemen who addressed the court on that subject. The provisions in favor of the widow and minor children are believed to be in accordance with the spirit of the constitution and the whole object and policy of the homestead exemption.

Christian and Anderson, J's, concurred in the opinion of Staples, J.

Moncure P. dissented.

Mandamus issued.

HOMESTEAD EXEMPTION.

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I. DEFINITION.

Homestead exemption is the right given by law to a debtor to retain a portion of his property without its being liable to execution at the suit of a creditor, or to a distress for rent. *Bouvier's Law Dict.* 734; 15 Am. & Eng. Enc. Law 525.

II. ORIGIN.

Homestead exemption is a creature of constitutional provision or statutory enactment; the common law did not recognize this right of the debtor. However, the privilege thus conferred by the legislature or constitution is not in derogation of the common law; for at common law though the right did not exist, neither was the real estate of a debtor ever liable to execution. In Virginia and West Virginia, the state constitutions are the source and origin of the right of homestead exemption. The

constitutional provision of Virginia (Va. Const. Art. XI) is self-executing, that is, itself confers the right and no legislation would be necessary to carry the right into execution; but the West Virginia provision (W. Va. Const. Art. VI, Sec. 48), is not self-executing, but confers on the legislature the power to provide for the right of homestead exemption by statute. See *Reed v. Union Bank*, 29 Gratt. 719; *Moran v. Clark*, 30 W. Va. 358, 8 Am. St. Rep. 66, 4 S. E. Rep. 303. In the latter case the court said: "From our investigation of this interesting subject, these propositions are naturally deduced: That the people in their constitution, as far as future debts may affect it, have the right to provide for any sort of homestead guarded as they please, subject to restrictions, or without restrictions, to prohibit the owner of the homestead from encumbering it, or to permit it to be done as in their wisdom they may see fit. That, unrestricted by the constitution, the legislature may exercise the same power. That where there is neither constitutional nor statutory prohibition as incident to the right of ownership, the owner of the homestead may sell or encumber it; and such sale or encumbrance will be as valid as if the property had not been set aside as a homestead. That, if the statute points out any particular mode by which the owner of the homestead may sell or encumber it, to that extent his power over it is restricted; that particular mode must be adopted, or the sale or encumbrance is invalid. That, where the constitution or statute is silent on the subject, a waiver of a debtor's right to claim personal property as exempted from execution, where attempted to be made by an executory contract as a clause in a note or contract, 'waiving the benefit of all exemption laws,' is ineffectual, and will not be enforced. That the sale of the homestead under a deed of trust, or under a decree of foreclosure of a mortgage thereon, is not a 'forced sale' within the meaning of the constitution which exempts a homestead from 'forced sale.'" See also, *Speidel v. Schlosser*, 18 W. Va. 686; *Holt v. Williams*, 18 W. Va. 704.

III. CONSTITUTIONALITY OF STATUTES.

A. Power of Legislature in General.—In *Helm v. Helm*, 30 Gratt. 409, the court said: "Generally the legislature cannot impair or abridge the rights of homestead secured by the constitution; it may enlarge such rights and confer them upon a class of persons not specifically mentioned in the constitution. Indeed, this question has been definitely decided by this court. In *Hatorff v. Wellford*, 27 Gratt. 356, the precise question as to the constitutionality of the act which confers the right to claim a homestead upon the widow or minor children of a decedent, who had not claimed and set apart his homestead, in his lifetime, was raised and argued in that case, and this court decided in favor of the constitutionality of the act, and of the right of the widow to claim the homestead in the estate of her deceased husband." See also, *Moran v. Clark*, 30 W. Va. 358, 8 Am. St. Rep. 66, 4 S. E. Rep. 303; *Va. & Tenn. C. & I. Co. v. McClelland*, 98 Va. —, 36 S. E. Rep. 479.

B. Discretion of Legislature.—In *Wray v. Davenport*, 79 Va. 25, the court, in passing upon the constitutionality of a statute providing for the manner and conditions of setting apart homestead exemption, said: "The homestead is given by the constitution of Virginia; but the constitution provides that the legislature shall prescribe in what manner and on what conditions the said householder or head of a family

shall thereafter set apart and hold for himself and family a homestead out of any property hereby exempted, and may, in its discretion, determine in what manner and on what conditions he may thereafter hold for the benefit of himself and family such personal property as he may have, and coming within the exemption hereby made." See also, *White v. Owen*, 30 Gratt. 51.

C. Restraints on Alienation of Homestead.—In *White v. Owen*, 30 Gratt. 52, the constitutionality of a statute, requiring the wife's joinder in a conveyance or incumbrance of the homestead, and thus to that extent imposing a restraint on the alienation of the homestead, was questioned. The court expressly declined to decide the point, though in a *dictum* it was strongly intimated that the statute went beyond the requirements of the constitution. But in the late case of *Va. & Tenn. C. & I. Co. v. McClelland*, 98 Va. —, 36 S. E. Rep. 479, it was held that the statute, (Va. Code, § 3634), providing that the homestead of a married man shall not be aliened except by joint deed of himself and wife, is not an unreasonable restriction of the form of alienation of the homestead, and does not impair the benefit intended to be given by the constitution. Accordingly a deed of the homestead by the husband alone was held to be void, and conveys nothing to the grantee.

D. Retroactive Homestead Exemption Laws.—The article in the constitution of Virginia, and the laws passed in pursuance thereof, giving a retroactive effect to the homestead exemption laws, are unconstitutional and void, being in repugnancy to that caused in the federal constitution which provides that no state shall pass any law impairing the obligation of contracts. In the *Homestead Cases*, 2 Gratt. 296, the court said: "The true doctrine is that such property as was subject to execution at the time the debt was contracted must continue subject to execution until the debt is paid, so long as it remains in the hands of the debtor." To the same effect, see *Russell v. Randolph*, 26 Gratt. 713; *Com. v. Ford*, 29 Gratt. 687; *Huffman v. Leffell*, 32 Gratt. 44; *Taylor v. Stearns*, 18 Gratt. 244; *Antoni v. Wright*, 22 Gratt. 858; *Speidel v. Schlosser*, 18 W. Va. 686; *Moran v. Clark*, 30 W. Va. 358, 8 Am. St. Rep. 66, 4 S. E. Rep. 303.

E. Statutory Exceptions to Right of Homestead.—Statutory exceptions to the right of homestead are void if in conflict with the state constitution. In *Donaldson v. Voltz*, 19 W. Va. 156, in passing upon the constitutionality of a statute whereby debts due for rent were excepted from the benefit of homestead exemption, the court said: "The constitution makes certain debts exceptions; but as to all other debts the exemption applies. If it was in the power of the legislature to except a debt due for rent from the benefit of the exemption, it could except all other debts and thus deprive the debtor of all the benefit intended by the constitution." See also, *Moran v. Clark*, 30 W. Va. 358, 8 Am. St. Rep. 66, 4 S. E. Rep. 303.

F. Statute Allowing Waiver of Homestead.—In *Reed v. Bank*, 29 Gratt. 719, the statute which authorizes the waiver of the homestead exemption was held to be constitutional; and that if a party, executing his bond or note, waives his homestead exemption as to the bond or note, neither he nor his wife can set up said homestead exemption as against said bond or note. See also, *Linkenbaker v. Detrick*, 81 Va. 44; *Scott v. Cheatham*, 78 Va. 82.

Where, however, there is no statutory authority for a waiver, it is held that a clause in a note or

contract, "waiving the benefit of all exemption laws," is ineffectual, and will not be enforced. *Moran v. Clark*, 30 W. Va. 358, 8 Am. St. Rep. 66, 4 S. E. Rep. 308.

D. Registry of Homestead Declaration.—It is held constitutional for the legislature to enact, that the declaration of intention to set apart homestead must be recorded, and that the homestead shall be liable for debts contracted before the recording of such declaration. See *Reinhardt v. Reinhardt*, 21 W. Va. 82; *Speidel v. Schlosser*, 13 W. Va. 686; *Holt v. Williams*, 13 W. Va. 704.

IV. CONSTRUCTION OF HOMESTEAD LAWS.

A. In General.—Homestead exemption being laws remediable in nature and not being in derogation of the common law, are liberally construed by the courts. *Calhoun v. Williams*, 32 Gratt. 18, 34 Am. Rep. 759; *Moran v. Clark*, 30 W. Va. 358, 8 Am. St. Rep. 66, 4 S. E. Rep. 308; *Wilkinson v. Merrill*, 87 Va. 513, 12 S. E. Rep. 1015.

The homestead exemption was intended to benefit in succession three classes: first, husbands; second, parents; and third, infant children of deceased parents. Each class steps into the shoes of its predecessor, and has the right to assert the homestead, subject to such regulations as are prescribed by law; but if the property has been obtained, from or through the preceding class or classes, the homestead will be subject to such liens and equities, as surrounded it in the hands of its predecessor. *Reinhardt v. Reinhardt*, 21 W. Va. 82; *Speidel v. Schlosser*, 13 W. Va. 686; *Holt v. Williams*, 13 W. Va. 704.

B. Status of Homesteader.

1. "Householder" or "Head of a Family."—In *Calhoun v. Williams*, 32 Gratt. 18, 34 Am. Rep. 759, it was held that the terms "Householder" and "Head of Family" have the same meaning, in the provisions of the constitution and statutes relating to homesteads. This case also decided, that an unmarried man who has no children or other persons dependent on him living with him, though he keeps house, and has persons hired by him, living with him, is not a householder or head of a family, within the meaning of these terms as used in the constitution and laws of Virginia, and therefore is not entitled to the homestead exemption as provided by the same. See also, *Kennerly v. Swartz*, 83 Va. 704, 8 S. E. Rep. 348.

2. After Dissolution of Family.—The above case of *Calhoun v. Williams*, 32 Gratt. 18, 34 Am. Rep. 759, was overruled in the later case of *Wilkinson v. Merrill*, 87 Va. 513, 12 S. E. Rep. 1015. In the former case, though not noticed by the court in its opinion, close perusal of the facts discloses that when the homestead was set apart, the person setting it apart was a homesteader in the purview of the homestead laws; for although unmarried he was under a legal obligation to support persons living with him. When suit was instituted against the debtor for the subjection of his homestead to the payment of his debts, the persons dependent upon him had died, and the court held that he had consequently ceased to be a "householder" and that the property set aside as his homestead was liable for his debts. The facts of the case of *Wilkinson v. Merrill*, 87 Va. 513, 12 S. E. Rep. 1015, were precisely similar, (as far as to the question under consideration is concerned), to those of *Calhoun v. Williams*, 32 Gratt. 18. The debtor had set apart his homestead when he was the head of a family. The family had consisted of his grandson whom he supported and who lived with him, but who had since died. The

court held, however, that notwithstanding the fact that the family has ceased to exist, yet that the homestead having been legally set apart by the debtor while he was the head of a family, the exemption did not cease upon the dissolution of the family; but being for the benefit of the householder as well as the family, it continued to exist for the benefit of the householder himself. See further on this subject, 2 Va. Law Reg. 170.

C. "Debt Contracted."—In *Whiteacre v. Rector*, 29 Gratt. 714, it was held that a homestead exemption cannot be claimed against a fine due the commonwealth, imposed for a violation of the criminal laws. The court, construing the phrase "debt contracted," said: "A fine imposed by the statute for the violation of a law cannot, in any just sense, be designated as a debt contracted. The ordinary meaning of the word 'debt' is a sum of money due to another by contract; and a 'debt contracted' necessarily means that a debtor has come under a voluntary obligation to a creditor. The relation of debtor and creditor implies, as of course, that the one has given credit to the other in a contract. It would be a solecism and absurd to say that a fine imposed as a punishment for a penal offence was a debt contracted. Contracted how? Contracted with whom? 'A debt contracted' implies the voluntary action of debtor and creditor founded on a valuable consideration. This cannot be predicated upon a fine imposed by way of punishment. The very essence of a contract is taken away when the amount is assessed as a penalty for violated law claimed by the state as a punishment for crime."

D. "Forced Sale."—The sale of a homestead, under a deed of trust or under a decree of foreclosure of a mortgage thereon, is not a "forced sale" within the meaning of the constitution which exempts a homestead from a "forced sale." *Moran v. Clark*, 30 W. Va. 358, 4 S. E. Rep. 308, 8 Am. St. Rep. 66; *Holt v. Williams*, 13 W. Va. 704.

E. "Laboring Man."—In *Farinholt v. Luckhard*, 90 Va. 936, 44 Am. St. Rep. 953, 21 S. E. Rep. 817, a mail carrier was held to be a "laboring person" within the meaning of the constitutional provision, declaring that the homestead exemption shall not be claimed as against any demand for services rendered by a laboring person.

F. Compliance with Statutes.

1. In General.—Where the statute prescribes a particular method to be adopted with respect to the claiming, selecting, and setting apart of the homestead, such provisions must be complied with, since the entire right to homestead exemption depends upon statutory authority. *Wray v. Davenport*, 79 Va. 19.

2. As to Valuation of Property.—In *Williams v. Watkins*, 92 Va. 680, 24 S. E. Rep. 223, it was held that, although a homestead deed may fail to sufficiently describe and value certain property intended to be set aside as exempt, this will not affect the validity of the deed as to other property which is accurately described and valued.

V. EXCEPTIONS TO RIGHT TO CLAIM HOMESTEAD.

A. Fiduciary Debts.—It was held in *Com. v. Ford*, 29 Gratt. 683, that a public officer who had made default in accounting for taxes of the state placed in his hands for collection, was not entitled to homestead exemption as against the state, in a suit for the recovery of such funds. The decision was based upon that provision of the constitution and the statutes passed in pursuance thereof, whereby

the benefit of homestead is expressly excepted from fiduciary liabilities. See also, *Whiteacre v. Rector*, 20 Gratt. 714.

B. Torts.—In *Burton v. Mill*, 78 Va. 468, it was held that the homestead exemption cannot be claimed against a demand for damages for breach of promise to marry, which is not a "debt contracted" but a *quasi contract*.

C. Non-Residents.—The privilege of homestead is accorded under the constitution of Virginia only to citizens of this state while they remain such. Change of domicile from the state, puts an end to the homestead privilege. Domicile is residence with no intention of removal. Mere absence, however long, effects no change of domicile. Hence a person, who having resided in Virginia with his family had set apart his homestead does not lose or abandon his homestead exemption by a temporary removal from the state with *animus revertendi*. The burden of proof of change of domicile, in such case, is on him who alleges it. *Lindsay v. Murphy*, 76 Va. 428; *Blose v. Bear*, 87 Va. 178, 12 S. E. Rep. 294.

D. Purchase Price of Property.—The constitution and laws of Virginia not allowing property to be claimed as exempt for debts contracted for the purchase price of such property or any part thereof, where a large portion of goods claimed as exempt has not been paid for, and are so mingled with those that have been, as to put it out of the power of the vendors to distinguish between the two, the *onus* is on the person claiming the exemption, to show which has been paid for; and he failing to do this, they will be treated as not having been paid for as far as the homestead deed is concerned, and therefore not exempt under the law. *Rose & Wife v. Sharpless & Son*, 33 Gratt. 158.

E. Shifting Stock of Goods.—The court in *Rose v. Sharpless*, 33 Gratt. 159, touched upon the question as to whether a homestead can be claimed in a shifting stock of goods, but declined to decide the point.

VI. RIGHTS OF WIDOW OF HOMESTEADER.

A. As against Creditors of Husband.—In *Hanby v. Henritze*, 85 Va. 177, 7 S. E. Rep. 204, a householder, having set apart his homestead, died leaving debts. It was held that the homestead continued after his death as against his creditors, for the benefit of his widow and minor children, by virtue of the statute authorizing such continuance. In *Hatorff v. Wellford*, 27 Gratt. 356, it was held that the widow has the right to claim homestead against creditors of her husband though the latter had not set it apart in his lifetime. See also, *Helm v. Helm*, 30 Gratt. 404; *Scott v. Cheatham*, 78 Va. 82.

B. As against Husband's Heirs.—The case of *Helm v. Helm*, 30 Gratt. 404, held, that a widow, whose husband has died leaving no children and no debts, and has not claimed the homestead in his lifetime, is not entitled to a homestead in his estate as against his heirs. Nor, according to *Barker v. Jenkins*, 84 Va. 895, 6 S. E. Rep. 459, can she claim a continuance of the homestead where her husband had legally set it apart during his lifetime, and died leaving no debts.

VII. RIGHTS OF HEIRS OF HOMESTEADER.

In *Hanby v. Henritze*, 85 Va. 177, 7 S. E. Rep. 204, it was held that, though the benefit of the homestead continues in favor of the infant children of the homesteader, yet that such exemption expires when the children have all attained their majority, and the property becomes liable for the ancestor's debts, provided, of course, his wife be then dead. See also, *Williams v. Watkins*, 92 Va. 684, 24 S. E. Rep. 223.

VIII. PRIORITIES.

A. Liens Attaching before Status is Acquired.—One who becomes a householder or head of a family after a judgment lien has fastened on his land, is not entitled to a homestead exemption in the land paramount to that lien until its discharge. See also, *Cabell v. Given*, 30 W. Va. 760, 5 S. E. Rep. 442; *Kearney v. Swartz*, 83 Va. 704, 3 S. E. Rep. 348.

B. Liens Attaching before Homestead is Claimed.—In *Blose v. Bear*, 87 Va. 177, 12 S. E. Rep. 294, it was held that a judgment lien attaching before homestead claimed in land cannot be enforced against the homestead during the existence of the exemption. The reason for this, as given by the court, "is found in the character of our homestead exemption, which unlike that in most of the other states, is not so much an estate in land itself as a right of occupancy which cannot be disturbed while the homestead character exists. This same general view, although expressed in different language, has been repeatedly taken by this court. *Scott v. Cheatham*, 78 Va. 82; *Lindsay v. Murphy*, 76 Va. 428."

C. After Expiration of Homestead.—After the expiration of the homestead exemption, liens which attached before the homestead was claimed, are to be paid out of it in the order of their priority at point of time. *Blose v. Bear*, 87 Va. 177, 4 Va. Law Reg. 23, 12 S. E. Rep. 294.

D. Between Conflicting Liens.—A judgment creditor who has the first lien on real estate of his debtor worth nearly \$30,000, has the right to subject the same to the payment of his judgment, though his debt contains no waiver of the homestead exemption, and the subsequent liens which are paramount to the homestead are in excess of the whole value of the land. If the debtor claims the homestead it may be set apart to him, and the judgment paid out of the residue, but, if necessary to pay subsequent liens which are paramount to the homestead, the land so set apart should be subjected. *Strayer v. Long's Ex'or*, 93 Va. 695, 26 S. E. Rep. 409.

E. Between Assignee of Homestead and Execution Creditor.—A householder who has set apart as exempt, under what is known as the homestead law, a chose in action, may assign the same as collateral security for a debt, and his assignee will take priority over an execution issued on a debt in which the homestead is not waived, though the assignee had notice of the execution. The property is free from the lien of the execution. A householder may claim an exemption in a debt which has been assigned by him as collateral security for a loan, and the exemption will prevail over an execution on a debt in which the homestead is not waived, and the assignee be entitled to priority over the execution creditor. *Williams v. Watkins*, 92 Va. 680, 24 S. E. Rep. 223.

IX. WAIVER OF HOMESTEAD.

A. By Contractual Stipulation.—It was held in *Williams v. Watkins*, 92 Va. 680, 24 S. E. Rep. 223, that a householder may waive the benefit of his homestead exemption by contractual stipulation, and that thereby the property set apart as exempt will be subject to the debt. See also, *Long v. Pence*, 93 Va. 584, 25 S. E. Rep. 593, where it was held that the waiver of the homestead exemption in the body of a negotiable note was only a waiver as to the particular obligation in the body of the note, and not as to the implied obligation growing out of an assignment of the note, and, as against the liability of the assignor to the assignee, the former may claim the benefit of the exemption, although the note declares that "the

drawer and endorsers each hereby waive the benefit of our homestead exemptions."

1. **Form of Waiver.**—See § Va. Law Reg. 809, on this subject.

B. **Effect of Waiver.**

1. **Application of Property to Homestead-Waived Debts.**—The entire estate of a decedent is liable for homestead-waived debts, but the portion not embraced in the homestead deed shall be first subjected. After the exempted property has been set apart, the residue shall be applied towards paying all the decedent's debts *ratably*, unless there be some entitled to priority under the statute (Va. Code 1873, ch. 126, § 25), and after such residue has been exhausted the exempted property may be subjected to pay such portions of the homestead-waived debts as remain unpaid. *Strange v. Strange*, 76 Va. 240; *Scott v. Cheatham*, 78 Va. 82.

2. **No Lien.**—In *Scott v. Cheatham*, 78 Va. 82, it was held that a creditor with a waiver of homestead is not a lien or preferred creditor, but merely has the right to apply the homestead to satisfy his debt so far as unpaid, after taking his *ratable* share of his debtor's estate outside the homestead.

C. **Failure to Waive.**—Where for certain reasons a supersedeas bond should contain a "waiver of homestead," the omission of such waiver may make the bond insufficient, but not *void*, and it may be made sufficient at any time on motion of the defendant in error. *Acker v. A. & F. R. Co.*, 84 Va. 648, 5 S. E. Rep. 688.

X. ALIENATION OF HOMESTEAD.

A. **Generally.**—Where there is neither constitutional nor statutory prohibition as incident to the right of ownership, the owner of the homestead may sell or encumber it; and such sale or incumbrance will be as valid as if the property had not been set apart as a homestead. *Williams v. Watkins*, 92 Va. 680, 24 S. E. Rep. 223; *Moran v. Clark*, 80 W. Va. 358, 4 S. E. Rep. 308, 8 Am. St. Rep. 66.

B. **By Deed of Trust to Secure Debts.**

1. **General Rule.**—In *White v. Owen*, 30 Gratt. 48, it was held that a deed of trust to secure a debt, executed by the debtor and his wife, conveying real and personal property which had been previously set apart as homestead, has priority over the homestead exemption, and the said property may be subjected to satisfy the debt.

2. **Homestead Expressly Reserved.**—A deed of trust to secure debts conveys certain real estate, and the grantor reserves in it, to himself and his family, all exemptions and property allowed by the constitution of Virginia and laws passed in pursuance thereof, and in addition thereto all exemptions allowed under the bankrupt laws. *Held*, the reservation is legal and valid. *Brockenbrough v. Brockenbrough*, 81 Gratt. 580.

C. **In Fraud of Creditors.**

1. **General Rule.**—Since general creditors have no specific charge or lien upon the homestead, it follows naturally that a sale or incumbrance of such homestead cannot generally be fraudulent as against them. *Simon v. Ellison* (Va.), 22 S. E. Rep. 860; *Williams v. Watkins*, 92 Va. 680, 24 S. E. Rep. 223.

a. **Qualification.**—In *Rose v. Sharpless*, 33 Gratt. 153, though the facts of the case do not show that the creditors had any lien upon the homestead, it was held, that, where a "householder or head of a family," executes a homestead deed as a part and in furtherance of a design to hinder, delay and defraud his creditors in the recovery of their just debts,

such deed will be vitiated and invalidated by such conduct.

2. **Where Fraudulent Conveyance Annulled.**—Where a fraudulent conveyance of property is subsequently annulled at the suit of creditors, the grantor is not estopped as against the creditor to assert his right to homestead in the said property. *Hatcher v. Crews*, 83 Va. 371, 5 S. E. Rep. 221; *Marshall v. Sears*, 79 Va. 49; *Shipe v. Repass*, 28 Gratt. 716; *Boynton v. McNeal*, 31 Gratt. 456; *Mahoney v. James*, 94 Va. 180, 26 S. E. Rep. 384.

XI. NEW HOMESTEAD.

A. **Generally.**—A householder, in 1874, by deed recorded, declared his intention to hold exempt as his homestead property to the amount of \$1,408. He afterwards removed to another town in another county, and becoming indebted, he created, in 1878, a new homestead of property valued at \$1,844.50, by a recorded deed, wherein he assailed the validity of his original homestead deed, without accounting for the amount thereof, thereby seeking to hold exempt from his creditors, an aggregate of \$3,312.50 worth of property; and obtained an injunction to restrain sale under executions levied. *Held*, that the debtor must be charged with the \$1,408, the value of the property exempted by the original homestead, but that he is entitled to enough of the property levied on to make the aggregate of his exemptions equal the amount of \$2,000, and no more.

The primary object of the statute (Va. Code 1878, ch. 183, § 7), is to authorize the sale of a homestead and the investment of the proceeds in a new one, to be held on like terms as the original, but there is nothing in the statute to authorize a debtor, who has squandered one homestead, to appropriate another against subsequent creditors. However, the debtor may supplement the original homestead by a new one, so as to make the aggregate equal, but not exceed, the maximum \$2,000; but this privilege, once fully exercised, is regarded as exhausted. The creation of a new homestead, determines the original one, if the property exempted under the latter remains in existence; at all events, the debtor will be required to account for the value of the old homestead in ascertaining the amount he is entitled to under the new. *Oppenheimer v. Howell*, 76 Va. 218; *Hatcher v. Crews*, 83 Va. 371, 5 S. E. Rep. 221.

B. **Estoppel.**—If a householder has squandered, or does not account for, the property set apart for his original homestead he cannot found a claim to a new one by attaching the validity of the deed, of his own making, which created the original. *Oppenheimer v. Howell*, 76 Va. 218.

XII. EFFECT OF BANKRUPTCY OF HOMESTEADER.

A. **In General.**—M was adjudged a bankrupt and discharged in 1873. He claimed as his homestead certain land, which the bankrupt court allotted him, but without notice to his creditors, who were lienors by judgments recovered in 1857. Those creditors in 1878 filed their bill in the state court to enforce their liens on said land, but did not make T, who was the assignee in bankruptcy of M. a party. M demurred, answered, and pleaded that the enforcement of the judgments was barred by the lapse of twenty years between their date and the filing of the bill. The demurrer was overruled and decree of sale entered, but the commissioner of sale was not directed to give the usual bond. On appeal by M, *held*, under the bankrupt laws of the United States the legal

title to the bankrupt's homestead does not vest in his assignee; and if it does vest, *eo instante* the homestead is allotted him, the legal title thereto reverts to him. Therefore the assignee had no interest in the subject of this suit and was not a necessary party. The assignee had not even a reversionary interest in the subject of this suit, as by Code 1873, p. 1171, ch. 183, § 8, if the homestead be not aliened in the householder's lifetime, after his death it continues for benefit of his widow and children, until her death or marriage, and after her death or marriage until the youngest child becomes twenty-one years of age; after which it passes to his heirs or to his devisees, not subject to dower, but subject to all his debts. In no event does it pass to his assignee in bankruptcy. Judgments obtained and docketed, and liens acquired before the debtor is adjudicated a bankrupt, may, after he is discharged as such, be enforced in the state courts at the instance of persons who were not parties to the bankrupt proceedings, on lands owned by him before his adjudication and allotted him for his homestead. *McAllister v. Bodkin et als.*, 76 Va. 809.

B. Where Part of Homestead Claim Allowed.—The fact that a homesteader has claimed his homestead in a bankrupt court and been allowed part thereof by the assignee, does not affect his claim to the balance. *Hatcher v. Crews*, 83 Va. 371, 5 S. E. Rep. 221.

XIII. RIGHTS OF CREDITORS AFTER EXPIRATION OF EXEMPTION.

In *Hanby v. Henritze*, 85 Va. 177, 7 S. E. Rep. 204, it was held that the statute, allowing the homestead, after its expiration, to be sold for all the debts of the householder, which accrued before or after it was set apart as exempt, is constitutional; and that accordingly after the expiration of the exemption, the homestead may be subjected by creditors.

XIV. WHEN RECEIVER OF HOMESTEAD PROPER.

When the guardian of non-resident infants, asks to transfer their money homestead out of the state, it is proper for the court to appoint a receiver to take charge of such funds and invest them, so that the principal may be forthcoming when the youngest of such infants becomes of age. *Clendenning v. Conrad*, 91 Va. 410, 21 S. E. Rep. 818.

XV. PLEADING AND PRACTICE.

A. In Equity.—In *Russell v. Randolph*, 26 Gratt. 713, the court held that, under the provisions of Code 1860, ch. 177, § 2, it was competent for a judgment creditor, without having sued out an execution at law, to impeach by bill in equity, a deed of homestead and a deed of trust, upon the ground of fraud, actual or constructive.

1. Amendment of Bill.—Where the homestead exemption expires pending a bill to sell the reversion of such homestead, the bill may be so amended as to pray for a sale of the entire estate. *Hanby v. Henritze*, 85 Va. 177, 7 S. E. Rep. 204.

B. Authority of Lower Court When Case Remanded.—A decree on former appeal remanding to the circuit court with direction to assign to the debtor his homestead, the proceeds of a deed that has been annulled as fraudulent, concludes with these words, "unless he appears not entitled to the same on other grounds." The circuit court disregarded the new objections presented by the creditor to such assignment, and made the assignment. *Held*, there is no error in the order of the circuit court, the inten-

tion of those words not being to open up the matter at large to new objections.

C. Claim of Homestead Pendente Lite.—In a suit by judgment creditors to subject their creditor's land to the payment of their debts, pending the cause, the debtor is declared a bankrupt, and he applies for a homestead under the constitution and laws of Virginia and the acts of bankruptcy of the United States. *Held*, the court should proceed to adjudicate upon the right of the debtor to his homestead. *Barger v. Buckland et als.*, 28 Gratt. 852.

D. Bond for Forthcoming of Corpus.—In *Williams v. Watkins*, 92 Va. 680, 24 S. E. Rep. 223, it was held that the court will not require security to be given for the forthcoming of the principal of the exemption at the expiration of the homestead period. So also, neither is the widow nor the infant children of a householder required to give such forthcoming bond. *Mahoney v. James*, 94 Va. 176, 26 S. E. Rep. 384.

E. Appellate Jurisdiction.—An appeal lies to a decree allowing a widow homestead for her lifetime in the reality of her deceased husband, though the appellant's interest therein be less than the minimum jurisdictional sum, as the controversy concerns title to land. *Barker v. Jenkins*, 84 Va. 895, 6 S. E. Rep. 459. In *Smith v. Rosenheim*, 79 Va. 540, where the amount in controversy was less than \$500, the supreme court of appeals was held not to have jurisdiction, notwithstanding the fact that in the progress of the cause in the court below a claim of homestead in the land was asserted by the defendant.

XVI. ARTICLES IN VIRGINIA LAW REGISTER

For an exhaustive and valuable discussion of the homestead law in Virginia, see article in 2 Va. Law Reg. 167, by Prof. M. P. Burks.

See also, interesting article in 1 Va. Law Reg. 31, on "Garnishment by Foreign Attachment—Conflict with Exemption Laws."

In 5 Va. Law Reg., there is paper on the subject of Homestead Exemptions, containing some excellent suggestions.

365 *Finney & als. v. Bennett.

March Term, 1876, Richmond.

Banks—Dissolution—Creditor's Bill—Receiver.—The bank of P. was ruined by the late war; and no officers of the bank have been elected nor has there been a meeting of the board since April 1865, and it has done no business since, and in fact it had been abandoned and ceased to exist. In April 1866 H and M. suing as well for themselves as for all the other stockholders, creditors and depositors, &c. filed their bill against the bank and the president, for a settlement of its affairs and a distribution of its assets. The court appointed a receiver in the case, and in June 1866 there was a decree for an account. *Held*:

1. **Same—Same—Same.**—It is a proper case for a creditor's suit.

2. **Same—Purchaser of Debts—Rights.**—A debtor of the bank purchasing debts due, from the bank after the decree for an account, is only entitled

The principal case is cited in the following cases: *Universal, etc., Co. v. Binford*, 76 Va. 109, where it is distinguished; *Nunnally v. Strause*, 94 Va. 200, 26 S. E. Rep. 580, where it is approved; *Richmond, etc., Ry. Co. v. N. Y., etc., Ry. Co.*, 95 Va. 389, 28 S. E. Rep. 373.

to stand in the shoes of his assignor, and receive his proportion of the assets realized.

3. Same—Action by Receiver—Record as Evidence.—In an action by the receiver against a debtor of the bank, the record in the chancery cause is evidence for the plaintiff.

This is a supersedeas to a judgment of the circuit court for the county of Pittsylvania, rendered in an action of debt brought by Coalman D. Bennett, "who styles himself treasurer of the Pittsylvania Savings Bank at Pittsylvania court-house," against William A. J. Finney, Jesse Carter and Philip Thomas, surviving promisors of themselves and George Craft, deceased.

The action was brought in April 1868, on a note for \$3,100, dated Pittsylvania court-house, March 23d, 1861, signed by said Finney, Carter, Craft and Thomas, **366** *payable sixty days after date to said Bennett, treasurer as aforesaid, or order, without offset for value received. The declaration was in the usual form. The defendant demurred to the declaration, plead payment, and filed an account of offsets. The plaintiff joined in the demurrer, and also joined issue on the plea. On the 6th day of November 1868, the court overruled the demurrer; and the issue on the plea of payment was tried by a jury, which found a special verdict, in which were set forth all the facts proved upon the trial, in substance as follows:

The defendants proved three certificates of deposit in the said bank, two by Elizabeth Stone, one for \$1,662.33, No. 1890, dated September 25th, 1858, and the other for \$2,696.66, No. 1836, dated August 2d 1858, and the third of the said three certificates of deposit was by Watoley Anderson, for \$605.51, No. 2521, dated October 8, 1861; and proved that said three certificates were regularly assigned in writing to William A. J. Finney, the principal debtor in the note aforesaid, before the commencement of the suit; which said certificates and assignments were embodied in the special verdict. And the defendants further proved, that the amount as shown on the back of each of said certificates, No. 1890, and No. 1836, is still due and unpaid by the said Pittsylvania Savings Bank, to-wit: on No. 1836 the amount due as of the 17th January 1865 is \$2,695.66, and on No. 1890 the amount due as of the 16th of June 1864 is \$1,662.33, and that the amount due on certificate 2521 as of the 16th of August 1866 is \$619.40.

The jury further found, that the defendant Finney acquired all the said certificates after the order of account was made at May term 1866, in a chancery suit now pending in the circuit court of Pittsylvania, **367** in *the name of George W. Hall and R. W. Martin, against Pittsylvania Savings Bank and others. But that the certificates No. 1836 and No. 1890 were acquired before the order of injunction in said cause, made at October term 1867. And the jury found that the said suit in chancery is still pending, and they set out in their ver-

dict the record of the said suit; from which it appears that,

The bill was filed on the 28th of April 1866 by Geo. W. Hall and R. W. Martin, suing as well for themselves as for all the stockholders, depositors and creditors of the Pittsylvania Savings Bank, who will come forward and contribute to the costs of the suit; and the said bank, and Richard White, late president thereof, were made defendants to the bill. The complainants among other things, state in substance in their bill that the said bank was incorporated on the 15th of March 1850 by an act of the legislature of Virginia; that it went into operation soon after its charter at Chatham, in the said county, and was prosperously engaged in the business of banking until during the war, when it became utterly insolvent; that it has been broken up and destroyed by the result of the war, since which it has not been engaged in business, nor has there been any election of officers, nor any meeting of the board of directors since April 1865; and that by mutual consent, and general understanding of all parties interested, it had been abandoned, and in fact ceased to exist; that there was "a large amount of money due to the said bank by negotiable notes discounted by it while doing business, most of which are well secured, or at least were so," &c. "That these notes, all the books, records and effects of the bank are now in the hands of some one or more of

the officers last elected by the direct- **368** ors; *that no one has been appointed by the directors or stockholders to take charge of the said notes, books, records and effects, in order to wind up and settle its accounts, but they remain in the custody in which they were when the bank ceased to do business;" that the stockholders and depositors in said bank are very numerous (some of them infants, and others laboring under disability), so that they could not all be united in a suit without great inconvenience, expense and delay; that the complainants are depositors and creditors of said bank, and directly interested in the assets belonging to it; and that there are no liens on the same. They therefore pray that defendants be made to the bill as aforesaid; that all the stockholders, depositors and creditors who will come forward and prove their claims, &c., be allowed to do so, and to have the benefit of any decree that may be made in the suit; that a receiver may be appointed, all necessary accounts settled, the debts due to the bank collected, the rights of all parties interested ascertained, its debts paid, and the proceeds divided among complainants and the other parties entitled thereto; that an injunction might be awarded (if necessary) to stay proceedings at law against said bank; and for general relief.

On the same day on which the bill was filed, the defendant, Richard White, late president of the bank, filed his answer; in which he admitted all the allegations of the bill to be true, and submitted to the court

to make such decree as might seem right and proper.

On the 28th day of April 1866, on the petition of the said complainants, the judge of the said court, in vacation, appointed a receiver in the case, who was the said Coalman D. Bennett.

On the 9th of June 1866, there was a **369** decree in the "cause for an account by a commissioner, of the debts due by and to the bank, and that the commissioner should, by notice, set up at the courthouse door of the county, and inserted for at least four successive weeks in a newspaper published in the town of Danville, warn and require all creditors of the bank to prove their debts or demands before him at such time as he should appoint for taking said accounts, and the commissioner was directed to make report to the court.

It appears that commissioner Neal made a report in pursuance of the said decree of the 9th of June 1866, but a copy of it is not in the record. It appears, however, that he ascertained and reported that the creditors of the bank would be entitled to 48 45-100 per cent. on the amount of the debts due to them respectively by the bank, as their ratable portions of the assets of the bank which were available, but that only 30 per cent. on said amount could for the present be paid to them.

On the 9th of November 1867 the cause came on again to be heard on the papers formerly read, and the report of commissioner Neal, to which there was no exception; when the court—Wingfield J.—delivered the following opinion:

This is a suit brought by certain depositors in and creditors of the bank, suing for themselves and all other creditors of the bank, upon the ground that the bank has, by the calamities of the late war, become insolvent, ceased to do business, and is practically dissolved.

Has a court of equity jurisdiction in the premises? is a question raised by the counsel of some of the creditors of the bank, who suppose they have obtained a legal advantage over others by the assignment

370 of *their certificates of deposit to debtors of the bank, to be used as offsets against the debts due from the latter to the bank, and they insist that the remedy of the creditors of the bank is by actions at law, and that this court has no jurisdiction.

This bill seems to have been brought upon the principle of a creditor's bill against the estate of a deceased insolvent debtor in the hands of his personal representative.

In considering the subject, one cannot but observe the striking analogy between the creditors of an insolvent corporation and those of an insolvent decedent's estate in the hands of his personal representative. In each case the remedy of the creditor at law is complete—if he obtained his judgment, he became entitled to satisfaction to the exclusion and prejudice of the rest. In each case the maxim, that equality is equity, disposes the court to intervene—in each case the discovery of assets and the settlement

of intricate accounts is necessary before justice can be done. Insolvency to a corporation produces in many respects the same consequences that death does in the case of a natural person. Its labor in its vocation ceases—its vital functions are ended—it no longer does or can pursue the objects of its creation. It goes into liquidation, which to it is administration on its effects. A natural person who has become insolvent still lives and works, and may retrieve his fortune. The insolvent corporation has ipso facto ceased its life work forever; that which formed the motive power for carrying it on (the value of its stock) is annihilated; its property can only be used for the payment of its debts. When this is done, it is a thing of the past.

The creditors of the bank are of various classes. Some of them are under the **371** disability of coverture *and infancy, and could not sue at law in their own names. Many of the certificates are for funds deposited by orders of chancery courts, upon which no proceedings can be taken until the chancery courts can have an opportunity to authorize proceedings at law.

Meanwhile the other creditors may, by motion on ten days' notice, unless restrained, acquire liens which will absorb the whole of the assets. Upon the whole, I think that upon the same principle that a court of equity has jurisdiction in the case of a creditor's bill or bill of conformity (if there were no other ground), the court of equity ought to take jurisdiction in cases like this.

But it may be said, there is no precedent for such a case. Concede this. Yet it does not follow that when a case arises which comes within the principles of its constitution and ordinary jurisdiction, the court ought not to take cognizance of it because it is a new case and not to be found in the reports. It ought to be borne in mind that these savings banks are institutions of recent origin; and that no question as to the administration of their effects, upon going into liquidation upon insolvency, has probably gone up to the higher courts; and an eminent recent chancellor of England has declared, that "it is the duty of every court of equity to adapt its practice and course of proceedings, as far as possible, to the existing state of society, and to apply its jurisdiction to all new cases, which, from the progress daily making in the affairs of men, must certainly arise." (Lord Cottenham, 4th Mylne & Craig, 141.) The right of a court of equity to jurisdiction in such a case seems to have been held by an eminent Virginia judge in the case of *Barksdale v. Finney*, 14 Gratt. 338. The president, Judge Allen, apparently replying to an argument from the bar, at **372** *page 360, says: "They (the appellees) were asserting their individual claim against their personal debtor. It is not a creditor's bill, calling for the distribution of the assets of an insolvent corporation among all entitled to participate." &c. It seems clear, from the context is

which this occurs, that it was his opinion that a creditor's bill would lie for the distribution of the assets of an insolvent corporation.

The fact that the creditors of the bank had each a remedy by action at law, furnishes (I think) no sufficient objection to the jurisdiction of a court of equity in cases like the one under consideration. If so, the same objection might have been originally taken to a bill of conformity, or a creditor's bill. It was not because the creditors had not a remedy at law that the courts originally took jurisdiction of a creditor's bill. But it was to prevent an unseemly struggle between the creditors, each trying to get an advantage over the other, so as to appropriate the assets to himself, to the exclusion of others who had equal claims in justice to satisfaction, and also to administer the assets equally among all the creditors, upon the principle that equality is equity. (See 1 Story's Eq., § 547), where he states the equity of the creditor's bill thus: "As executors and administrators have vast powers of preference at law, courts of equity ought, upon the principle that equality is equity, to interpose upon the application of any creditor by such a bill to secure a distribution of the assets without preference to any one or more creditors." (And the same reason applies here; for the officers of the bank, in whose hands the assets were left, might have applied them to the payment of such of the creditors as they preferred, and left the others wholly unpaid.) Therefore, on a creditor's bill, as

soon as the court has taken jurisdiction *and made a decree for an account, it will prevent any of the creditors from proceeding elsewhere by enjoining them, so as to protect the executor against vexatious and unnecessary suits, and to prevent them also from disturbing the equitable distribution of the assets. This is the doctrine of the court, although the assets are legal exclusively. § 560. It was adopted at a time when the order of distribution was unsettled, so that diligence gave preference. And this fact, that diligence gave preference, was the cause of the courts intervening by injunction to prevent it. Creditors who had not sued are restrained from suing at law at all; and those who have brought suits are stayed at whatever stage their actions may happen to be when the decree for an account passes. 1 Story's Eq., § 549; Daniel's Chan. Prac. 1844. The principle is stated by Story as follows: "The object of the court is to compel all the creditors to come in and prove their debts before the master, and to have the proper payments and discharges made under the authority of the court, so that the executor may not be harassed by a multiplicity of suits, or a race of diligence be encouraged between different creditors, each striving for an undue mastery and preference."

This principle of the courts of equity was established in the reign of Charles the Second, and we have seen it enacted into statute law in our own time. And (I think),

therefore, that causes similar in principle ought to be administered and governed by the same rule. There is besides (on grounds of public policy) another reason why courts of equity ought to take jurisdiction in cases like this. These corporations are not created merely for the benefit of the corporators, but for the public convenience and benefit—to encourage industry, frugality and economy in the people,

374 *and to afford them a safe and profitable depository for their earnings and small gains as their industry and other exigencies of their business may enable them to acquire and lay up for future emergencies; and we all know, in fact, that the capital put into these savings banks by those who are called the actual stockholders is but a mite compared with the operative capital put in by the depositors, who, if not actual, may be regarded as quasi stockholders, in having afforded the principal means upon which the bank operated; and as the effects of the bank, when it ceased to do business, arose from a common fund contributed by all of the depositors, they have in justice a right to follow it where it was invested by those who had the custody and management of it by the bank while it was in existence; and when recovered, it ought by the rule of right and justice to be divided ratably among all who so contributed, and ought not to be appropriated by a part of them to the exclusion of the others.

But if the court had not jurisdiction upon the principle of its constitution and ordinary jurisdiction, it would, in this case, have a substantive ground of jurisdiction to prevent the vast multiplicity of suits at law that must necessarily have arisen out of the subjects of this suit.

The court having (as I have endeavored to show) properly taken jurisdiction of the whole subject, appointed a receiver to take possession of the assets of the bank, and hold them for the benefit of all its creditors, decreed an account to be taken of the assets and of the debts due to and from the bank. The next question is, will it protect the funds which it has taken into its own hands? Unless it will, the result will be that while some of the creditors are properly proceeding upon a case of equitable jurisdiction to ob-

tain *from this court such a disposition of the whole case as would be equal justice to all, and while they are prohibited by known rules from suing, as to the same subject of litigation in a court of law, others who have been cited to establish their claims in this forum may refuse, and proceed to frustrate all the work of the commissioner, destroy the principle of equity, absorb the entire subject which the court has undertaken to deal with, and thus wholly to defeat its jurisdiction. This can never be allowed by the court. To do so would be to abandon fundamental maxims upon which its jurisdiction is founded, and by which its relation to the law courts are regulated.

The order sequestering the effects of the bank, and putting them into the hands of a receiver for the benefit of all its creditors, and the decree for an account, for the purpose of their equitable distribution, were, in effect and principle, very much the same as an assignment in bankruptcy; and each of the creditors then became entitled to his ratable share of such effects, and had no right afterwards, by a contrivance with a debtor of the bank, to get his whole debt by the assignment of his certificate of deposit to such debtor, so as to enable him to get the whole amount allowed as an offset, and thus deprive other creditors of getting even their ratable proportion of the assets. Such a shift and inequitable contrivance ought not to be tolerated in a court of equity, and will not be allowed in this case. Therefore that statement of the commissioner which allows credits to the debtors of the bank for certificates of deposit acquired by them after the decree for an account was passed, only for their equal ratable proportion of such certificates, is approved, and the holders of such certificates will be enjoined from offsetting or pleading, or

376 attempting to offset against *the debts due from them any greater amount of any such certificate than the equitable ratable amount allowed thereon by the commissioner in the statement approved by the court as aforesaid.

The receiver will be directed to sell the letter-press mentioned in the report, and to proceed to collect the debts in his hands, and to report in order to a distribution.

The court approved and affirmed a portion of said report, and disapproved and rejected another portion thereof, and decreed among other things that the said receiver should proceed to collect the debts in his hands due to said bank, and to pay the costs of the suit, &c. And all parties who had appeared and proved their claims before the commissioner, or whose debts were reported by said commissioner in the statement approved by the court as aforesaid, were enjoined and restrained from finally setting off, or offering to set off, against their debts to the bank a larger amount than their pro rata share of the assets of said bank; but for the present were enjoined from so setting off a greater amount than 30 per cent. of their debt so reported as due to the bank, the court for the present reserving the difference between 30 and 48 45-100 per cent. on the amount of said debt, as a fund to cover any deficiency that may occur on account of the failure to collect any of said debts on account of the insolvency of the debtor or otherwise, and to insure equality in the distribution of the effects of the bank among all those entitled thereto; but for the present, and until the further order of the court, the said receiver was directed not to collect from the debtors who hold such offsets, and whose offsets at par appear to be equal to, or greater

377 than, the amount of *their debts to the bank, any greater sum on the amount of such debts than the excess over

48 45-100 per cent. thereon; but in all cases where debtors have such offsets, he is to allow them credit at present for 30 per cent. on the amount as ascertained to be due from the bank to the holder of such offsets by the report aforesaid; and the receiver was directed to report his proceedings to the court.

And the jury further found that the certificates of deposit aforesaid were included by commissioner Neal in a report made by him in pursuance of an order made in the chancery suit aforesaid, and approved by the said court; but that the said certificates were never presented by the holder thereof, or by any other person before said commissioner, or attempted to be proved. If upon the above facts the defendants were only entitled to a credit of 30 per cent. upon their certificates of deposit, then the jury found for the plaintiff the debt in the declaration mentioned, with interest from the 25th of May 1861, subject to a credit of \$1,648.37, as of the 16th of August 1866. But if the defendants were entitled to the full amount of their said certificates, then the jury found for the defendants.

The court rendered judgment for the plaintiff upon the special verdict.

An exception was taken by the defendants to the ruling of the court in the progress of the trial, in admitting the record of the suit in chancery aforesaid as evidence, and instructing the jury that they should only allow 30 per cent. of the certificates filed by the defendants, by way of offset to the plaintiff's demand. An exception was also taken by the plaintiff to another ruling of the court in the progress of the trial, but it is not material to the decision of the case.

To the judgment aforesaid the defendants applied *to a judge of the late district court at Lynchburg for a supersedeas; which was accordingly awarded.

Dabney, Tredway & Barksdale, for the appellants.

Ould & Carrington, for the appellee.

Moncure, P., delivered the opinion of the court.

After stating the case he proceeded:

The only question in this case is, whether the bill in the proceedings mentioned, filed on the 28th day of April 1866 by George W. Hall and R. W. Martin, suing "as well for themselves as for all the stockholders, depositors and creditors of the Pittsylvania Savings Bank, who will come forward and contribute to the costs of the suit," is what is called a "creditor's bill," or has the same effect? For if it is, or has, it is perfectly certain that the decree for an account, rendered in the suit on the 9th day of June 1866, operated as a decree in favor of all the creditors of the said savings bank, all of whom might come forward and prove their claims under the said decree, and placed them all on an equality in the distribution and application of the assets of the said bank, except such as at the time of said

decree may have had specific liens on the said assets or any part thereof, which liens would, of course, remain in full force, notwithstanding such decree. So that in that view the plaintiff in error, Wm. A. J. Finney, having obtained the assignments of the certificates of deposit in the proceedings mentioned after the date of the said decree of the 9th day of June 1866, acquired only the rights to which his assignors were then entitled in regard to the assets of the said

bank, which were to a ratable proportion of *the said assets with the other creditors of the bank, which ratable proportion has been accorded to the said assignee by the judgment of the court below; and the said judgment ought therefore in that view to be affirmed.

The learned judge of the court below, in an able opinion delivered by him, and made a part of one of the decrees rendered in the said chancery suit, maintained this view; and as we entirely concur in that opinion, we adopt it as our own, which makes it unnecessary for us to say much, if anything more, in the case. Besides the cases referred to in that opinion, that of *Exchange Bank of Va. &c. v. Knox &c.*, 19 Gratt. 739, since decided by this court, has an important bearing upon the question; and much of what is said by Judge Christian in that case, in whose opinion the other judges concurred, is strongly confirmatory of the same view; and so are the cases, or many of them, referred to by the counsel for the appellees, among which are the cases cited from 21 Howard 112, and 22 Id. 380. The nature, object and effect of a "creditor's bill," and the course of proceeding therein, are set forth in 1 Story's Eq., sections 547-550; and in Story's Eq. Pl., sections 99-104. See also the cases referred to in the notes to those sections. That this case comes within the same reason, and is subject to the same principle, which apply to an ordinary creditor's bill, in regard to the distribution of assets among creditors, seems to us to be very clear. Here is a case in which, by a sudden and extraordinary convulsion of war, a bank has been rendered insolvent, and totally unable to prosecute its business. Its stockholders have been deprived of all their property, and the remaining assets of the bank are insufficient to pay its debts, or even fifty per cent.

380 *of their amount, if apportioned ratably among the creditors. There has been no recent election of officers of the bank; and there is no responsible person in charge of its assets, whose duty it is to collect and apply them to the payment of the debts of the bank; and there is danger of a general scramble among the creditors for priority, by bringing suit, obtaining judgment, and suing out execution against the bank. What more suitable case could there be for a creditor's bill, and the application of the rules and principles which apply to it?—and for the application of the rule of equity, that "equality is equity?" Here is a trust fund, amounting, it is said, to about \$100,000, without a trustee, and

distributable among a large number of creditors. The law affords no adequate remedy for such a case, none that will not produce the greatest confusion, and end in the rankest injustice. Is it not a case which loudly calls for equitable relief—the institution of a suit by some in behalf of themselves and all the other creditors, the appointment of a receiver, and the collection of the assets and distribution of them ratably among all the creditors? Surely cases already decided by courts of equity warrant this court, if not expressly, at least by strong implication and analogy, in pursuing that course. And if there be no case expressly in point, it is the province of a court of equity to provide a suitable and adequate remedy for such a case. A necessity for new remedies, or rather for the application of old remedies to new cases, is continually arising in the progress of affairs and the transactions of mankind; and our system of law and equity is so wisely and happily framed, that it can be moulded to suit any new case which may arise. The opinion of Lord Cottenham, in the case of

Taylor v. Salmon, 4 Myl. & Cr. 133, 381 141 (18 Eng. Ch. *R.), referred to by the judge of the court below, is well expressed on this subject. "I have before taken occasion to observe," says his lordship, "that I thought it the duty of this court to adapt its practice and course of proceeding as far as possible to the existing state of society, and to apply its jurisdiction to all those new cases which, from the progress daily making in the affairs of men, must continually arise, and not from too strict an adherence to forms and rules established under very different circumstances, decline to administer justice, and to enforce rights for which there is no other remedy."

In regard to the admissibility of the record of the chancery suit aforesaid, as evidence in the case, we are of opinion that there is no error in the ruling of the court below, as mentioned in the bill of exceptions tendered by the defendants. They were in effect parties to that suit, and conclusively bound by it.

Upon the whole, we are of opinion that there is no error in the judgment of the court below, and that it ought to be affirmed.

Judgment affirmed.

382 *Boaz's Adm'or v. Hamner & als.

March Term, 1876, Richmond.

1. *Executors—Freed Slaves—Liability for Price of.*—Testator dies in 1859, and directs all his estate to be sold as soon as convenient. The executor has the personal property appraised on the 21st of November, and sells it the next day. Four slaves, appraised at \$3,700, are sold for \$4,955, and bought by one of the legatees living in Missouri. This legatee was not present, but the executor, on his request, bought them for him. The purchaser executed his bond for the price, but without security; and the executor retained possession of the

slaves until they were freed by the results of the war. The executor and his sureties must account for the slaves at the price for which they were sold by him.

2. *Same—Duty to Take Security for Credit Sales.**—It is always the duty of a personal representative to demand and take good security of every purchaser on credit of property of the decedent, wherever the purchaser may reside, and whatever may be his pecuniary circumstances.

This was a suit in equity in the circuit court of the city of Lynchburg, brought in September 1866, by Charles H. Hamner and others, three of whom were infants suing by their next friend, against Robert J. Boaz in his own right and as executor of Meshack Boaz deceased, and his sureties and others, to have an account of his administration, and payment of the amount due from him to the legatees of Meshack Boaz deceased. The account was referred to a commissioner, who made his report; and the only question in the cause was as to the liability of the executor for four slaves, purchased by Emmett D. Boaz, who lived in the state of Missouri.

Meshack Boaz, of the county of Appomattox, died in 1859, leaving a will, which was duly admitted to probate in the county court of that county at its November term of that year; and Robert J. Boaz qualified as his executor. The first item in the will is as follows: 1st. After my death, as soon as convenient, I desire my executor to advertise and sell my whole estate, both real and personal, on such reasonable credit as he may think best for the interest of my estate, and out of the proceeds of such he pay all my just debts and funeral expenses.

The testator then proceeds to give his estate, in five equal parts, to the children of his five children, except one-fifth which he gives to his son Emmett D. Boaz. David Boaz, one of the sons, was dead, and his children lived in Missouri.

The executor proceeded promptly to have the property appraised and sold. The appraisal took place on the 21st of November 1859, when the four slaves bought by Emmett D. Boaz were appraised at \$3,700; and the sale was made the next day upon a credit of six months, when these slaves were sold at \$4,955.

The executor filed with his answer two letters of Emmett D. Boaz; the first dated October 23d, 1859, in which, after saying he cannot be present at a sale in November, he says, "I would earnestly request you and all the legatees to make such disposition of the blacks as would gratify their wishes and best secure their comfort and happiness. You are hereby particularly desired to buy any or as many blacks as may desire to be bought by me, to the full amount of my interest and the interest of David's children

in the entire estate; and in addition to my and David's children's interest, you are requested to use \$2,000 in buying the negroes belonging to the estate that may
384 *desire to be purchased by me; provided you can make an arrangement to wait for the money for one year, at an interest not exceeding ten per centum per annum. Any legatee wishing to buy any of the blacks, to gratify the blacks, shall have the full and entire amount of my interest and the interest of David's children in said blacks for one year, by paying such interest as may accrue by law. Buy no negro for me unless they request it."

At the sale the executor bought for Emmett D. Boaz the four slaves, and retained them in his possession until the terms of sale should be complied with. This, however, was never done: Emmett Boaz gave his own bond for the amount without security; and on the 1st of January 1861 he paid to the executor \$550. The balance of the purchase money was not paid; and the slaves, except one that died, were retained by the executor until they were emancipated by the results of the war.

The cause came on to be heard on the 29th of November 1867; when the court held, that the executor should be charged with the sum for which the said four slaves were sold on the 22nd of November 1859; and made a decree against the executor and his sureties, in favor of the respective plaintiffs and a trustee of the legatees of one-fifth of the estate, for the amount appearing due to them by the report. And directed the executor to render a further account.

Robert J. Boaz having died, his administrator applied to this court for an appeal; which was allowed.

Bocock, for the appellant.

J. Alfred Jones and Kirkpatrick & Blackford, for the appellees.

Moncure, P., delivered the opinion of the court.

385 *The court is of opinion that the circuit court did not err "in holding the executor chargeable with the value of the slaves, John, Frederick, Polly and Sally, and with interest thereon." It was the plain duty of the executor to sell them. The first clause of the will expressly declares, that "After my death, as soon as convenient, I desire my executor to advertise and sell my whole estate, both real and personal, on such reasonable credit as he may think best for the interest of my estate, and out of the proceeds of such he pay all my just debts and funeral expenses." Accordingly, very soon after the probate of the will and the qualification of the executor, and during the same month, to wit: on the 22d day of November 1859 he sold the slaves at public auction on a credit of six months, when Emmett D. Boaz, residing in the state of Missouri, one of the sons, and five residuary devisees and legatees of the testator, and also testamentary guardians of the children of David Boaz, a deceased

*Duty of Executors to Take Security for Credit Sales.

—This duty is imposed by statute. Va. Code, § 2851. See also, 3 Min. Inst. (2d Ed.) 578; Barton's Ch. Pr. (2d Ed.) 718; Cogbill v. Boyd, 77 Va. 450; Southall v. Taylor, 14 Gratt. 209; Miller v. Holcombe, 9 Gratt. 665.

son of said testator, the said children, also residing in the said state, became the purchaser of the said slaves, through the agency of the said executor, at the price of \$4,955. It was the plain duty of the executor to demand and take of the purchaser bond with good surety for the purchase money. That the purchaser was a man of ample means, if he really was so (though that fact does not appear from the record), makes no difference. It would make none if the purchaser had resided in the state of Virginia. It is always the duty of a personal representative to demand and take good security of every purchaser on credit of property of the decedent, wherever the purchaser may reside, and whatever may be his pecuniary circumstances. That the purchaser resides abroad, if it be not a reason for increased strictness in this respect, is certainly no reason for the

386 *contrary. When therefore the purchaser in this case failed to comply with the terms of sale, by giving bond with good security for the purchase money, in a reasonable time after the sale, it was the plain duty of the executor to resell the slaves at the risk and loss of the purchaser. Had he performed this plain duty the estate would have sustained no loss by the transaction, but would have realized the full market value of the slaves at that time. Suppose the executor, though required by the will to sell the testator's whole estate as soon as convenient after his death, had not sold the slaves at all, but retained them as his testator's estate, until they perished in his hands by the result of the war, would he not have been clearly liable to the estate for their value at the time when they ought to have been sold? Was not that in effect the very course which he pursued? To retain and hold the slaves themselves as security, in lieu of that which the law made it his duty to demand and receive, was no legal equivalent therefor. Slaves were a precarious security at best, and especially at that time. They were always liable to loss by sickness, death and running away, and their intrinsic value daily diminished, until, in consequence of the late war, it was wholly destroyed. In that way the value of these slaves was destroyed, and the loss of that value has thus plainly resulted from the neglect of the executor. His liability to indemnify against the consequences of that loss such of the legatees as had no agency in bringing it about cannot be denied. That he was influenced by kind and humane feelings in what he did cannot alter the case. It may excite our sympathy for him, and our regret at his loss, but right and justice must still be done by us, and we must administer the law as it is written.

387 Men may do what they please with their *own, and may justly be commended for their liberality in so dealing. But when they undertake to execute a fiduciary trust for others, and especially infants and others under disability, they must take care to proceed according to the rules of law and equity. It can require no

citation of authority to sustain these principles with which we are all familiar.

The court is further of opinion that the circuit court did not err "in fixing the value of said slaves at the price at which they were sold at the executor's sale, instead of the sums at which they were appraised at the appraisal the day before." The presumption is, that they were sold for no more than their market value, and that if they had been resold at the loss and risk of the purchaser, on his failure to comply with the terms of sale, they would have brought the same, or nearly the same, price; and at all events the loss would have been made good by the first purchaser.

The court is further of opinion that the court did not err "in decreeing payment of the shares of the minor plaintiffs directly to them, instead of to their guardians." The effect and object of the decree, which is merely interlocutory, was to settle the rights of the parties, or some of them. Of course the money will not be paid into the hands of infants; and the court below can yet make any order on that subject which may be necessary to ensure the payment of the money into proper hands. If the appellant has any interest in that question, he might have guarded his interest by a proper motion to the court below before he brought the cause here, and he may guard it by such a motion after the cause goes back.

This court is of opinion that there is no error in the decree of the court below, and that it ought to be affirmed.

Decree affirmed.

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*Walters v. Hill & als.

March Term 1876, Richmond.

1. Suit Setting Aside Decree of County Court.—L died in 1863. By his will he gave to the children of a deceased daughter E, all infants, to two married daughters, to one not married, and to a son, the residuum of his estate; and appointed K his executor and trustee, to hold the same for the separate use, &c., of his daughters, and after their death to their respective children. In 1868 K filed a bill in the county court, alleging he had bought of L, in his lifetime, a tract of land called T, and had paid him the price, and was put in possession, but the title was not made; and he asked for a conveyance. With the bill he filed a paper signed by the widow and three daughters of L and their husbands, by which they express the wish that a deed for the land may be made to K. When the bill was filed, an answer was filed for the parties who had signed the paper, and by a guardian *ad litem* for the infants. And at the same time a decree was made appointing a commissioner to convey the tract of land to K. At another term the decree was amended, and the commissioner was directed to convey also to K a small tract adjoining T, with a mill on it. The commissioner died without conveying the land to K; and K sold it to W, but had made no deed. In 1869 the six infant children of E, and the two married daughters, filed their bill against K and W, to set aside the decree of the county court and recover the land. They alleged

that there was no written contract between L and K; that K had not paid a dollar for it; that they knew nothing of the suit, and were not parties to it, and it was not binding on them. K answered, admitting he had not paid any part of the price to L; but their contract was, that he was to be executor of L, and apply the price in the course of administration. W said he bought and paid, with no knowledge of any act or conduct of K which would defeat his title. The decree of the county court was held to be void and of no effect as against the plaintiffs. K was removed from the trust, and another trustee appointed, who was decreed to hold the land under the same title and the same right prescribed by the will of L; and the decree was affirmed by this court.

389 *William Lyon, of the county of Pittsylvania, died in 1863, and his will was duly admitted to probate in the county court of that county. By his will he provided that his property should be equally divided among his children then living, and the descendants of such as were dead, the descendants to take their parents' share; and all his children, except his son William, were to have but a life-interest in the property given them, and at their death the same to go to all their children living at their respective deaths. He directed that what was called his Thomas tract, containing about two hundred and seventy-five acres, should be valued by two neighbors, and that his son William should take it at said valuation, as a part of his share of testator's estate. And he directed that all the property of every description, given to his daughters and to his son James, should be vested in Witcher W. Keen, as trustee, to hold the same for the sole and separate use of his daughters, free from the debts of their respective husbands, and after their deaths to go to their children. And he appointed said Keen his executor; who qualified as such. The will bears date July 7th, 1859.

William Lyon died in the lifetime of his father; and the controversy in this case relates to the Thomas tract of land devised to him.

On the 16th of November 1863 W. W. Keen presented his bill to the county court of Pittsylvania, in which he says, that several years before that time he purchased of William Lyon a tract of land in the county of Pittsylvania, with a mill thereon, known as a part of the Thomas tract, containing by estimation two hundred and seventy-four acres: that he paid to Lyon the full amount of the purchase money for said land, and took possession thereof; that Lyon after-

390 wards *died without conveying plaintiff the land, leaving a widow and children and grandchildren, the children of a daughter Elizabeth Hill, who was dead, the grandchildren being infants. He says that the adult parties are willing to make title to said lands, but the infant parties are incapable; and making the widow, the daughters and their husbands, and the infant children by name, parties, he calls upon them to answer; and prays that the

title to said land may be made to him, and for general relief.

The plaintiff filed with his bill a paper dated October 9th, 1863, signed by the widow, James Lyon, the two married daughters and their husbands, and an unmarried daughter, in which they say—We the widow and heirs at law of Wm. Lyon, deceased, of Pittsylvania county, are desirous that the title to a mill and a tract of land called the Thomas tract, which were sold in the lifetime of said Wm. Lyon, should be made good to W. W. Keen, who purchased said mill and land of said Lyon in his lifetime, and received possession thereof, but no conveyance, do hereby authorize and request the court to make such decree as will complete the contract and make the title good to W. W. Keen.

At the same time that the bill was presented, a paper purporting to be the answer of the same parties who had signed the above paper, was also filed, in which they say they admit the allegations of the bill to be true, and they are willing that their interests in the land in the bill mentioned shall be conveyed to the plaintiff: And still at the same time, on motion of the plaintiff, a guardian ad litem was appointed for the infant defendants, and an answer by their guardian ad litem was filed for them, in which they say—they have no doubt of the truth of the facts in said bill, and 391 submit *their rights to be disposed of as may be proper and legal.

On the same 16th of November 1863, the cause came on to be heard upon the bill, answers and exhibits, when it was decreed that James M. Williams do, by proper deed with special warranty, convey the land in the proceedings mentioned as part of the Thomas tract, with the mill thereon, to the plaintiff.

And at another day, viz: on the 19th of September 1864, the cause came on upon the papers formerly read, and upon the application of the parties to correct the decree pronounced at the November term 1863; and it being agreed (as the decree states) that the Thomas tract of land in the bill mentioned contains two hundred and seventy-four acres, and is separate from a tract of twenty acres with mill thereon, which was held by William Lyon deceased and James H. Howerton, the court doth alter and amend said former decree, and decree that James M. Williams, instead of executing said decree, do, by proper deed with special warranty, convey to W. W. Keen the interest of the said William Lyon deceased in the said tract of two hundred and seventy-four acres, a plat of which, &c., and also the interest of the said William Lyon in the tract of twenty acres, with mill thereon.

In February 1869 the six infant children of Elizabeth Hill deceased, and the two married daughters of William Lyon deceased, by Mrs. Ellen H. Lyon, their next friend, and Mrs. Carter, the unmarried daughter, instituted their suit in equity in the circuit court of Pittsylvania county, against W. W. Keen in his own right and as trustee. &c.

under the will of William Lyon deceased, A. G. Walters, James Lyon, and the husbands of the married plaintiffs. After referring to the will of William Lyon, 392 and the death of his son *William in his lifetime, they claim that they are entitled to the land devised to him as a part of the residuary estate of the testator William Lyon. They refer to the suit brought by Keen, and exhibit a copy of the record. They charge that Keen never paid one cent of said land to said Lyon in his lifetime, or to any other person at any time, and that he is largely indebted to his testator's estate as executor. They charge that they were no parties to the suit. The married daughters say they have no recollection of signing the paper exhibited with Keen's bill, but may have done so at the request of Keen, in whom at the time they placed great confidence, he being the executor appointed by their father. But if they signed it, they were at the time married women, and they are not bound by any admissions in it. The plaintiffs further charge that no written contract was made between Keen and William Lyon for said land, and no money paid by Keen. They are informed that Keen has contracted to sell said land to A. G. Walters, but no deed has been made by Keen to Walters; they do not know whether a deed was made by Williams to Keen.

The prayer of the bill is, that the decree of the county court may be set aside and annulled; that Keen may be removed as trustee under the will of said William Lyon; for a sale of the land for partition among the residuary devisees; and for general relief.

At the October term 1869 of the court, Walters demurred to the bill on the ground of multifariousness, and because the bill does not charge fraud in procuring the decree of the county court, and does not show any ground on which the court could set aside the proceedings and decree of the said county court.

Keen answered the bill. He says 393 he purchased said *land from Wm.

Lyon some time before his death, with the understanding that he was to be Lyon's executor, and as such would apply the purchase money of said land (which it was agreed should remain in his hands,) to the payment of whatever claims might be found outstanding against said Lyon's estate; and under this agreement and understanding, the said Lyon in his lifetime put him, Keen, in full possession of said land. He admits there was no written contract between him and said Lyon for the said land, and that he did not pay to Lyon in his lifetime any part of the purchase money, as under the contract of sale he was not to pay the money to him in his lifetime, but was to apply it after his death to the benefit of his estate; and he has not since his death paid the legatees. He admits he sold the land to C. G. Holland, who ordered a deed to be made to A. G. Walters. He denies that he, as executor, is largely indebted to the estate of his testator, or is in fact in-

debted to said estate at all, except for such portions of the purchase money for said land as may still be due. He denies the allegations of the plaintiffs, both adults and infants, that they were not parties to the suit in the county court, and he denies that there was any fraud in obtaining the decree in that case; and he insists the adult parties are bound by the paper they signed; which they signed freely and with full knowledge of its contents.

The court overruled the demurrer of Walters to the bill; and he thereupon filed his answer. He insists that the proceedings in the suit brought by Keen are valid; that no fraud is charged; and certainly the decree was not procured by any fraud of which he, Walters, had knowledge. He does not know whether Williams executed the deed to Keen; but insists that so far as the title or rights of Keen and those claiming

394 *under him are concerned, the fact is immaterial; as a court of equity will regard that as done which ought to have been done by said commissioner. That Keen sold the land to Holland for full value, and Holland transferred his purchase to respondent for full value. It was true that Keen had not conveyed the land to respondent, but the only reason for that was, that Williams, the commissioner, appointed to make the deed to Keen, died in 1864, and it was supposed that Keen's deed to respondent would not be good until a new commissioner was appointed; and the matter passed by from neglect.

There was evidence taken in the cause which showed that Keen had a very large property in his possession during the war, and was in good credit; but he was largely indebted, he having become a bankrupt in 1867 or 1868, when his debts amounted to between four and five hundred thousand dollars.

The cause came on to be heard on the 5th of June 1871, when the court being of opinion that the decree of the county court of Pittsylvania in the bill and proceedings mentioned was obtained in fraud of the rights of the plaintiffs, decreed the same to be void and of no effect as to them; and it was further decreed that the powers of Keen as trustee, under the will of William Lyon, should be revoked, and he should be removed from his trust, and Joseph D. Blair appointed in his place; that the infant plaintiffs, and said Blair as trustee, were entitled to hold the land under the same title and in the same right prescribed by the will of William Lyon; and it being admitted by all the parties in interest that the said land could not be conveniently divided in kind, the said Blair was appointed a commissioner to sell the same in the manner and on the terms stated in the decree.

395 From this decree *Walters applied to this court for an appeal; which was allowed.

Robertson & Green and Jones & Bouldin, for the appellant.

Tredway, E. E. Bouldin and W. W. Henry, for the appellees.

Anderson, J., delivered the opinion of the court.

William Lyon departed this life in March 1863. Previous to his death he made and published his will, bearing date the 7th of July 1859; by which he bequeathed to the children of his deceased daughter Elizabeth Hill, all of them infants, and his three living daughters, and his son James, the whole residuum of his estate; and appointed Witcher W. Keen his executor. All the property given to his daughters and to his son James by his will he vested in said Witcher W. Keen as trustee, to hold the same for the sole and separate use of his said daughters, free from the debts of their respective husbands, and after their deaths to go to their respective children, as he had before directed. The bequest to his son James was made to him for life, remainder to his children by the woman Jane, to the exclusion of any children he has by any other person. The children of Elizabeth Hill were to get one hundred dollars less than a child's part, and his son James was to get one hundred dollars less than a child's part; and none of the other children to account for any advancements theretofore made.

The tract of land which he calls his Thomas tract, containing about two hundred and seventy-five acres, *he directed to be valued by two neighbors, and to be taken by his son William at valuation, and to be accounted for by him in the equal division. William died before the testator, unmarried and without issue; by reason whereof this devise to him lapsed into the residuum. This controversy is in relation to that tract of land.

W. W. Keen, the executor and trustee, claimed to have purchased it from the testator in his lifetime; and after his death he filed his bill in chancery in the county court of Pittsylvania, on the 16th day of November 1863, against the widow and devisees and legatees of William Lyon deceased; alleging that he had purchased the said tract of land of the decedent in his lifetime, had paid him the full amount of the purchase money, and had taken possession of it under his purchase; that said Lyon had departed this life without conveying him the title; and he prays that the title may be conveyed to him. On the same day, November 16th, 1863, a decree was pronounced in the cause, that James M. Williams, who was appointed a commissioner for the purpose, do, by proper deed with special warranty, convey the land in the proceedings mentioned, as part of the Thomas tract, with the mill thereon, to the plaintiff. And on the 19th day of September 1864 an amended decree was entered, correcting the foregoing decree as to the description of the land to be conveyed; describing it as the interest of said Lyon in the said tract of two hundred and seventy-

four acres, and also directing a conveyance of his interest in a tract of twenty acres with mill thereon, which, in fact, had not been claimed by the bill. No conveyance was ever made.

On the 5th of April 1869, Mary Ann Hill & als., infant children of Elizabeth Hill, who sue by their *next friend,

Ellen H. Lyon, and Mary W. Howerton and Nancy Howerton being femes covert, holding separate property, who sue by their next friend, Ellen H. Lyon, whose husbands, William H. Howerton and James H. Howerton, are made defendants, and Martha Carter, daughters of said decedent, filed their bill in chancery in the circuit court of Pittsylvania county against W. W. Keen in his own right, and as executor of William Lyon, and trustee as hereinbefore described, and others, in which they allege the suit brought by said Keen in the county court, and the decree in his favor for the conveyance of title, which they are informed has never been made. They charge that said decree was made upon an alleged agreement of purchase by said Keen, and an allegation that he had paid the whole of the purchase money. They expressly charge that said Keen never paid one cent of purchase money to the said Lyon in his lifetime, or to any other person at any time, and that he is largely indebted to his testator's estate as executor; and they further charge that they were not parties to said suit. The infant children of Elizabeth Hill, by their next friend, charge that they were never made parties to said suit, and are not bound by the decree; and they charge that there never was any contract in writing between the said William Lyon in his lifetime and the said Keen for the sale and purchase of said land.

The appellants claim the right to hold the land by virtue of that decree in favor of W. W. Keen. If the appellees were not parties to that suit as they allege, or if said decree was fraudulently procured, which though not expressly charged, if the facts alleged be true, is established, said decree is not binding on them, and can confer no rights upon Keen, or those who claim under him.

398 *There appears to have been no process against them. There is, with the papers in the cause, a paper which professes to be the answer of the defendants named. But it is not signed by either of them, or by anybody for them, and two of them, William H. and James H. Howerton, who are made defendants in this suit, swear that they never authorized any one to put in their appearance, or to answer for them, and that they did not know of the suit. And the others who are plaintiffs in this suit aver that they were not parties to that suit, and thus is the onus thrown upon the appellants, to show that they were, in order to bind them by the decree.

It should appear from the record itself that they were before the court. There is nothing to show it unless the paper referred to is their answer, and was filed as such by their agency, or at least with their know-

edge and consent. That does not appear. How it got amongst the papers is not shown. It might have been put there by the plaintiff himself without their knowledge or consent. There is nothing to show that any one of them had any connection with it or any knowledge of it. Unless it was their act, or done with their consent or authority, it is not binding on them, nor shows an appearance on their behalf, or that they were before the court.

The circumstances attending the procurement of said decree tend strongly to negative any equity in the plaintiff in that suit, and are so indicative of fraud in the procurement of the decree as would disincline a court of equity to give it effect.

What were the relations of these parties? On one side they were married women, daughters of the testator, who had a life interest, and their children, who had the remainder thereof, a son of the testator, who *was not sui juris as to this property, who had a life interest, and his children who were entitled to his interest in remainder, and the infant children of a deceased daughter of the testator. On the other side was the plaintiff, who was the executor of the testator, and who was constituted trustee by the testator's will for his said married daughters and his son and their children, who was seeking to acquire title in his own name and for his own benefit of property, which had been intrusted to him for their benefit. His relation to the widow of the testator and his children and grandchildren was a relation of confidence.

Holding this relation of confidence not long after the death of the testator, *flagrante bello*, he has a paper prepared, to which he obtains the signatures of the widow and her children, in which they are made to acknowledge the sale of the land in question to him by the testator in his lifetime, of which he received possession, but no conveyance, and authorizing and requesting the court to make such decree as will complete the contract and make good the title to him. This paper is dated October 9, 1863, and is not addressed to any court, no suit being then pending. But armed with this paper, on the 16th of November following he institutes his said suit in the county court of Pittsylvania county, files his bill, and on the same day obtains the decree aforesaid, which, nearly a year afterwards, he has amended as hereinbefore described. He does not set out in his bill any contract of purchase; he merely alleges that he purchased the land in the lifetime of his testator, and paid the full amount of the purchase money. Nor does it appear in any part of the record of that suit, or this, what price he was to pay for the land. But it
400 does appear now, that the *allegation of his bill that he had paid the whole amount of purchase money was untrue, and that he had not in fact paid one dollar thereof.

If he had disclosed the truth in his bill, which, in the relation he stood to the parties, he had no right to suppress, much less

to misrepresent, he must utterly have failed to have obtained the decree which was entered. It was consequently procured by a deception practised upon the court—a representation which he now virtually admits, in his answer to the bill in this suit, was not true.

There was no evidence before the court of the alleged purchase except the paper above referred to. And that is not entitled to the weight of evidence. It was, in fact, but a certificate of what they had been informed of by Keen himself; for they do not appear to have had knowledge of it themselves, and evidently relied upon his representation, and were influenced by the relation of confidence which subsisted between them to sign the paper. Surely such an acknowledgment could not divest married women of their estate in land, of which, under the statute, they can only be divested upon privy examination properly certified, and it could not divest their children of their interest, nor the infant children of Mrs. Hill, who were not parties to it.

The whole procedure, instituting the suit *flagrante bello* in the county court, to acquire a transfer to him of the rights of infants and married women, which he held in trust for them when their husbands were soldiers in the army, upon testimony procured through the influence of confidential relations, upon the mere allegation that he had purchased the land, without setting out the contract or the price he was to
401 pay for it, *and upon the false allegation that he had paid the full amount of the purchase money, when, in fact, he had not paid one dollar, shows so conclusively the fraudulent procurement of said decree, that it would be rendered null and void if all the parties had been before the court, which it seems was not the case.

The court does not therefore regard said decree of the county court as interposing any barrier to the relief which the plaintiffs in this suit seek to obtain. And upon the merits, the court is of opinion that the devisees and legatees are entitled to have the land in question embraced in the partition and distribution of the estate of their testator, the evidence being insufficient to establish such a contract of sale by the testator in his lifetime to W. W. Keen, and such a performance on his part as would entitle him to a decree of specific performance.

The court is further of opinion that the appellant, A. G. Walters, having purchased from one who had no valid title, cannot hold it against parties whose title is good in law and equity, and of which they have never been lawfully divested. And if the decree in favor of his grantor was invalid, he was not invested with the legal title, and his equity could not prevail over the prior equity of the appellees, upon the authority of *Briscoe v. Ashby & als.*, 24 Gratt. 454.

The court is also of opinion that the demurrer to the plaintiff's bill, on the ground of multifariousness, was properly overruled. Before the Code of 1849, courts of equity could pass on all equitable questions arising

in cases of partition. And they may now take cognizance, under the provisions of the Code, of all questions of law affecting the legal title that may arise in such proceeding.

402 *The court is also of opinion that it was not error to remove W. W. Keen as trustee in this suit, as ancillary to the design and object of the suit, and to appoint another in his stead. Upon the whole, the court is of opinion that there is no error in the decree of the circuit court, and that the same be affirmed with costs.

Decree affirmed.

403 *Miller v. Fletcher & als.

March Term, 1876, Richmond.

[21 Am. Rep. 356.]

1.. **Bonds—Delivered to Obligees as an Escrow.**—If a bond, perfect on its face, is delivered to the obligee as an escrow, to be valid upon another person's executing it, it is valid, though the condition is not complied with.

2. **Deeds—Same.**—A deed, perfect on its face, cannot be delivered as an escrow to the grantee or obligee, upon a condition upon which it is to be a valid deed. In all such cases the condition is void, and the deed is at once operative.

3. **Same—Parol Evidence.**—Parol evidence is inadmissible, to prove that a deed, perfect on its face, was delivered to the grantee on a condition.

***Deeds—Delivering to Obligees in Escrow.**—The principal case is cited in Kyger v. Sipe, 89 Va. 511, 16 S. E. Rep. 627; also, Lyttle v. Cozard, 21 W. Va. 200. The same rule—that a deed complete upon its face cannot be delivered to the obligee as an escrow, but by such delivery becomes absolute and unconditional—is also adhered to in Wendlinger v. Smith, 75 Va. 317; Ward v. Churn, 18 Gratt. 801; Hicks v. Goode, 12 Leigh 479; Preston v. Hull, 28 Gratt. 600; Nash v. Fugate, 24 Gratt. 202, 2 Min. Inst. (4th Ed.) 734; Barton's Law Pr. (2d Ed.) 630, 6 Am. & Eng. Enc. Law 858.

The principal case is cited, but distinguished in Nash v. Fugate, 32 Gratt. 605, which latter is followed in Humphreys v. Richmond, etc., R. Co., 88 Va. 481, 13 S. E. Rep. 985.

†**Parol Evidence.**—"The terms of a valid, written contract cannot be contradicted or varied—much less squarely contravened—by parol evidence of what occurred between the parties previously thereto, or contemporaneously therewith. (See Greenleaf on Evidence, chapter 15, and, especially, sections 275, 277, 281; Watson v. Hurt, 6 Gratt. 633; Towner v. Lucas 18 Gratt. 705; Woodward, Baldwin & Co. v. Foster, 18 Gratt. 200; Sangston v. Gordon & Riely, 22 Gratt. 755; Colhoun and Cowan v. Wilson, 27 Gratt. 646; Miller v. Fletcher, 27 Gratt. 413; Southern Mutual Insurance Co. v. Yates, 28 Gratt. 593; Barnett v. Barnett, 33 Va. 508, 2 S. E. Rep. 733; Tait's Executor v. Central Lunatic Asylum, 84 Va. 279, 4 S. E. Rep. 697; Shenandoah Valley R. Co. v. Dunlop & Wife, 86 Va. 352, 10 S. E. Rep. 239.)" Peyton v. Stuart, 88 Va. 76, 16 S. E. Rep. 160. See also, 6 Am. & Eng. Enc. Law 858; Barton's Law Pr. (2d Ed.) 630. But see, where the principal case was cited and distinguished in Nash v. Fugate, 32 Gratt. 595, and *note*, which latter case was followed in Hukill v. Guffey, 37 W. Va. 425, 16 S. E. Rep. 544.

The principal case was also cited in Owens v. Boyd Land Co., 95 Va. 562, 28 S. E. Rep. 950.

This was an action of debt in the circuit court of Rappahannock county, brought in January 1871 by John S. Fletcher against James F. Brown, Benjamin F. Miller and John Miller, upon a bond of \$2,409.51, bearing date the 4th of September 1861, and payable on demand. The bond was perfect on its face.

B. F. Miller, one of the defendants, filed a special plea, that the writing declared on was made and delivered as an escrow to the plaintiff, on the express condition, and none other, that John Miller and Eastham Jordan should sign and seal it as their own act and deed, and should become bound equally and jointly with the said James F. Brown and B. F. Miller; and if the said John Miller and Eastham Jordan should refuse, or fail to sign, seal and deliver the said writing as joint co-obligors of the said James F.

404 Brown and B. F. Miller, the same was not to bind the said B. F. Miller, but was to be held null, &c.; and he avers that said Eastham Jordan did not sign, seal and deliver the said writing; and so, &c.

The plaintiff demurred to the plea; but the court overruled the demurrer.

Upon the trial of the cause, the defendant, B. F. Miller, was introduced as a witness, and his counsel proposed to prove by him that a firm, under the style of Brown, Miller & Co., composed of the three defendants and Eastham Jordan, who were dealers in cattle, on the 4th of September 1861 owed the plaintiff the sum of \$2,409.51 on a transaction between them, for which the plaintiff held their written contract not under seal, and that he desired to change the form of the evidence of the debt, and applied to B. F. Miller to execute the bond sued on: and that B. F. Miller executed the bond upon condition, that all the other members of the firm should execute said bond. But the court excluded all evidence of the facts proposed to be proved, save as to the conditions upon which the bond was executed: And the defendant excepted.

The plaintiff was then sworn in his own behalf, and on his cross-examination the defendant proposed to prove by him the facts stated in the foregoing exception, as to the original debt. But the court excluded the evidence; and the defendant again excepted.

The jury found in favor of the plaintiff for \$2,409.51, with interest from the 4th September 1861, subject to the credits endorsed upon the bond; and the court rendered a judgment according to the verdict. Whereupon B. F. Miller applied to a judge of this court for a supersedeas; which was awarded.

W. W. Gordon, for the appellant.

405 *Brooke & Scott, J. C. Gibson and Menifee, for the appellee.

Staples, J., delivered the opinion of the court.

This is an action founded upon a bond or single bill for the payment of money. The defendants plead, that it was executed by them in satisfaction of a debt due the plaintiff by the firm of Brown, Miller &

so., and delivered to the plaintiff as an escrow, upon condition it was to be likewise executed by two other members of said firm; but that in fact it had been executed only by one of them; and so the condition upon which the writing was to take effect had not been performed. The question raised by this plea, and which we are called upon to decide is, whether where a deed, perfect on its face, is delivered by the obligor or grantor directly to the obligee or grantee, it is competent to prove by parol evidence the delivery was upon a condition which has not been complied with, and hereby render the instrument inoperative as to the parties executing it.

In Sheppard's Touchstone, volume 1, pages 58, 59, the rule is thus laid down: "The delivery of a deed as an escrow, is said to be, where one doth make and seal a deed and deliver it unto a stranger, until certain conditions be performed, and then to be delivered to him, to whom the deed is made, to take effect as his deed. And so a man may deliver a deed, and such delivery is good. But in this case two cautions must be heeded: 1. That the form of words in the delivery of a deed in this manner be apt and proper. 2. That the deed be delivered to one that is a stranger to it, and not to the party himself, to whom it is made."

After discussing the first ground of **406** caution at some length, "the learned author proceeds as follows: "So it must be delivered to a stranger; for if I seal my deed and deliver it to the party himself, to whom it is made upon certain conditions, &c., in this case let the form of the words be what it will, the delivery is absolute, and the deed shall take effect as his deed presently; and the party is not bound to perform the condition; for in *traditionibus chartarum, non quod dictum, sed quod factum est inspicitur.*" Another reason assigned for this rule of the common law by Lord Coke is, "the delivery is sufficient without speaking of any words; and then when the words are contrary to the act, which is the delivery, the words are of none effect."

The doctrine here laid down by these learned writers has been sometimes spoken of by judges as extremely technical and unsatisfactory. It may be so; but after a very careful examination I have not been able to find any well considered case in which that doctrine has been directly overruled.

In *Hicks v. Goode*, 12 Leigh 479, 490, Judge Cabell, in delivering the opinion of the court, conceded the distinction between a deed delivered as an escrow to the party to the deed, and one that is delivered to a stranger, and he was not disposed to controvert it. He said, "the reasoning on which the distinction is founded was not only technical but unsatisfactory to his mind. He considered it as settled, however, that if a deed be delivered to the party himself, to whom it is made as an escrow, but to become the deed of him who sealed it on certain conditions; in such case, whatever be the form of the words, the de-

livery is absolute, and the party is not bound to perform the conditions."

The counsel who argued that case, on both sides, admitted that such is the law; **407** too well settled for controversy. *It was insisted, however, on behalf of the defendant, that the rule applied only to a deed perfect and complete on its face, requiring nothing to be done to give it full efficacy as a deed, according to the intention, but the mere delivery. But where the instrument at the time it passes into the hands of the grantee or obligee is incomplete, and indicates clearly on its face that some other act is to be done to give it effect, according to the intention of all the parties, there it was insisted the rule did not apply, and it was competent to show by parol that the delivery was upon a condition which had not been performed. And so this court held; and it will be seen upon examination that the decision was placed upon that ground exclusively.

In *Ward v. Churn*, 18 Gratt. 801, Judge Joynes adverted to this rule of the common law: "He said it was strict and technical to the last degree; and yet he did not venture to deny that the doctrine is well settled." In the course of his opinion he cites with approbation some observations of Chief Justice Best in the case of *Hudson v. Revett*, 15 Eng. C. L. R. 467, wherein the learned chief justice quotes Comyn, vol. 4, page 276, 4 A., *Fait* as saying: "If the deed be delivered to the party as an escrow, to be his deed on the performance of a condition, it is not his deed till the condition be performed, though the party happens to have it before the condition is performed."

Now it is most remarkable, be it said with all humility, that two judges, so distinguished for accuracy and learning, should have fallen into such an error. What Comyn does say is this:

"So if it (the deed) be delivered to a stranger as an escrow, to be his deed upon performance of conditions, it is not his deed till the conditions are performed, **408** *though the party happens to have it before. 2 Rol. 25, 125, 45; Coke Lit. 36 a.

"Or be delivered to a stranger to keep till conditions be performed, 2 Rol. 25, 1, 40.

"Or to be delivered to the party as his deed upon performance of a condition."

Now this is relied upon by Chief Justice Best as authority for the position, that a deed may be delivered to the party upon condition, and it is good. But it will be perceived that Comyn means simply to affirm, that if the deed be delivered to a stranger, "to be delivered to the party as his deed upon performance of a condition, it is not his deed till the conditions be performed, though the party happens to have it before." That such was his meaning is manifest from the very next sentence, not noticed by the learned chief justice, in which he declares: "But a delivery cannot be to the obligee as an escrow." 2 Cro. 85, 86.

And in division A 3, page 274, Comyn again declares, that "if an obligation be

made to A, and delivered to A himself as an escrow, to be his deed upon performance of a condition, this is an absolute delivery; and the subsequent words are void and repugnant."

A more remarkable instance of an entire misconception of an author's meaning has rarely been exhibited by a learned judge. It is worthy of observation, that Chief Justice Best himself does not assert the rule laid down by Sheppard as not sound law; he merely declares it a technical subtlety. The case of *Hudson v. Revett*, was decided upon the ground, that the deed was incomplete when it passed into the hands of the grantee; and the observations of the chief justice were wholly unnecessary to the decision.

There is one other case decided by 409 an English court, *sometimes relied on as opposing the doctrine of the text in Sheppard and the other common law writers. I mean the case of *Johnson et al. v. Baker*, 4 Barn. & Ald. 440, in which it was held it might be shown by parol that a composition deed was delivered as an escrow, upon condition it should be void unless executed by certain other creditors, which was not done. It will be seen, however, that the instrument was a deed of composition, whereby payments were to be made to all the creditors, each of whom was to release his claim, and if any should refuse, the entire purpose of the deed was defeated. Nor does it appear that the creditor, to whom the delivery was made, was then a party to the deed, and he was therefore in no condition to insist upon the estoppel.

With the exception of these cases, which, indeed, do not expressly controvert the principle, the English authorities, so far as I have seen, are uniform in their adherence to the doctrine for which I am contending.

In the United States the cases speak almost with one voice. This is the more remarkable, because, in a large majority of the states, a strong disposition has been constantly manifested, either by judicial decision or by legislation, to rid the courts of those rules of the common law, which are regarded as purely technical. The rule in question has, however, been adhered to with an unanimity almost without parallel. It is impossible, with any just regard to the proper limits of an opinion, to quote from the numerous authorities upon this subject. It may not be improper, in a question of so much importance, never yet settled in this state, to cite the opinions of distinguished judges in some few of the cases decided in the different states, and also the opinions of learned commentators who have written upon the subject.

410 *The first case is that of *Simonton's estate*, 4 Watts' R. 180, Pennsylvania.

Kenedy, J. "An agreement to deliver a deed as an escrow to the person in whose favor it is made, and who is likewise a party to it, will not make the delivery conditional. If delivered under such an agreement, it will be deemed an absolute delivery,

and a consummation of the execution of the deed."

"To construe such agreements otherwise, would not only be putting it in the power of the party, in whose favor the deed is made, to practice a fraud upon the community by means of it, in obtaining a credit that otherwise would not be given to him, but would be opening a wide door for the introduction of frauds and perjuries."

Duncan et al. v. Pope, 47 Georgia R. 445.

Montgomery, J. "An escrow, *ex vi termini*, is a deed delivered to some third person, to be by him delivered to the grantee upon performance of some precedent condition by the grantee or another, or the happening of some event. If delivered to the grantee or his agent, the delivery is complete, and the paper is not an escrow. It follows that the delivery of the deed to the attorneys of the bastard, carried the complete title in the property granted to the grantee, divested of all parol conditions."

Cin., Wil. and Zanesville R. R. Co. v. Iliff, 13 Ohio St. R. 235.

Brinkerhoff, J. "There can be no doubt, according to the uniform current of authority, that if, in this case, the instrument of release had been, as a completed instrument, delivered to Carrol, simply as the agent of the company to procure the right of way, although the delivery may have been accompanied by verbal stipulations that the instrument should not

411 *operate as a release until and unless certain conditions were first performed, the release would have been operative according to its terms, and the verbal stipulations, in respect to its operation after delivery, would have amounted to nothing."

Ward v. Lewis, 4 Pick. R. 518.

Morton, J. "We are therefore satisfied that the deed of indenture was delivered by the debtors to the assignees and to the creditors. It could not have been delivered as an escrow, because it was delivered to the parties; an escrow can be delivered only to a third person. It could not have been delivered to the parties conditionally, to take effect upon the happening of any future contingency, because this would be inconsistent with the terms of the instrument itself. Upon delivery it became an absolute deed, and went into immediate operation as to all who had executed it. If it had been the intention of the parties to make a conditional assignment, to take effect only upon the signature of the whole, or a major part of the creditors, that condition ought to have been inserted in the instrument itself. But to permit parties to a deed, purporting to be absolute, to show by parol evidence that it was conditional, and to avoid it for a non-performance of the condition, would be not only a violation of the fundamental rules of evidence, but productive of great injustice and mischief."

Currie v. Donald, 2 Wash. Va. R. 59.

Lyons, J. "The second objection is to the proof respecting the delivery. The parties have declared it to be sealed and delivered, and this is attested by the signa-

ture of four witnesses, who could not afterwards have been permitted to disprove it. This delivery we must consider as absolute, because if it had been intended as an escrow it ought to have been so stated."

412 *2 Lomax's Digest 38.

"Secondly, that the delivery of the deed as an escrow be to a stranger; for if a person delivers a deed to the party himself, to whom it is made as an escrow upon certain conditions, the delivery is absolute, and the deed will take effect immediately; nor will the party to whom it is delivered be bound to perform the conditions."

In 3 Washburn on Real Property 268, the doctrine is thus laid down: If the delivery is made to the party, no matter what may be the form of the words, the delivery is absolute, and the deed takes effect presently as the deed of the grantor, discharged of the conditions upon which the delivery was made.

To these authorities may be added the cases of Brackett v. Barney, 28 New York R. 333; Worrall v. Mann, 1 Seld. R. 238; Jackson v. Catlin, 2 John. R. 259, decided by the supreme court of New York. The case of Black v. Shreve, 13 New Jersey Eq. R. 456; the case of Herdman v. Bratton, 2 Har. R. (Del.) 396; the case of Cin., Wil. & Zanesville R. R. Co. v. Iliff, 13 Ohio St. R. 235; the case of Mad. & Ind. Plank R. Co. v. Stevens, 10 Ind. R. 1; the case of Brown v. Reynolds, 15 Sneed R. (Tennessee) 639; Gibson v. Partee, 2 Dev. & Battle (N. C.) 530; Hagood v. Harly, Rich. Law R. 325; Graves v. Tucker, 10 Smeedes & Mar. (Miss.) 9; Firemens Ins. Comp. v. McMillan, 29 Alab. R. 147, 161; and the case of Moss v. Riddle, decided by the supreme court of the United States.

A doctrine sustained by such an array of authorities, a doctrine which has survived all the changes and innovations of modern reform, must have something to commend it to the approbation of the courts beyond its mere antiquity. It is not to be overturned by denunciation. The chief

413 argument against it is, *that it recognizes distinctions technical and unsatisfactory in the extreme.

It is said, for example, a deed may be delivered as an escrow to a stranger, or even to a co-obligor, to be delivered by them to the obligee; and there can be no good reason why it should not be delivered directly to the obligee as an escrow. It would be easy to show that this distinction is not so technical and unsatisfactory as is imagined. But it does not concern me to vindicate that distinction. I am dealing only with the particular rule of the common law invoked in this case. The question is, whether this court can safely depart from it here. Whether it can overturn that which is so well established elsewhere, and so fully sustained by the concurring voice of able commentators and great judges.

It may be that the rule will sometimes lead to fraud and to grievous injustice; but what rule can be laid down that will not occasionally be perverted to purposes of

mischievous. The statutes of "frauds and perjuries" were designed for the prevention of notorious evils; and yet constant experience attests that they are often but a cover for the perpetuation of the grossest frauds.

In Towner v. Lucas' ex'or, 13 Gratt. 705, the obligee induced one of the obligors to execute the bond as surety by the most solemn assurances that it was a mere matter of form, that the surety would never be required to pay any part of the debt, and that he, the obligee, would give him a written indemnity against any liability or damage.

This agreement was proved by the clearest evidence, and was found by the verdict of a jury upon an issue directed by the circuit court. This court held it was not competent to prove such an agreement by

414 parol. *Judge Allen, in a very able opinion which has received the almost universal approbation of the profession, relied upon the common law maxim, that it would be inconvenient that matters in writing, made by advice and on consideration, and which finally import the certain truth and agreement of the parties, should be contradicted by averment of parties, to be proved by the uncertain testimony of "slippery memory." He said, "it is reasoning in a circle to argue that fraud is made out, when it is shown by oral testimony that the obligee, contemporaneously with the execution of the bond, promised not to enforce it. Such a principle would nullify the rule. The true question is, was there any such agreement. And this can only be established by legitimate testimony. For reasons founded in wisdom, and to prevent frauds and perjuries, the rule of the common law excludes such oral testimony of the alleged agreement; and as it cannot be proved by legal evidence, the agreement itself, in legal contemplation, cannot be regarded as existing in fact. Neither a court of law nor of equity can act upon the hypothesis of fraud where there is no legal proof of it."

Most of the observations here made apply with peculiar force to the question under discussion.

It is easy to see that the most solemn obligations given for the payment of money, are of but little value as securities, if they may at any future day, be defeated by parol proof of conditions annexed to the delivery of the instrument, and never performed. This case before us is in point. The bond in controversy was given in 1861, for a debt antecedently due, for which all the defendants are confessedly bound independently of the obligation. The plaintiff being no

doubt well satisfied with his security, 415 did not sue *till 1871. On the trial he is met with the defence, that the defendants executed the bond with the understanding that another person alleged to be jointly bound with them for the debt should also execute the bond; and that it was delivered to the plaintiff upon that condition. The plaintiff and one of the defendants were the only witnesses examined; each giving his version of the transaction. The jury it seems, believed the plaintiff; but

they might have believed the defendant with equal propriety. If we reverse the judgment of the court below upon the ground of the rejection of proper testimony, it is not improbable that upon a new trial a verdict may be found for the defendants. And it may be that such a verdict would be correct. The result would be in effect, however, that this most solemn deed of the parties is of no more value than the most informal parol promise to pay. It thoroughly exemplifies the observation in the case of *Williams v. Green*, Cro. Eliz. 884, that if such testimony is allowed "a bare averment without any writing would make void every deed."

A doctrine of this sort is perhaps still more mischievous as applied to deeds of conveyance—for the title of the grantee is liable at any time to be defeated by evidence establishing parol conditions accompanying the delivery of the deed. No safeguard can be provided against perjury or the mistakes of "slippery memory" in such cases. If parties desire to make the delivery of deeds conditional, it is easy to make such delivery to a stranger, or to insert in the instrument the terms of the contract.

For these reasons I am for adhering to the rule of the common law. In doing so, I do not mean to affirm that this rule will apply to every species of contracts in writing. There are cases in which it has
416 *been held, that you may show the agreement was signed by mistake, or that it was signed on the terms that it should not be an agreement till money was paid, or something else was done. *Pym v. Campbell*, 88 Eng. C. L. R. 370, is one of these. But these cases, whether rightly decided or not, have no application to deeds; as to which delivery is the essence and constitutes the estoppel.

I am, therefore, for affirming the judgment of the circuit court: first, because that court ought to have sustained the demurrer to the plea; and, second, because the evidence offered by defendants and excluded was rightly excluded upon the grounds already stated. The judgment, being right, although upon a false issue, must of course be sustained.

Anderson, J., was not fully prepared to concur in the doctrine, that a delivery to a grantee in a deed on condition, is absolute and free from the conditions; but he would not dissent.

Judgment affirmed.

417 **Rogers v. Strother & als.*

March Term, 1876, Richmond.

1. Limitations—"Stay Law"—When Not Applicable.—

The § 7, of the act of March 2, 1866, known as the stay law, and the act amendatory thereof, do not apply to appeals, writs of error, or *supersedeas*; and therefore an appeal from a final decree made on the 1st of November, 1867, cannot be allowed on the 12th of June, 1871.

2. Decrees—When Final.*—In a pending cause, *R* who had been administrator of *S*, is decreed in November 1867 to pay to *A*, administrator of *L*, the amount ascertained to be due from him to *S*, and from *S* to *L*, which was the same. There is another cause in the same court, in which *A*, who had become administrator of *S* and *R*, are parties; and in this cause in June 1869 it was decreed that *A*, as administrator of *L*, should recover from himself, as administrator of *S*, the amount *S* owed *L*; and the decree of November 1867 was modified, and *R* was directed to pay to *A*, as administrator of *L*, the amount he had been directed to pay *S*'s administrator. **HOLD:** The decree of November 1867 having given all the relief asked for in that case, was a final decree; and its character was not altered by the decree of June 1869.

Asa Rogers qualified as the administrator of Martha Strother in 1859. In 1860 he filed his bill in the circuit court of Loudoun county, in which he asked the direction of the court in his administration upon the estate. Among the subjects mentioned in his bill he states, that Mrs. Lucinda Rawlings, the wife of Wm. Rawlings and a sister of his intestate, holds a number of bonds of his intestate given to Mrs. Rawlings, amounting to upwards of \$5,000, and he is in doubt to whom they should be paid.

418 *The distributees of Martha Strother were so numerous and so widely dispersed that the case could not be matured before the late war came on and courts ceased to be held in the county of Loudoun. During the war both Mr. and Mrs. Rawlings died, and F. M. Young qualified as executor of Mr. Rawlings, and Andrew Robey became the administrator of Mrs. Rawlings.

In December 1865 Mrs. Rawlings' death was suggested, and the suit was revived against Andrew Robey as her administrator. And Robey and Young having entered into a written agreement, that a decree might be entered in the cause authorizing the payment of the bonds executed by Martha Strother to Mrs. Lucinda Rawlings, to Mrs. Rawlings' personal representative, it being admitted by the executor of Wm. Rawlings that her estate was entitled to them, the cause was brought on as to these parties, and a decree was made according to the agreement, giving to Mrs. Lucinda Raw-

*Final Decrees.—In 4 Min. Inst. (2d Ed.) 388, it is said: "The general doctrine is that any decree or order is final which *disposes of the whole subject*, gives all the relief that was contemplated, provides with reasonable completeness for giving effect to the sentence, and leaves nothing to be done in the cause, save to superintend ministerially the execution of the decree. (*Cocke v. Gilpin*, 1 Rob. 20, 46; *Harvey v. Branson*, 1 Leigh 108; *Ruff v. Starke*, 3 Gratt. 28; *Vanmeter v. Vanmeters*, 3 Gratt. 148; *Fleming v. Bolling*, 8 Gratt. 222; *Ambrose v. Keller*, 22 Gratt. 774 *et seq.*; *Rogers v. Strother*, 27 Gratt. 417; *Scott v. Hore*, 1 Hughes' U. S. Circuit Ct. R. 167-73.)" See further, *Thorntons v. Fitzhugh*, 4 Leigh 309; *Rawlings v. Rawlings*, 75 Va. 76; *Barton's Ch. Pr. 6d Ed.* p. 821, and *foot-note*; *Barton's Law Pr. 3d Ed.* p. 762, and *foot-note*; *Core v. Strickler*, 24 W. Va. 60, citing the principal case.

lings' administrator the said bonds, but not deciding upon the validity of said bonds as against the plaintiff as administrator of his intestate.

In 1866 a decree was made directing Rogers to settle his administration account before a commissioner of the court; and in the same year the commissioner returned his report. He rejected a claim for a credit of \$9,000, invested by Rogers in 1863 in a confederate bond under an order of the circuit court of the city of Richmond, and reported Rogers' indebtedness at \$9,662.91, of which \$8,375.83 was principal and \$1,226.20 was interest on the 11th of July 1863.

Rogers having ceased to be administrator of Martha Strother, Robey qualified as administrator de bonis non on her estate; and in July 1867, as administrator
419 *of Mrs. Rawlings and administrator de bonis non of Martha Strother, filed his cross bill against Rogers and his sureties in his administration bond and the other distributees of Martha Strother; in which he asked for a further settlement of Rogers' administration account, and payment to the parties entitled, and for general relief.

On the 1st of November 1867 the two causes came on to be heard together; when the court, having reduced the amount reported by the commissioner against Rogers, by several credits allowed him, to the sum of \$6,889.36, with interest thereon from July 11th 1863, decreed that Rogers and his sureties should pay this sum with its interest to Robey as administrator de bonis non of Martha Strother.

On the 21st of October 1869 the court made a decree in another case in the court, of Robey, executor of Lucinda Rawlings, against Asa Rogers and others; by which Robey, as executor of Lucinda Rawlings, was to recover from Robey, administrator de bonis non of Martha Strother, the amount of the bonds referred to in the bill of Rogers. And the decree of the 1st of November 1867 was modified, and Rogers and his sureties were directed to pay the said sum of \$6,889.36, with its interest, to Lucinda Rawlings' administrator, subject to such sums or credits as they had theretofore paid to said Andrew Robey, administrator of Martha Strother.

On the 21st of June 1871 Rogers presented his petition for an appeal from the decrees of November 1st 1867 and the 21st of October 1869 to one of the judges of this court; and the appeal was allowed on the 26th of the same month.

The only question considered by this court was, whether the appeal had been applied for in time; and *only so much
420 of the case is given as seemed necessary to the presentation of that question.

Meredith, Jones & Bouldin and Spilman, for the appellant.

Eppa Hunton, for the appellee.

Moncure, P., delivered the opinion of the court.

The court is of opinion that the decree which was rendered on the first day of November 1867 in the original cause of Rogers v. Strother &c., and the cross cause of Robey v. Rogers &c., to which two causes this appeal applies and is confined, was a final decree in those causes, notwithstanding the pendency in the same court of the case of Andrew Robey, executor of Lucinda Rawlings, deceased, plaintiff, against Asa Rogers &c., defendants; and notwithstanding the decree thereafter made in the last named cause, on the 21st day of October 1869. By the said decree of the first day of November 1867, and the prior decrees rendered in the first named two causes, the court below gave all the relief which it intended to give in those causes; and having ascertained the balance due by Asa Rogers, the late administrator of Martha Strother, deceased, to her estate, to be \$6,889.36, with interest thereon from July 11th, 1863, until paid; and it appearing to the court proper, in order to the complete administration of the estate of Martha Strother, deceased, that the amount due by Asa Rogers, the late administrator as aforesaid, should be paid to Andrew Robey, the present administrator de bonis non of said Martha Strother, deceased, who is also the administrator of

Lucinda Rawlings, deceased, a creditor of said *estate, to an amount
421 nearly, if not entirely, equal to the said sum of money and interest; the court, therefore, by the said decree of the 1st day of November 1867 decreed that the said Asa Rogers, administrator as aforesaid, and his sureties, John D. Rogers, Arthur L. Rogers, and Hamilton Rogers, should pay to the said Andrew Robey, administrator de bonis non of Martha Strother, deceased, the said sum of \$6,889.36, with legal interest thereon from July 11th, 1863, until paid. The whole remaining subject of controversy, in the said two suits first above named, was thus decreed to be transferred from the hands of the late administrator to those of the present administrator de bonis non of said Martha Strother, to be by him disposed of among the parties entitled thereto according to their respective rights; and nothing further could be done in said suits except by bill of review or appeal. There was no bill of review in the case, but this appeal was taken; and the question now to be decided is, whether or not it was taken in time.

The court is further of opinion that when the petition for this appeal was presented, to wit: on the 12th day of June 1871, such an appeal was barred by the statute of limitations which was then in force. This is certainly so, according to the express decision of this court in Callaway v. Harding, 23d Gratt. 542, unless the stay law applies to this case. Judge Christian, in delivering the opinion of the court in that case, reviews the acts of limitation bearing upon it, and comes to the following conclusion thereon: "Upon the plain and obvious construction of the acts above referred to, we think it is clear that the longest period of limitation, within which a petition for an

appeal, writ of error and supersedeas can be presented, is two years, nine months and ten days, as to final judgments, 422 *decrees or orders rendered before the passage of the act approved November 5th, 1870; and as to those rendered after the passage of that act, such period of limitation is two years."

The judge then says: "As to what may be the effect of the seventh section of the act passed March 2d, 1866, known as the stay law, it is not necessary to refer to in this case; for conceding that the seventh section applies to appeals, writs of error, &c., in the case before us, more than three years after the expiration of the stay law had elapsed, before the petition for a writ of error was presented."

While more than two years, nine months and ten days elapsed after the final decree was rendered in the case under consideration, to wit: the first day of November 1867; and even after the first day of January 1868, when the stay law passed, March 2d, 1866, was, by its terms, to expire, yet such an interval of time did not elapse after the first day of January 1869, to which day the operation of the said act of March 2d, 1866, was extended by an act passed March 2d, 1867, and before the 12th day of June 1871, when the petition for an appeal was presented in this case.

It will therefore be necessary for us to do in this case what was not necessary to be done, and was not done by the court in *Callaway v. Harding*, supra, nor in the subsequent case of *Sexton v. Crockett & als.*, 23 Gratt. 857; that is, decide whether the seventh section of the stay law, and the act amendatory thereof as aforesaid, apply to the case.

The court is of opinion that they do not apply to the case; that the 7th section of the stay law never did apply to an appeal, writ of error, or supersedeas; and if it ever did, it was repealed as to such application, either expressly or by implication, by 423 an act *passed March 15, 1867; in either of which views, the petition for an appeal, when presented in this case, was barred by limitation.

First, The acts constituting the stay law, never did apply, nor were intended to apply, to an appeal &c. Section 1, of the act passed March 2, 1866, provides, "that while this act remains in force, no execution, venditioni exponas, attachment upon a decree or order for the payment of money, or other process to compel the payment of money, or the sale of property for that purpose, shall be issued, or if heretofore issued shall be proceeded with; nor shall there be any sale under a deed of trust, mortgage, pledge or other security, nor under any judgment, decree or order for the payment of money, except in the cases hereafter provided for, until the first day of January 1868."

Section 7 provides, that "the period during which this act shall remain in force, shall be excluded from the computation of the time within which, by the operation of any statute or rule of law, it may be neces-

sary to commence any proceeding to preserve or prevent the loss of any right or remedy."

Does this section apply to a right or remedy by appeal &c., or was it intended to be confined to an original right or remedy by suit or action &c.? The first section applies only to a levy on, or sale of, property under execution &c., and to effectuate its object, there would seem to be really no necessity for staying an original right or remedy, by suit or action. Indeed the act created no stay of such right or remedy, but merely directed the time during which the act should remain in force, to wit: from the date of the passage of the act, March 2, 1866, to the 1st day of January 1868, to be excluded from the computation of the time prescribed by law for the limitation

424 *of such right or remedy. It was perfectly competent for the party entitled to such right or remedy to commence and prosecute it while the act remained in force, though it was not necessary for him to do so in any case, to preserve, or prevent the loss of his right or remedy. The uninterrupted operation of the statute of limitations in regard to original remedies by suit or action, would not have been inconsistent with the first section of the stay law before set forth; and it may be difficult to account for the adoption of the 7th section aforesaid for any purpose. Statutes of limitation are measures of repose, founded on public policy, which requires that disputes shall be commenced and settled while the transactions are fresh, and the evidence concerning them is still in existence, and in the power of the parties. There may be a necessity for the suspension of the operation of such statutes during a period of war: according to the maxim, *inter arma silent leges*. But it is not perceived that there was any necessity, or propriety in such a suspension after the war was over, and the courts were reorganized, and in full operation. Nay, it would seem that the suits and actions, having already been long delayed by the necessities of war, there was reason, rather for expediting, than for longer delaying them, after such necessities had ceased. All that the state of the country seemed to require in that respect after the termination of the war, was, that a levy on, or sale of, property under execution &c., should be stayed; and that was effectually done by the first section of the act.

But whatever necessity or propriety there may have been in providing, as was done by the seventh section of the act for cases of original suits and actions, there would seem to be none whatever for the application of such a provision to a case of 425 *appeal, &c., to revise the judgment or decree of an inferior court. Such a proceeding is not in its nature instituted to obtain a judgment or decree, nor to enforce the execution of one already obtained; but rather to revise and reverse a judgment or decree. And reason and policy required that if any party were dissatisfied with a judgment or decree on account of any sub-

posed errors therein, he should proceed in a reasonable time, if at all, to endeavor to have them corrected. This view of the subject is confirmed by other acts of the legislature, passed at or about the same time with the stay law. On the same day on which that law was passed, to-wit, on the 2d day of March 1866, another act was passed, entitled "an act to preserve and extend the time for the exercise of certain civil rights and remedies;" the first section of which enacts, "that the period between the 17th day of April 1861 and the passage of this act shall be excluded from the computation of the time within which, by the terms or operation of any statute or rule of law, it may be necessary to commence any action or other proceeding, or to do any other act, to preserve or to prevent the loss of any civil right or remedy, or to avoid any fine, penalty or forfeiture; nor shall the further period, from the expiration of that above prescribed to six months after a supreme court of appeals shall be organized under the present government, be included in the computation of the time within which any party or parties may be required by statute or rule of law to obtain a writ of error, supersedeas, or other process, from the supreme court of appeals of Virginia: provided," &c. The legislature at the time of the passage of that act, on the 2d of March 1866, well knew that a supreme court of appeals would be organized in a
 426 very short *time, under the then government; for on the very day after the passage of that act, to-wit, on the 3d day of March 1866, another act was passed "making provisions concerning the organization, jurisdiction and proceedings of said court;" and in a month or two thereafter, said court was organized and in full operation. Where was the necessity or propriety for postponing the right of appeal to the end of six months after the organization of the court of appeals under the then existing government, if the 7th section of the stay law, enacted on the same day, applied to the case; under which section, in that view, there could be no appeal until after the 1st day of January 1868, which time was afterwards, to-wit, on the 2d of March 1867, extended to the 1st day of January 1869? We cannot suppose that the legislature intended such an incongruity; and we therefore believe that it did not intend to apply the 7th section of the stay law to the right of appeal. And we think this view is conclusively sustained by an act passed March 15, 1867, which declared that no petition shall be presented for an appeal, &c., to any final judgment, &c., which shall have been rendered more than two years before the petition is presented. Now this act conclusively shows that the legislature thought it important that the time for taking an appeal, &c., should be greatly shortened; for by this act the limitation was reduced from five years to two years. Can we suppose, with this manifest indication of legislative policy on the subject before our eyes, that the legislature intended, by the obscure and

doubtful and general words of the seventh section of the stay law, to extend the time for taking an appeal to the 1st day of January 1868, and then to the 1st day of January 1869, when neither necessity nor convenience required any such *extension, and when, on the contrary, convenience and public policy were opposed to it? We think not. We therefore think that the stay law never did apply, nor was intended to apply, to an appeal, &c. But if it ever did,

Secondly, it was repealed as to such application, either expressly or by implication, by the said act passed March 15, 1867. On this particular question we deem it unnecessary to add anything to what we have already said, as most of that applies also to this question, and is decisive of it.

We have noticed the case of Sexton v. Crockett &c., 23 Gratt. 857, in which the questions we have been considering were raised, but not decided, the court being equally divided upon them. The reasoning of our brother Bouldin, with whom our brother Anderson concurred in that case, is certainly very strong, but has not shaken our confidence in the views we have expressed; and two of us, Christian and Moncure, still adhere to the views entertained and expressed by them in that case; and another of us, Judge Staples, who did not sit in that case, nor in Callaway v. Harding, supra, having been counsel in both of those cases, concurs with the two. Judge Anderson will speak for himself in regard to the present decision.

The court is therefore of opinion, that this appeal when taken was barred by the statute of limitations, and must be dismissed, but without prejudice to any relief to which the appellant and his sureties, as administrator of Martha Strother, deceased, may be entitled in the said suit of Andrew Robey, executor of Lucinda Rawlings, plaintiff, against Asa Rogers, &c., defendants, now pending in the court below, in which was made the decree of the 21st day of October 1869 as aforesaid. But this
 428 court expresses no opinion as *to the existence of any right to such relief, nor as to the nature or measure of such right if it exists.

Anderson, J. said: I am not now satisfied that the opinion of Judge Bouldin in Sexton v. Crockett, in which I concurred, as to the effect of the 7th section of the stay law, upon the limitation of appeals and writs of error, is not right; upon which question, in that case the court was equally divided. But a majority of the whole court holding, in the cause now under judgment, that the said seventh section does not apply to the limitation of the right of appeal, and writs of error, settles the question adversely to the opinion which I have entertained. I must therefore recognize this decision as an exposition of the law, which precludes me from an investigation of the case before us, upon its merits. Upon these grounds I concur in the judgment.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed, with the record, that the decree which was rendered on the first day of November 1867 in the original cause of "Rogers v. Strother &c.," and the cross cause of "Robey v. Rogers &c.," to which two causes this appeal applies and is confined, was a final decree in those causes, notwithstanding the pendency in the same court of the case of Andrew Robey, executor of Lucinda Rawlings, deceased, plaintiff, against Asa Rogers &c., defendants; and notwithstanding the decree thereafter made in the last named cause, on the 21st day of October 1869. The court is further of opinion, that when the petition for this appeal was presented, to wit: on the 12th day

429 of June 1871, the said appeal *was barred by the statute of limitations, which was then in force. Therefore it is decreed and ordered that the said appeal be dismissed, and that the appellant pay to the appellee, Andrew Robey, administrator of Lucinda Rawlings, deceased, his costs by him about his defence in this behalf expended.

But this decree is without prejudice to any relief to which the appellant and his sureties as administrator of Martha Strother, deceased, may be entitled in the said suit of Andrew Robey, executor of Lucinda Rawlings, deceased, plaintiff, v. Asa Rogers &c., defendants, now pending in the court below, in which was made the decree of the 21st day of October 1869 as aforesaid. But this court expresses no opinion as to the existence of any right to such relief, nor as to the nature or measure of such right if it exists.

Which is ordered to be certified to the circuit court of Loudoun county.

Appeal dismissed.

430 *Norfolk City v. Cooke.

Absent, STAPLES J.

March Term, 1876, Richmond.

1. **Water Lots—Rights of Proprietor.**—The city of Norfolk is the owner of the ground which she has not disposed of, covered by water, lying between Parker street and the portwarden's line, both as riparian proprietor and as having had long possession thereof; and the city may maintain an action of unlawful entry and detainer, against any intruder upon said water lots.

2. **Patents of Navigable Rivers.**—A patent for land constituting a part of the bed of a navigable river, conveys no title to it.

The case is stated by Judge Christian, in his opinion.

***Rights of Proprietor of Water Lots.**—See Alex., etc., R. Co. v. Faunce, 31 Gratt. 761, and note, citing the principal case; also, Barre v. Flemings, 29 W. Va. 319, 1 S. E. Rep. 735; Ravenswood v. Flemings, 22 W. Va. 64, in both of which cases the principal case is cited with approval.

The principal case is also cited by MR. JUSTICE GRAY in Shively v. Bowlby, 14 Sup. Ct. Rep. 557.

W. B. Martin, for the appellant.

W. H. C. Ellis, for the appellee.

Christian J. delivered the opinion of the court.

This is a writ of error to a judgment of the corporation court of the city of Norfolk.

The action was unlawful entry and detainer, brought by the city of Norfolk to recover of the appellee Cooke, the possession of a certain water lot described in the summons. A jury being waived by the parties, and all matters of law and fact being referred to the court, a judgment was entered for the defendant, the appellee here. To this judgment a writ of error was awarded by this court.

The only question we have to determine is, whether *upon the facts disclosed by the record, the city of Norfolk had the right of possession to the water lot described in the summons; and whether upon these facts, the action of unlawful entry and detainer can be maintained.

The material facts shown by the record are as follows: The house of burgesses by an act passed in the first year of the reign of George III, and to be found in 7 Hen. Stat. §§ 4, 5, pp. 435-6, declared that certain land in the borough of Norfolk, then known as the Fort land, should be vested in certain persons named in said act, as trustees and directors who should hold the same in fee simple, for the purpose of enlarging and securing said land, and erecting thereon a wharf and warehouses; and upon certain conditions the trustees were to convey the same to the county or borough of Norfolk. By another act, 7 Hen. Stat. §§ 3, 4, 5, pp. 511-12, the trustees were required to convey to the borough of Norfolk to the exclusion of the county. A third act (8 Hen. Stat. pp. 269-70,) reciting that the trustees formerly appointed had formed themselves into the Town Point Company, perpetuated the succession of said trustees.

In July 1792 the Common Hall of Norfolk borough had the Town Point or Fort lands surveyed, and laid off into lots and streets. A copy of this plat was filed in the clerk's office of the borough. This plat was recognized, together with the port warden line, established by the act of 1801, as an official map of the borough of Norfolk, in Harris' case, 20 Gratt. 833.

In 1792, James Taylor and others, trustees of the Fort lands, or Town Point Company lands, in consideration of £2,000, the amount of advances made by them, conveyed by deed, bearing date August 1st,

1792, the said lands to the mayor, recorded, aldermen *and common councilmen of the city of Norfolk, in fee simple.

The deeds filed, and the authentic map of this property recognized by this court in Harris' case, supra, show that the Fort land, or the Town Point property, extended westward to Parker street, the western limit of Parker street being the limit of the sur-

vey, investing the city of Norfolk with the title of the property to the line.

This plat shows that the city of Norfolk had extended its streets as occasion required, and sold or leased water lots down to Parker street, and without dispute extended the streets of the city to Parker street. Much of the land conveyed and claimed by the city of Norfolk was covered by water at high tide; but up to the line of Parker street there is no dispute as to the title of the city of Norfolk both to the lots and the streets running towards Elizabeth river down to Parker street.

As to the streets, Main, Kelly and Water streets, which bisect Parker street, running towards Elizabeth river, it is clear the city of Norfolk has the right—both under its charter and on well settled principles of law—the right to extend these streets out into the water as far as the port warden line.

According to the recognized plat of the Fort or Town Point lands, the city of Norfolk has the title to this property to the western boundary of Parker street, and the fee simple title to this street is in the city of Norfolk.

The city of Norfolk has, for many years, claimed title, and exercised acts of ownership over the water lots lying west of Parker street, having, in 1841, sold one of these lots to Hardy & Bros., who built wharves thereon, and hold possession of the
433 same under title *derived from the city of Norfolk; and in 1867 having leased the other lot, which is a part, if not the whole, of the water lot in controversy to William and J. J. Swaine, whose interest in the same was sold under execution, and purchased by Chamberlaine and Grandy for the sum of \$500. Afterwards, it seems, Chamberlaine and Grandy surrendered to the city all their interest in said water lots.

In November 1873, the defendant, Cooke, obtained from the commonwealth a patent for the water lot lying between Parker street and the port warden line, and adjoining the lot sold to the Hardys, it being the same lot which had been leased to the Swaines, and purchased by Chamberlaine and Grandy, and by them surrendered to the city of Norfolk. Under this patent Cooke entered and had built a small house on piles, and was in possession of it when this action was brought. His claim of title and his possession is under and by virtue of this patent.

Upon these facts, the question we have to determine is, whether the city of Norfolk can maintain against Cooke the action of unlawful entry and detainer, and is entitled to recover against him in this action. The corporation court decided that question in favor of the defendant; and it is this decision we now have to review.

First, as to Cooke's title: we think it is clear that the grant of the commonwealth is void. The patent conferred on Cooke only such title as was in the commonwealth. The lot called for in the patent was the bed of a navigable river, and was incapable of being granted to any individual. See Horne

v. Richards, 4 Call 441-449; Meade v. Haynes, 3 Rand. 33-36; French v. Bankhead, 11 Gratt. 169; Code 1873, chap. 62, § 1, p. 604; chap. 108, § 4; §§ 42, 43, 867. But

434 *although Cooke's patent is void, and he is a mere trespasser, yet being in possession, he cannot be turned out unless it can be shown that the city of Norfolk has the right of possession as against him. While it is not necessary in this action to show a fee simple title to the property in controversy in the city of Norfolk, it is essential at least to show the right of possession even against an intruder. This brings us to the consideration of the important question in the case, viz: whether the city of Norfolk has the right of possession to the water lot in controversy against the defendant, Cooke; or, in other words, whether the action of unlawful entry and detainer can, upon the facts of this case, be maintained against the defendant who has no title, and is in possession under a grant which is void.

Now it must be conceded that by virtue of the statutes, deeds and established plat, above referred to, the title to the Fort or Town Point lands up to the western boundary of Parker street, was vested in the city of Norfolk. This street though sometimes covered with water at high tide, is one of the recognized streets of the city to which the city has the fee simple title. The city therefore is the riparian owner of the water lots opposite the line of Parker street, and has the same rights and privileges as an individual owner.

These rights both at common law and by statute, are secured to the riparian owner, to erect wharves, piers, or bulk heads for his own use or the use of the public, subject only to such general rules and regulations as the legislature may prescribe; and the only limitation upon such right is, that navigation may not be obstructed, or the rights of others be injured. This is the common law rule; and the same rights are secured by statute in this state. Sec. 59, ch. 52, Code 1873, declares that, "any

435 person owning land upon a *water course may erect a wharf on the same, or a pier, or bulkhead, in such water course opposite his land, so that the navigation be not obstructed thereby, and so that such wharf, pier, or bulk head, shall not otherwise injure the private rights of any person."

This right of the riparian owner is not a mere license or privilege, but is property, property in the soil, up to the line of navigability, though covered by water; for the wharf, pier or bulkhead, can only be built on the soil. It is not a mere easement to pass over the water, or a privilege to use the surface, but property in the soil under the water, on which to fasten and build such structures; and for this purpose, and subject to the restriction that navigation shall not be obstructed, is as much property as the land above the margin of a navigable stream.

This principle has been fully recognized

by the supreme court of the United States in *Yates v. Milwaukie*, 10 Wall. U. S. R. 447, 504. Mr. Justice Miller, delivering the unanimous opinion of the court, says: "But whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream; and among those rights are access to the navigable part of the river from the front of his lot, the right to make a landing, wharf or pier, for his own use, or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those may be.

"This riparian right is property, and is valuable; and though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of
436 which, *when once vested, the owner can only be deprived in accordance with established law, and, if necessary, that it be taken for the public good upon due compensation." See also Wall. U. S. R. 22, 289; 1 Black. 23; 1 Del. on Cor. § 70, note 3, § 72, note 2.

It is clear, therefore, that the city of Norfolk had the right of property in the water lot in controversy, and consequently the right of possession for the purpose of erecting wharves, piers or bulkheads, and could exercise that right whenever it chose to do so. For that purpose (subject to the only limitation imposed by the legislature, that the rights of navigation should not be obstructed), it had the right of exclusive possession, and upon this ground could maintain the action of unlawful entry and detainer to recover possession unlawfully withheld, or an action of trespass against any wrongdoer interfering with such right.

But the city of Norfolk can maintain this action upon another ground. It had had for many years, and at the time of the unlawful entry of the defendant, the actual possession of these water lots. I say actual possession, so far as such property is susceptible of actual possession. Of course, water lots cannot be in the literal occupation of the owner, but he may exercise such acts of ownership over them as constitute in law the actual possession. Such acts of ownership have been for many years exercised by the city of Norfolk. It has sold lots adjoining the one in controversy. It has leased for a number of years the very lot which the defendant has unlawfully taken possession of. By authority of law and order of the city council the port warden has marked off and designated these water lots, and they have been plotted and made a matter of record. By all these acts of ownership the city of Norfolk has had the actual possession of these water

437 *lots as far as such property is capable of being reduced into actual occupation. Having in legal contemplation, such possession it may maintain an action to recover possession against one who wrong-

fully and unlawfully withholds it. This position is conclusively sustained by a recent decision of this court in the case of *Power & Kellogg v. Tazwells*, 25 Gratt. 786. In that case the Tazwells, under authority of an act of the general assembly, had leased for one year from the state inspector of oysters, a lot covered by water below low water mark for the purpose of planting oysters thereon. The Tazwells had staked off the lot so as to designate it, but had planted no oysters thereon when defendants took possession of the lot. An action of unlawful entry and detainer was brought to recover the possession. It was insisted in that case, as it has been in this, that the action could not be maintained; that the lease of the state was only a license or privilege; that the Tazwells had no title and no right of possession to the bed of the river covered by water, and therefore could not maintain an action of unlawful entry and detainer. This court held otherwise, and declared that the lease to Tazwells was not a mere license or privilege, but that it conferred rights of property in the soil covered by water, to which the plaintiffs had the right of exclusive possession, and that the action of unlawful entry and detainer was a proper remedy. I refer to the able opinion of Judge Anderson in that case, as fully sustaining the principles upon which the city of Norfolk may maintain its action in this.

In that case, the lot covered by water was designated by stakes driven into the water to mark its boundaries. In this, the water lot claimed by the city of Norfolk was designated by the port warden line, made
438 under *official authority, plotted, mapped, and put upon the public records. In that case, the only evidence of possession or acts of ownership was the driving down a few stakes. In this we have, in addition to the distinct and official designation, the fact, that for years the city of Norfolk has leased out this and contiguous water lots, and its right and title disputed by no one.

Another important fact to be mentioned in this connection is, that by its charter the city of Norfolk has the right to extend its streets running at right angles to Parker street out to the port warden line; and a part of the lot claimed by Cooke is opposite the ends of these streets.

I am therefore of opinion, that the city of Norfolk, for the purposes of extending its streets, building wharves, piers and bulkheads, or other structures in the interests of commerce, has a right of property in the soil covered by water contained in the survey within the port warden's line and opposite Parker street. I think it had such possession in these lots at the time of the unlawful entry of Cooke, as to maintain against him the action of unlawful entry and detainer. As was said by Judge Moncure in *Olinger v. Shepherd*, "such possession is not confined to actual occupancy or enclosure: It applies to any possession

which is sufficient to sustain an action of trespass. 12 Gratt. 462, 473."

I think it would be technical in the last degree to hold that the city of Norfolk is without remedy to recover possession of this valuable property, so necessary to the extension of its streets and the protection of its commerce, because it is land covered by water, below low water mark, and was never in the actual occupancy of the city. The privilege to extend streets and build wharves would be of no value, if the soil (though *covered with water), over which such streets are to be built and such structures erected, may be taken possession of by another and not recovered by any action. This would be to give a right without a remedy—a thing unknown to the law. It would be unjust to the last degree to say that a commercial city, one which we hope to see at no distant day the great commercial emporium of the state, shall be deprived of her right to extend her streets and build her wharves in the interests of a growing commerce, by any squatter who may, with or without color of title, choose to occupy her water fronts; and that upon the merest technicality the city is without remedy to keep off intruders, or recover possession whenever she may choose to assert her right.

I am for reversing the judgment of the corporation court, and entering a judgment for the plaintiff for the premises mentioned in the summons.

Judgment reversed.

440 *Paine, Surv. &c. v. Tutwiler & als.*

March Term, 1876, Richmond.

s. Executions—Return—Presumption.—Execution on a forfeited forthcoming bond for \$318.53, in the name of K against T, returnable to December rules 1860, went into the hands of J. deputy of S. sheriff of the county of F. On January 1st, 1861, J becomes sheriff of F. In May 1861 J receives from T \$176.40 on this execution and signs his own name to the receipt with the addition of sheriff: but he does not return the execution. In February K issues another execution on the judgment; when T files his bill to enjoin it on the ground that he had paid it, and he files J's receipt for \$176.40. Neither T nor J can say positively whether the execution was or was not levied, or whether J received the money as deputy of S, or as sheriff. **HOLD:** After the great lapse of time, the court will presume that the execution was levied by J before the return day, and that he received the money as deputy of S, so as to entitle T to a credit for the amount paid.

This was an appeal from a decree of the circuit court of Fluvanna county, rendered on the 12th of April 1872, in a cause in which Thomas H. Tutwiler was plaintiff, and Wm. G. Paine, survivor of Kent, Paine & Kent, and others were defendants, and also from a judgment of the same court between the same plaintiff and Paine sur-

vivor defendant. The case is substantially as follows:

In September, 1860, Kent, Paine & Kent, issued their execution from the clerk's office of the circuit court of Fluvanna, on a judgment on a forfeited delivery bond, against Thomas H. Tutwiler and John P. Baskett, for \$637.06, to be discharged by the payment of \$318.53, with interest thereon, from July 23d, 1860, *and \$3.23 costs. Said execution went into the hands of Joseph Payne, deputy for John Sclater, sheriff of Fluvanna, on the 4th October, 1860, and was returnable to the December rules. On the 1st of January, 1861, the said Joseph Payne became the sheriff of Fluvanna. The said execution never was returned. On the 13th February, 1871, Kent, Paine & Kent sued out another execution, returnable to April rules, 1871, for \$637.06 to be discharged by the payment of \$318.53, with interest from 23rd July, 1860, till paid, and costs \$4.97, which was delivered to Lewis J. Walton, sheriff of Fluvanna, on the 15th day of February, 1871.

Tutwiler filed his bill on the first Monday in April, 1871, against Kent, Paine & Kent, John Sclater, Joseph Payne, and Lewis J. Walton, praying for an injunction against the last named execution, that the said execution might be quashed, and Kent, Paine & Kent be required to refund to him the sum of two years' interest, which he had paid on the execution. The bill alleges rather inferentially and argumentatively than positively, that Tutwiler had paid sundry amounts on the first execution to Joseph Payne, after the return day of the execution, to-wit, in and after May 1861, while said Payne was sheriff of Fluvanna. In the same inferential and argumentative way, he alleges that Payne, while he was deputy, and before the return day of the execution, levied the execution upon his property or some portion of it. He gives at length his reason for coming to these two conclusions. He exhibits a receipt from Payne, signed by him with the addition to his name of "sheriff," dated March 3rd, 1861, for \$176.40½ in part of execution of Kent, Paine & Kent. Tutwiler calls on the defendants to answer on oath; and accordingly, Kent, Paine & Kent answer denying both levy and payment. Payne also answers, *denying that he had levied the execution, and denying any payments by Tutwiler to him on account of the execution, except the payment of \$176.40½ in May, 1861, and alleging that he received that as sheriff and not as the deputy of Sclater.

After Tutwiler had filed his bill, to-wit, in September, 1871, he made a motion in the Fluvanna circuit court, to quash the last execution. Kent, Paine & Kent objected on the ground that the same application was then pending on the chancery side of the court on bill and answers. But the court overruled the objection and examined two witnesses, Tutwiler and Payne, whose testimony is substantially the same as that

*For monographic note on Executions, see end of case.

found in the bill of the first and the answer of the latter.

No depositions were taken on either side in the chancery cause.

The court on the motion to quash, gave judgment in favor of Tutwiler on the alleged grounds, that the first execution had been levied on the property of Tutwiler, and that the amount of said execution had been fully paid by Tutwiler "to the proper officer of said county, in whose hands the same had been properly placed."

On the 12th day of April, 1872, the chancery cause came on to be finally heard on the bill and exhibits, the answers of Kent, Paine & Kent, and of Joseph Payne, and the order of the circuit court of the county made in the aforesaid motion to quash, and thereupon the court perpetuated the injunction, and decreed that W. G. Paine, surviving partner of Kent, Paine & Kent, should refund to Tutwiler the aforesaid two years interest, being \$37, with interest from 11th February, 1869.

443 *Upon the application of Wm. G. Paine this court allowed an appeal.

Ould & Carrington, for the appellant.

There was no counsel for the appellees.

Anderson, J., delivered the opinion of the court.

The appellee proceeded by bill in equity to perpetually injoin the appellant's execution, and subsequently by motion in the court of law to quash it pending the injunction. The defendant, in the proceeding at law, moved the court to dismiss the motion, upon the ground, that the plaintiff had elected to proceed in equity in respect of the same matter, which was still pending, and that the court of equity had possession of the cause, and had full power to do justice; but the court refused to dismiss the motion, and gave judgment for the plaintiff for costs, and to quash the execution, and the case is brought here upon a writ of error and supersedeas to said judgment.

The appellee subsequently prosecuted his suit in equity to a decree perpetuating his injunction, and giving him his costs expended in the prosecution of his suit in equity. From that decree the defendants appealed to this court. Without deciding now whether the court of law erred in refusing to dismiss the plaintiff's motion upon the grounds set out in the defendant's bill of exceptions, the court is of opinion, for reasons which will hereafter appear, that the judgment of the court of law quashing the execution is erroneous, and must be reversed.

In the case of appeal from the decree, perpetuating the injunction to the appellant's execution, the court *is of opinion that it does satisfactorily appear from the evidence in the record, that a previous execution upon the same judgment was sued out by the plaintiffs, which came to the hands of Jos. Payne on the 4th

of October 1860, who was then deputy for John Sclater, sheriff of Fluvanna county, and that the same was returnable on the first Monday in December next following; and that said execution was not returned, but remained in the hands of the said Jos. Payne, deputy as aforesaid, who, in January following, qualified as sheriff of said county. And that on the 3d of May next following, the appellee made payment to the said Joseph Payne, in part of said execution, \$176.40½ cents, as is shown by his receipt, which is signed "Jos. Payne, sheriff."

The appellant contends that the appellee is not entitled to a credit on the execution for said payment, and that he is still liable to the plaintiffs in the execution for the whole amount thereof, the payment not having been made to an officer authorized to collect the same. That the payment was made on that execution, and was so intended by both payer and payee is undoubtedly true.

The execution having been put in the hands of Jos. Payne, in his official character as deputy sheriff for collection, and he having retained it in his possession after the return day had passed, whilst he continued to be deputy sheriff, and before he became sheriff of the county, the presumption is, that it remained in his possession after he became sheriff of the county as deputy sheriff. His being appointed sheriff of the county could not change his possession of the execution which he then held as deputy sheriff.

It is also presumable that he received the payment, which was afterwards made

445 to him upon it in the character *in which he held the execution. And after so great a lapse of time, when neither the debtor nor the sheriff can speak from memory as to whether the execution had been levied or not, the deputy sheriff's receiving, implies that he considered himself authorized to receive it, which he only could have been in the character which he held it as deputy sheriff, and then only upon the ground that he made a levy before the return day of the execution. That would have authorized him to receive the payment at the time it was made; and this taken in connection with the fact, that the execution was one upon which the sheriff was forbidden to take security, and that the defendant had ample property to satisfy it, entirely accessible to the sheriff, and often in his view, upon which he could have made a levy, in the absence of any positive testimony to the contrary, leads almost irresistibly to the conclusion that a levy was made. It is true, the sheriff testifies that he received payment in his character of sheriff; but evidently he does not speak from personal recollection, for he had almost in the same breath said he had no recollection of the payment at all. There is an affix of "sheriff," as we have seen, to his signature to the receipt. Does that show that the money was paid to him as the sheriff of the county, as the letters S.

F. C. annexed to his signature might import, although, as we have seen, the execution was not in his hands in that character, and although he had no authority to receive payment in that character? Or does it merely indicate that it was received by him, not in his personal character, but in his official character as sheriff? And may it not be applied as well to his official character as deputy sheriff, in which character he had possession of the execution, as to his official character as high sheriff, in which character he did not hold the

446 *execution: For he was sheriff officially in both characters: in the one as deputy, and in the other as high sheriff, or sheriff of Fluvanna county—S. F. C. If he received payment officially, as deputy sheriff, in which character he held the execution, and not in his personal character, that would be indicated by the affix of "sheriff," as unmistakably as the affix of S. F. C. might have shown that he received it as sheriff of Fluvanna county. Under all the circumstances of this case, and after so great a lapse of time, it seems to the court, it would be too rigorous to hold that the appellee was not entitled to receive a credit for the money, which he unquestionably paid on the execution to the officer, in whose hands it had been placed for collection, because he annexed those letters to his signature to the receipt.

But the appellee has failed to show any further payment on the execution. The court is therefore of opinion to reverse the decree of the circuit court, perpetuating the injunction as to the whole amount of the execution, and that the following order be made:

The court being of opinion, for reasons stated in writing and filed with the record, that the judgment of the court of law, quashing the execution and giving the plaintiff his costs in said motion is erroneous; it is considered that the same be reversed and annulled, and the said motion be dismissed, and that the defendants to said motion recover their costs therein in the court below; and it is further considered, that the plaintiffs in error recover their costs expended in the prosecution of their writ of error and supersedeas here.

And the court being also of opinion that the decree in the injunction case, perpetuating the injunction to *the entire execution, and decreeing costs to the plaintiff therein, is erroneous, it is ordered that the same be reversed and annulled, and that the appellants recover their costs expended in the prosecution of their appeal here. And the court proceeding to render such decree as ought to have been rendered by the circuit court, it is adjudged, ordered and decreed, that the injunction awarded in this case be dissolved, except as to one hundred and seventy-six dollars and forty and one-half cents, paid on the 3d day of May 1861, and be perpetuated as to so much thereof; and that the defendants below pay to the plaintiff his costs expended in the

prosecution of his said suit in equity in the circuit court.

Decree reversed.

EXECUTIONS.

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I. DEFINITION.

A writ of execution is a process by which the final judgment of a court is carried into effect. 11 Am. & Eng. Enc. Law (2d Ed.) 600.

II. PROPERTY SUBJECT AND PROPERTY NOT SUBJECT TO EXECUTION.

A. Property of Wife for Husband's Debts.—Since at common law, the personality of a *feme sole* in possession, passes, upon her marriage, to her husband, it becomes subject to execution for his debts. *Vance v. McLaughlin*, 8 Gratt. 280; *Hill v. Wynn*, 4 W. Va. 68; *Dold v. Geiger*, 2 Gratt. 98. In this last case, it was held that even the choses in action to which the wife becomes entitled during coverture, are liable to the claims of the husband's creditors.

B. Interests of Mortgagor.—In *Tiffany v. Kent*, 1 Gratt. 231, it was held that a sale by a sheriff of an equity of redemption in lands surrendered by a debtor in execution, upon his taking the benefit of the act for the relief of insolvent debtors, is legal.

C. Property under Valid Deed of Trust.—The equitable interest of the grantor in a valid deed of trust, before sale thereunder, cannot be taken under an execution at law, but can only be subjected in equity. *Clayton v. Anthony*, 6 Rand. 307; *Coutts v. Walker*, 2 Leigh 280. But see *contra*, *Spence v. Repass*, 94 Va. 714, 27 S. E. Rep. 583, and criticism in 4 Va. Law Reg. 255.

D. Property Conveyed by Marriage Settlement.—It seems that property conveyed by deed of marriage settlement, in trust, that the husband and wife shall be permitted during their joint lives, to enjoy the profits, may be taken in execution to satisfy a debt incurred after the marriage for supplies furnished for the proper support of the husband and wife. *Scott v. Loraine*, 6 Munf. 117.

E. Property Fraudulently Conveyed.—If property subject to execution be conveyed and such conveyance be either with intent to hinder, delay or defraud creditors, or be upon consideration deemed voluntary in law, execution may still be enforced; for where the conveyance is fraudulent it is void as to both existing creditors, and subsequent purchasers, and where the conveyance is voluntary only, it is void as to antecedent creditors, though it may be sustained as against subsequent purchasers. *Chamberlayne v. Temple*, 2 Rand. 384; *Wright v. Hencock*, 3 Munf. 521; *Harvey v. Fox*, 5 Leigh 444; *Penn v. Whitehead*, 17 Gratt. 528; *Goshorn v. Snodgrass*, 17 W. Va. 717; *Rixey v. Deltrick*, 85 Va. 46, 6 S. E. Rep. 615; *Lockhard v. Beckley*, 10 W. Va. 87; *Hunter v. Hunter*, 10 W. Va. 321; *Beall v. Shauli*, 18 W. Va. 256; *Watkins v. Wortman*, 19 W. Va. 78; *Harden v. Wagner*, 22 W. Va. 356; *Silverman v. Greaser*, 27 W. Va. 550; *Livesay v. Beard*, 22 W. Va. 585; *Knight v. Capito*, 23 W. Va. 639; *Williams v. Blakey*, 76 Va. 254; *Witz v. Osburn*, 83 Va. 227, 2 S. E. Rep. 33; *Whitten v. Saunders*, 75 Va. 538; *Sutherland v. Price*, 75 Va. 223; *Tebbs v. Lee*, 76 Va. 744; *McCormick v. Atkinson*, 78 Va. 8; *Burton v. Mill*, 78 Va. 468; *Saunders v. Waggoner*, 82 Va. 316; *Young v. Willis*, 82 Va. 291; *Wray v. Davenport*, 79 Va. 19; *Fink v. Denny*, 75 Va. 668; *Clay v. Walter*, 79 Va. 92; *Beecher v. Burns*, 84 Va. 512, 6 S. E. Rep. 209; *Hatcher v. Crews*, 78 Va. 460; *Williams v. Lord*, 75 Va. 390; *Click v. Green*, 77 Va. 827; *Batchelder v. White*, 80 Va. 103; *Hickman v. Trout*, 83 Va. 479, 3 S. E. Rep. 131; *Armstrong v. Lachman*, 84 Va. 726, 6 S. E. Rep. 129; *Lucas v. Claflin*, 76 Va. 269; *Johnson v. Wagner*, 76 Va. 567; *Moore v. Ullman*, 80 Va. 307; *Scott v. Rowland*, 82 Va. 494; *Baker v. Naglee*, 82 Va. 876, 1 S. E. Rep. 191; *Waller v. Johnson*, 82 Va. 906, 7 S. E. Rep. 382; *Fishburne v. Ferguson*, 84 Va. 87, 4 S. E. Rep. 575; *Fisher v. Dickenson*, 84 Va. 518, 4 S. E. Rep. 737; *Roanoke Nat. Bank v. Farmers' Nat. Bank*, 84 Va. 608, 5 S. E. Rep. 662; *Rucker v. Moss*, 84 Va. 634, 5 S. E. Rep. 527.

A husband had obtained slaves through a sale under a deed of trust fraudulent as to the creditors of the grantor, and one of these slaves had been allotted to his widow, after his death. *Held*, the slave in her possession may be taken in execution at the suit of a creditor of the grantor, though the husband and those claiming under him had been in possession of the slave for more than five years. *Snoddy v. Haskins*, 12 Gratt. 363; *Lawrence v. Swann*, 5 Munf. 332; *Lang v. Lee*, 3 Rand. 410; *Wilson v. Buchanan*, 7 Gratt. 334; *Addington v. Etheridge*, 12 Gratt. 436; *Marks v. Hill*, 15 Gratt. 400; *Pratt v. Cox*, 22 Gratt. 337; *Russell v. Randolph*, 26 Gratt. 713; *Perry v. Shen. Nat. Bank*, 27 Gratt. 757.

It is well settled that the ownership of personal

property will be taken to be with the possession, and the retaining of possession after a sale is *prima facie* fraudulent, and the property still subject to execution against the seller. This presumption of fraud may however be rebutted by proof that such possession is consistent with a *bona fide* sale. *Wray v. Davenport*, 79 Va. 19; *McCormick v. Atkinson*, 78 Va. 8; *Young v. Willis*, 82 Va. 291; *Saunders v. Waggoner*, 82 Va. 316; *Claflin v. Foley*, 22 W. Va. 434; *Klee v. Reitzenberger*, 23 W. Va. 749; *Curd v. Miller*, 7 Gratt. 185; *Lewis v. Caperton*, 8 Gratt. 148; *Land v. Jeffries*, 5 Rand. 211; *Braxton v. Gaines*, 4 Hen. & M. 151.

F. Property Loaned.—T makes a parol loan of a slave to C; and the slave remains in the possession of C and C's ex'ors for more than five years, and then T takes possession of him. *Held*, the slaves may be subjected by the execution creditors of C, to satisfy their claims. But the ex'ors of C having brought an action of *detinue* for the slave against T, who dies pending the suit, which is revived against his ex'or, and a verdict and judgment having been given in favor of the defendant, the creditors of C, who having recovered judgments against his ex'ors, cannot levy their executions upon the slave. *Taylor v. Beale*, 4 Gratt. 93; *McKenzie v. Macon*, 5 Gratt. 379; *Beale v. Digges*, 6 Gratt. 582; *Garth v. Barksdale*, 5 Munf. 101; *Rose v. Burgess*, 10 Leigh 197; *Beasley v. Owen*, 3 H. & M. 449; *Pate v. Baker*, 8 Leigh 80; *Collins v. Loftus*, 10 Leigh 10; *Boyd v. Stainback*, 5 Munf. 305; *Lightfoot v. Strother*, 9 Leigh 451.

Money *bona fide* lent to a sheriff, and applied by him to his own use, prior to his receiving a writ of *hæc facias* against the lender is not liable to satisfy such execution, either at law, or in equity; notwithstanding the same money was originally deposited in his hands as a pledge for certain purposes. *Price v. Crump*, 2 H. & M. 89.

G. Property of Vendee.—Upon a *bona fide* sale of personal property, though the vendee does not take possession at the time of the sale, yet if he gets possession before an execution is issued against the vendor, his title is good against creditors. So also, where a *bona fide* vendee of personal property having gotten possession thereof before issuing of an execution against the vendor, his title is good against the creditor, though after such possession by the vendee, he employs the vendor as his agent to sell the property; and the vendor is in possession as the agent of the vendee at the time the execution issues, and is levied upon it. *M'Kinley v. Ensell*, 2 Gratt. 333.

A sale of property under an execution, by the sheriff, is *bona fide*, though irregular; and the purchaser leaves the property with the debtor in the execution. *Held*, the sale is valid; and the property is not liable to the creditors of the debtor in execution. A purchaser of property leaves it in the possession of the original owner, but possession thereof is taken by the adm'r of the purchaser before creditors have acquired a specific lien thereon, by judgment and execution. *Held*, it is not liable to the original owner's creditors. *Carr v. Glasscock*, 3 Gratt. 343.

H. Property of Bankrupt.—The lien of a judgment is not defeated by the discharge of the debtor as a bankrupt, and it may be enforced in the state courts. In such a case the elegit sued out upon the judgment may be in the usual form; and in executing it the sheriff must take notice of the bankruptcy of the debtor, and disregarding all property of the debtor not subject to the lien, levy it upon that

which is so subject. *McCance v. Taylor*, 10 Gratt. 580.

I. In Hands of Personal Representative.—If there be two executors, one of whom is a legatee of part of the personal estate; and a division of the testator's property is made according to his will, subsequent to which, the legatee executor dies, a creditor, who afterwards obtains judgment against the surviving executor, cannot levy the execution upon one of the slaves allotted to the deceased executor, in the hands of his administrator. And if the administrator of the deceased executor obtains an injunction to the sale of the slave which is dissolved, and the slave then sold under the execution, the creditor will, at the hearing, be decreed to pay the then value of the slave, if living, and his hires from the time of the sale; and an issue will be directed to ascertain them. *Chapman v. Washington*, 4 Call 327; *Sampson v. Bryce*, 5 Munf. 175.

K. Property Exempt under Statutes.

"**Poor Man's Law.**"—A laborer's \$50 exemption, allowed him by statute cannot be waived so as to give a lien by *A. fa.* thereon. *Crump v. Com.*, 75 Va. 922.

Homestead Exemption.—See monographic note on "Homestead," appended to *Hatorff v. Wellford*, 27 Gratt. 364.

L. Property of Building Contractor.—Where one contracts to build, the materials to be used in such building remain the property of the contractor until actually put into the construction; and hence are liable for the contractor's debts and subject to execution. *Wheeling v. Baer*, 86 W. Va. 777, 15 S. E. Rep. 979.

M. Property Purchased for Valuable Consideration without Notice.—The trustees and beneficiaries in a deed to secure *bona fide* debts, without notice, are purchasers for valuable consideration within the meaning of the statute which exempts property of such persons from liability for the debts of their assignor. *Evans v. Greenhow*, 15 Gratt. 153.

N. Property of Principal in Possession of Agent.—Property consigned to an agent at a stipulated price, to be paid for when such property is sold, remains the property of the principal until such sale to a *bona fide* purchaser, and hence is not subject to execution against the agent. *Barnes, etc., Co. v. Bloch Bros., etc., Co.*, 88 W. Va. 153, 18 S. E. Rep. 482, 22 L. R. A. 850; *Brown, etc., Co. v. Deering & Co.*, 85 W. Va. 255, 13 S. E. Rep. 383.

O. Property Forfeited to State.—Where land is forfeited to the state for non-entry on the assessor's land books the title vests in the state, and the property is not liable to execution under a judgment rendered against the former owner since the forfeiture; but the right of such former owner to the excess of the proceeds of sale after the payment of taxes, etc., is property which he can sell, and which is liable to the lien of an execution. *Wiant v. Hays*, 38 W. Va. 681, 18 S. E. Rep. 807.

P. Property in Remainder.—Two persons being entitled to a remainder in slave property expectant on a life estate therein, a *A. fa.* is sued out against one of the remaindermen, and levied on some of the slaves then in his possession by consent of the tenant for life and the slaves so taken in execution are sold by the sheriff; then this remainderman conveys all his estate to a trustee for the benefit of his creditors; and after the death of the tenant for life, in a suit brought by the trustee against two remaindermen for partition, the slaves so sold by the sheriff, are allotted to the trustee, the purchaser

at the sheriff's sale not being a party to that suit. *Held*, at the time of the levying the execution and sale made by the sheriff, the debtor had no several property in any particular slaves, and so the sale by him made, passed no title to the purchaser. *Leslie v. Briggs*, 5 Leigh 6.

Q. Property Received by Commissioner without Authority.—A commissioner having received money without authority to receive it, is liable to the purchaser for the amount so paid, and may be proceeded against by a rule in the cause and an execution of *scire facias* may be sued out against him for the money. *Tyler v. Toms*, 75 Va. 116.

R. Property of Railroad Companies.—The road and franchises of a railroad company are liable for the satisfaction of executions against the company. *W. & S. R. Co. v. Colfelt*, 27 Gratt. 777.

S. Money.—It was held in *Steele v. Brown*, 2 Va. Cas. 246, that a writ of execution may be levied on ready money in the possession of the defendant. See also *Norris v. Crumme*, 2 Rand. 330.

T. Fixtures.—It was held in *Green v. Phillips*, 28 Gratt. 752, that the engines and machinery of a planing-mill are fixtures and hence not liable to execution. See also, *Shelton v. Ficklin*, 22 Gratt. 22; *Patton v. Moore*, 16 W. Va. 428; *McFadden v. Crawford*, 86 W. Va. 671, 15 S. E. Rep. 408; *Franks v. Cravens*, 6 W. Va. 186; *Bank v. Anderson*, 75 Va. 22; *Morotock Ins. Co. v. Rodefer*, 92 Va. 753, 24 S. E. Rep. 303; *Haskin, etc., Co. v. Cleveland, etc., Co.*, 94 Va. 45, 26 S. E. Rep. 878.

III. ISSUANCE OF WRIT.

A. Prerequisites.

1. Judgment or Decree.

a. In General.—As a condition precedent to the issuance of a writ of execution there must be a valid subsisting judgment, or decree, to support it; hence an execution issued, before judgment, on the verdict of a jury, is simply void. *Lowther v. Davis*, 28 W. Va. 132, 10 S. E. Rep. 20.

It is improper for the court or judge in vacation to allow an execution to issue unless the grounds for it are shown. *Shackelford v. Apperson*, 6 Gratt. 61.

It was held in *Enders v. Burch*, 15 Gratt. 71, that when execution is capable of being issued on a judgment, such judgment becomes final though the term of court be not ended.

It is held in *Evans v. Greenhow*, 15 Gratt. 153, that it is the duty of the clerk, in all cases, to issue the execution as soon as possible after the adjournment of the court, unless he be instructed to the contrary by the plaintiff or his attorney.

b. Necessity for Reviver.—In *May v. State Bank of N. Car.*, 2 Rob. 53, 40 Am. Dec. 733, it was held: first, that if after the death of a sole plaintiff or defendant, a judgment be, nevertheless, entered, as though such party were alive, it must be revived by *scire facias* before execution can regularly issue thereon; second, that the death of a sole plaintiff after judgment renders a *scire facias* necessary to the issuance of execution; and third, that if a corporation expires either before or after judgment, execution can no longer issue in its name. There is also a *dictum* to the effect that, where there is but one defendant, and he dies after judgment, an execution cannot be issued without first surviving such judgment by a writ of *scire facias*, unless the writ is tested as of a day before his death. See also, *Roane v. Drummond*, 6 Rand. 182.

Where, however, a judgment is rendered against several defendants, and afterwards one of them dies, the execution should still be issued against all. *Holt v. Lynch*, 18 W. Va. 567.

If proceedings on a judgment at law be enjoined by a court of chancery, and the injunction be afterwards dissolved, and on appeal the order of dissolution is affirmed *in omnibus*, an execution may be sued out on the judgment at law, before the decree of affirmance is entered up in the court of chancery. *Epes's Adm'rs v. Dudley*, 4 Leigh 146.

Judgments do not bind land after one year from their date, unless an execution be taken out within that time, or an entry of *elegit* be made on the record. *Eppes v. Randolph*, 2 Call 125.

Upon a *scire facias*, to revive a judgment against a defendant who makes default, there should be award of execution. *Williamson v. Crawford*, 7 Gratt. 302.

B. Time of Issuance.

1. **At Common Law.**—In *Beale v. Botetourt*, 10 Gratt. 281, the court held that, "a judgment on which no execution is issued within a year and a day from its date, is, generally, so far presumed to be satisfied as to render a *scire facias* to revive if necessary. See *dicta* to the same effect, in *Nimmo v. Com.*, 4 H. & M. 67, in *Spotts v. Com.*, 85 Va. 531, 8 S. E. Rep. 375, and again in *Smith v. Charlton*, 7 Gratt. 447. But no length of time can bar the commonwealth from execution on a judgment in its favor, nor even render it necessary to sue out a *scire facias* to entitle it to such execution. *Nimmo v. Com.*, 4 H. & M. 57.

2. Alias and Pluries Writs.

In General.—In *Hamilton v. McConkey*, 88 Va. 533, 2 S. E. Rep. 724, it was held that by statutory provision the limitation within which an *alias* execution may be issued is twenty years, where there is "a return of the officer"; and whether such return be true or false, sufficient or insufficient, is not a question which can arise under the statute. See also, *Brown v. Campbell*, 33 Gratt. 402; *Taylor v. Spindle*, 2 Gratt. 44; *Stuart v. Hamilton*, 8 Leigh 508; *Eppes v. Randolph*, 2 Call 125; *Hutcheson v. Grubbs*, 80 Va. 251; *Coles v. Ballard*, 78 Va. 139; *Rowe v. Bentley*, 29 Gratt. 756; *McCarty v. Ball*, 82 Va. 874, 1 S. E. Rep. 199; *Ayre v. Burke*, 82 Va. 338.

According to statute in West Virginia, it is held that where an execution issues within two years, other executions may be issued within ten years from the return day of the last execution on which there is no return, or which has been returned satisfied. *Shipley v. Pew*, 23 W. Va. 494; *Werdenbaugh v. Reid*, 20 W. Va. 596; *Laidley v. Kline*, 23 W. Va. 574.

Effect of Stay Law.—In computing the time within which a *scire facias* may be sued out under § 3577 of the Code, to revive a judgment, the time which elapsed between January 1, 1860, and March 29, 1871, is to be included, though the same period, by the terms of the statute, is excluded as to writs of *scire facias*. *Fadely v. Williams*, 96 Va. 397, 31 S. E. Rep. 515; *James v. Life*, 92 Va. 702, 24 S. E. Rep. 275; 4 Va. Law Reg. 508, and *note*.

In West Virginia it is held that the statute providing that no execution shall issue on any judgment after ten years from its date, applies to judgments rendered prior to the first day of April 1860, when the Code took effect. *Bank v. Hays*, 37 W. Va. 475, 16 S. E. Rep. 561; *Spang v. Robinson*, 24 W. Va. 327.

It is held, in *Gardner v. Landcraft*, 6 W. Va. 36, that an execution may be issued within two years after the date of the judgment.

3. Delay of Execution by Debtor.

Injunction.—In *Hutsonpiller v. Stover*, 12 Gratt. 582, the court held "that where the plaintiff is prevented by injunction from proceeding to execution, he may at any time within the year after its dissolution, sue out execution without *scire facias*; and this, where the parties remain unchanged, whether the injunction have continued for more or less than ten years." The statute of limitation to judgments does not run while an injunction to the execution is pending. See also, *Smith v. Charlton*, 7 Gratt. 447; *Noland v. Seekright*, 6 Munf. 185.

In *Richardson v. Prince George*, 11 Gratt. 190, it was held that where either party to a judgment died pending an injunction, a *scire facias*, might be sued out to revive the judgment. But nowhere in the opinion is it even intimated that a *scire facias* is necessary, though the defendant had since died.

4. **Procedure upon Scire Facias.**—Neither a declaration nor a rule to plead is necessary upon a *scire facias* to revive a judgment. If a *scire facias* is returnable to rules, and the defendant makes default, there should then be an award of execution, which if not set aside at the next term, becomes a final judgment as of the last day of the term. No order of the court is necessary in such case. *McVeigh v. Bank*, 76 Va. 267; *Gedney v. Com.*, 14 Gratt. 318.

5. **Effect of Writs Irregularly Issued.**—The fact that an execution was issued irregularly and unlawfully after the expiration of more than a year and a day from the time of the decree, without any previous proceeding by way of *scire facias* or otherwise to authorize the same, is not such irregularity as would render the execution void, but only voidable. *Beale v. Botetourt*, 10 Gratt. 278; *Spotts v. Com.*, 85 Va. 531, 8 S. E. Rep. 375.

6. **Effect of Proceedings in Chancery.**—Where ten years or more have elapsed since rendition of judgment, and no execution was issued upon it, and no writ of *scire facias* was sued out to revive it, within the period of ten years, the said judgment is barred by the statute of limitations, both at law and in equity. Petitions filed during that period by judgment creditor in a chancery suit brought to subject the lands of judgment debtor to the payment of judgment liens, and dismissed without any order on it except that of dismissed seven years after it was filed, did not suspend the right to sue out execution upon the judgment. *Dabney v. Shelton*, 82 Va. 349.

C. Formal Contents of Writ.

1. **Irregularity in Caption.**—An execution purported in its caption to have been issued by a justice of the peace of Hardy county, when in fact it was issued by a justice of Hampshire county. Held, that the error was immaterial, and that the writ was valid to give authority to an officer in Hampshire county to levy it. *Davis v. Davis*, 2 Gratt. 363.

2. **Recitals of Property to Be Taken.**—In *Gill v. State*, 30 W. Va. 479, 20 S. E. Rep. 568, it was held that a writ of *scire facias* upon a judgment of a circuit court for a fine against a person convicted of a misdemeanor, ought, according to statute, to run against the goods and chattels and real estate of the debtor.

3. **Conformity of Execution with Judgment or Decree.**—Every execution should conform accurately to the judgment or decree which it is used to enforce. *Snaveley v. Harkrader*, 30 Gratt. 487; *Taney v. Woodmansee*, 23 W. Va. 709; *Holt v. Lynch*, 18 W. Va. 567; *B. & O. R. R. Co. v. Vanderwarker*, 19 W. Va. 265; *O'Bannon v. Saunders*, 24 Gratt. 138; *Moss v. Moss*, 4 H. & M. 298; *Beale v. Botetourt*, 10 Gratt. 282.

4. Where There Are Separate Judgments.

Against Several Defendants.—Where separate judgments are obtained, in favor of the same plaintiff, against several defendants in different suits, it is error to issue one execution upon such several judgments. *B. & O. R. R. Co. v. Vanderwerker*, 19 W. Va. 285; *Taney v. Woodmansee*, 23 W. Va. 709. But in *Walker v. Com.*, 18 Gratt. 50, it was held that where in a proceeding at law against several parties, judgments against one or more are entered at one time, and against others at another time, one execution may issue against all.

Against Same Defendant.—In *Stuart v. Heiskell*, 86 Va. 191, 9 S. E. Rep. 984, where there were two complainants before the court, one by original bill and the other by cross-bill, it was held that a provision in the decree giving them the right to have executions severally was both proper and in accordance with the usual practice.

5. Where Writ Issued after Assignment of Judgment.—After a judgment has been assigned, an execution thereon should be issued in the name of the assignor and not in the name of the assignee, though the court will not permit the former to control the execution. *Reinhard v. Baker*, 13 W. Va. 806; *Clarke v. Hogeman*, 13 W. Va. 718.

6. Interest.—According to statute the clerk in issuing executions is to include interest, even though interest is neither mentioned in the declaration, nor in the promise upon which the action was brought. *Baird v. Peter*, 4 Munf. 76; *Wallace v. Baker*, 2 Munf. 334.

D. From What Court Issuable.

1. At Law.—The power of courts of law to issue executions is conferred by the common law, and also by statutory enactments, in Virginia. *Coleman v. Cocke*, 6 Rand. 618.

2. In Equity.—In *Shackelford v. Apperson*, 6 Gratt. 453, it was held that it is only by force of statute that process of execution can be sued out upon decrees in chancery. See also, *Windrum v. Parker*, 2 Leigh 361; *Snively v. Harkrader*, 30 Gratt. 487.

The court, in *Windrum v. Parker*, 2 Leigh 369, said: "Since all executions, which can be issued upon a judgment at law, have been allowed by our statute to issue upon decrees in chancery, the courts of chancery are bound, in deciding upon all questions in respect to them, to abide by the common law and statutes respecting executions at law." See also, *Snively v. Harkrader*, 30 Gratt. 487.

3. Leave of Court.—In *Shackelford v. Apperson*, 6 Gratt. 453, it was held that, according to statute, the clerk had no authority to issue an execution upon an interlocutory decree, without an order of the court or the judge thereof in vacation.

Notice of Motion for Leave of Court.—A party may, without any previous notice to the defendant, move the court to direct an execution to be issued, where the clerk refused to issue one. *Com. v. Hewitt*, 2 H. & M. 181.

E. To What Place Issuable.—An execution must issue to the county where the defendant lives in the first instance, unless he has removed his effects out of it. *Fleming v. Saunders*, 4 Call 563; *Byrdie v. Langham*, 2 Wash. 72.

F. Who May Sue Out the Writ.

Assignee of Judgment.—The assignee of a judgment, acquires the ancillary right of execution and may, upon sufficient proof of his rights, demand an issuance of the writ. *Wallop v. Scarborough*, 5 Gratt. 5; *Reinhard v. Baker*, 13 W. Va. 806.

G. Against Whom the Writ May Issue.

1. Municipalities.—By virtue of statutory authority in West Virginia, an execution may issue against the private property of a municipal corporation. But by implication the taxes and public revenues of such corporations are exempt from the operation of the execution statutes. *Brown v. Gates*, 15 W. Va. 181.

2. Personal Representatives.

a. De Bonis Propriis.—Where there is a judgment or decree *de bonis propriis* against a personal representative, the execution thereon should not be against the goods and chattels of the decedent in his hands to be administered, but against his own goods and chattels. *Moore v. Ferguson*, 2 Munf. 42; *Barr v. Barr*, 2 H. & M. 26.

b. De Bonis Testatoris.—Upon a judgment or decree *de bonis testatoris* against a personal representative, the execution should issue against the assets of the decedent, in the hands of the personal representative, not against the property of the latter in his own right. *Beale v. Botetourt*, 10 Gratt. 273.

But where the writ directs the sheriff to levy on the goods and chattels of E, executor of D, instead of on the goods and chattels of D in the hands of E to be administered, this is error of form only and not of substance, hence will not be held fatal. *Beale v. Botetourt*, 10 Gratt. 273.

H. Delivery to Sheriff.

In General.—After the issuance of the execution there are several successive steps to be taken. The first step is to place the execution into the hands of the sheriff. The effect of this step is to make the execution a lien on the property of the defendant to a certain extent and of a certain character. *Walker v. Com.*, 18 Gratt. 43, 98 Am. Dec. 631.

Delivery to Deputy Sheriff Who Afterwards Becomes Sheriff.—Where an execution delivered to a deputy sheriff and he retains it until after the return day has passed, and thereafter he is appointed sheriff, his appointment does not change his possession of the execution, and he still holds it as deputy sheriff. *Paine v. Tutwiler*, 27 Gratt. 444.

I. Officers' Commissions.—A debtor after the levy of a *f. fa.*, or an arrest on a *ca. sa.*, cannot deprive the officer of his commissions by paying the money to the plaintiff before the sale of his property, or his discharge from custody, as the case may be. *Gardner v. Neal*, 9 Gratt. 87.

IV. ALIAS AND PLURIES EXECUTIONS.

A. In General.—A plaintiff may always, with the consent of all the defendants, abandon a levy upon the property of all or any of them, and afterwards sue out a new execution. If the defendants in an execution be a principal and his sureties, and the property levied on be that of the sureties, the plaintiff may, with the consent of the sureties only, abandon the levy, and afterwards sue out executions against all the defendants. If the levy be abandoned by the sheriff, with the consent of the defendants, without the concurrence or authority of the plaintiff; or if the property be eligned or removed by the defendant out of the reach of the sheriff, without the consent of the sheriff or the plaintiff, the latter may sue out a new execution. A mere suspension of proceedings on a levied execution does not authorize a restoration of the property to the possession of the defendant, or release the levy. And if, by a misunderstanding of the directions of the plaintiff by the sheriff and the defendants, the property is released by the sheriff to them, the plaintiff may have a new execution. *Walker v. Com.*, 18 Gratt. 3.

B. While Levy in Force.—As a general rule where an execution has been levied upon property, an *alias* execution is not issuable while such levy is still in force and remains undisposed of. Bullitt v. Winstons, 1 Munf. 269; Windrum v. Parker, 2 Leigh 361.

According to statute, a party who has sued out one execution, may sue out others, if the first be not returned and not executed; but if the first be executed though not returned, the party is not entitled to sue out any other execution. Windrum v. Parker, 2 Leigh 361.

C. While Forthcoming Bond in Force.—Where an execution has been levied, and a forthcoming or replevy bond given, a new execution cannot issue while such bond is in force and has not been quashed. Taylor v. Dundass, 1 Wash. 92; Downman v. Chinn, 2 Wash. 199; Randolph v. Randolph, 3 Rand. 490.

D. Where First Execution Not Complete Satisfaction.—Under an execution, of which there was no return by the officer, it appeared that some shares of stock belonging to the debtor had been sold to satisfy the judgment; but the stocks did not bring enough to discharge the judgment, and it was held that the plaintiff could have another execution for the balance still due. Fisher v. March, 26 Gratt. 766; Coleman v. Cocke, 6 Rand. 618, 18 Am. Dec. 757.

E. Discharge from Arrest under *Ca. Sa.*—It was held in Windrum v. Parker, 2 Leigh 361, that if a debtor be arrested on a *ca. sa.* and discharged by order of the creditor or his agent, no other execution can be had on the same judgment or decree. There is a *dictum*, however, by GREEN, J., to the effect that if a debtor in custody under a *ca. sa.* be permitted to escape, the creditor is entitled to another execution against him.

If a debtor charged in execution escape, the creditor may obtain a new execution, either by *scire facias*, or upon motion after reasonable notice. Fawkes v. Davison, 8 Leigh 554.

F. Issued without Authority of Law.—The commonwealth got judgment against the sheriff of W. county and his sureties, and had a *fi. fa.* issued and levied. Upon return thereof, it had a *venditioni exponas* issued. Instead of this writ going to the sheriff, it was taken in charge by the auditor of public accounts. Nothing was done, and no other process issued for over sixteen years, when, in December, 1884, an *alias fi. fa.* was issued, levied and returned, and thereupon a writ of *venditioni exponas* was issued. The sureties moved the court below to quash the *alias* writ of *venditioni exponas*, which motion was denied. Held, the writ of *venditioni exponas*, as well as the *alias fi. fa.*, was issued without authority of law, and should be quashed. Sutton v. Marye, 81 Va. 329.

V. LEVY OF EXECUTION.

A. Necessity for Levy on Tangible Property.—The second step after the issuance of the execution is to levy the same on specific tangible property, by which such property is set apart from the general property of the defendant and placed in the custody of the law until it can be sold and applied to the payment of the execution. Walker v. Com., 18 Gratt. 43, 98 Am. Dec. 631.

Before there can be a sale of corporeal personal property under execution there must be an actual levy of the writ of *scire facias* and the mere delivery of the writ to the sheriff without a levy creates no security for the debt. Humphrey v. Hitt, 6 Gratt. 526, 52 Am. Dec. 136; Walker v. Com., 18 Gratt. 43; Charron v. Boswell, 18 Gratt. 225.

An officer who is interested in an execution cannot levy it himself. Carter v. Harris, 4 Rand. 199.

Under Control of Plaintiff.—In executing a writ of *scire facias* the sheriff is the agent of the beneficial plaintiff, and he and his attorney have the right to control the execution of the writ, and to say whether the sheriff shall levy it, or return it without doing so. Rowe v. Hardy, 97 Va. 674, 34 S. E. Rep. 625.

B. Time of Levy.

1. Levy after Return Day.—The officer has no right to make a levy after the return day of the writ, and such levy is void and not binding on the creditor. Grandstaff v. Ridgely, 30 Gratt. 1; O'Bannon v. Saunders, 24 Gratt. 138; Chapman v. Harrison, 4 Rand. 336; Cockerell v. Nichols, 8 W. Va. 159.

But where the execution has been levied before the return day, the officer may receive payment after that day has passed. Paine v. Tutwiler, 27 Gratt. 440; Grandstaff v. Ridgely, 30 Gratt. 1; O'Bannon v. Saunders, 24 Gratt. 138; Chapman v. Harrison, 4 Rand. 336; Cockerell v. Nichols, 8 W. Va. 159.

2. After Satisfaction of Judgment.—Though, as a general rule, after the payment of a judgment the writ of execution cannot be levied, yet in West Virginia it is still an open question whether the execution will be kept in force for the benefit of a sheriff or stranger who has paid the judgment. Feamster v. Withrow, 12 W. Va. 611; Neely v. Jones, 16 W. Va. 628; Beard v. Arbuckle, 19 W. Va. 135. In Virginia, however, a sheriff may purchase a debt in his hands for collection if he acts in good faith. Rhea v. Preston, 75 Va. 757.

3. After Death of Plaintiff.—The death of the plaintiff does not abate an execution, and it is proper for the officer to levy the writ notwithstanding such death. Turnbull v. Claibornes, 8 Leigh 392; May v. Bank, 2 Rob. 60.

C. Mode of Levy.

1. In General.—In Bullitt v. Winstons, 1 Munf. 269, it was held that a writ of *scire facias*, may be levied upon chattels without touching or removing them, provided they be in the immediate power of the sheriff, and admitted by him to have been taken to satisfy the debt. This is especially true where the debtor waives seizure and requests that the property be left in his possession. See also, Wardsworth v. Miller, 4 Gratt. 101; Dorrier v. Masters, 88 Va. 459, 2 S. E. Rep. 927. In 4 Va. Law Reg. 253, there is a very able editorial on this subject.

2. Partnership Chattels.—Upon an execution against partnership property for the individual debt of one of two partners, the sheriff must seize all the social effects, and sell a moiety thereof undivided, for if he seized a divided moiety and sold that the other partner would still have a moiety of such moiety. Shaver v. White, 6 Munf. 110, 8 Am. Dec. 730; Wayt v. Peck, 9 Leigh 434; Christian v. Ellis, 1 Gratt. 396; Pettyjohn v. Woodroof, 86 Va. 478, 10 S. E. Rep. 715; Ashby v. Porter, 26 Gratt. 455; Robinson v. Allen, 85 Va. 721, 8 S. E. Rep. 885; Straus v. Kerngood, 21 Gratt. 584; Carper v. Hawkins, 8 W. Va. 291; Shackelford v. Shackelford, 32 Gratt. 502.

3. Confusion of Goods with After-Acquired Property.—Where executions of different dates are levied on a fluctuating stock of goods the senior execution has preference on all the goods in stock before its return day, and the *onus probandi* is on the junior execution creditor to show that any special articles came into the stock after the return day. Carr v. Meade, 77 Va. 142.

D. Against Several Defendants.—In Humphrey v. Hitt, 6 Gratt. 523, 52 Am. Dec. 134, there is a *dictum* by

BALDWIN, J., to the effect that upon a joint judgment against two defendants, execution may issue and be levied upon the property of either. See also, *Knight v. Charter*, 22 W. Va. 422.

E. When There Are Several Executions.—Where there are several executions against the same debtor in the hands of the sheriff, it is his duty to levy them in the order in which they were delivered to him. *Hartman v. Campbell*, 5 W. Va. 394.

F. Property in Custodia Legis.—While property is in the hands of a receiver, or under the control of the court, no execution can be levied upon it, for that would be to interfere with the possession of the court, but the *A. fa.* creates a lien thereon. *Davis v. Bonney*, 80 Va. 760, 17 S. E. Rep. 220; *Frayser v. R. & A. R. Co.*, 81 Va. 392. But see, 3 Va. Law Reg. 23.

The court may direct money made under an execution, and which money is in the hands of the sheriff, or is brought into court, according to the command of the writ of *fi. fa.*, to be paid over in satisfaction of another writ of *A. fa.* in the hands of the same sheriff against the goods and chattels of the plaintiff in the first execution, he having the legal and equitable title to receive the same. And this is true although it may not appear that sufficient effects cannot otherwise be found to satisfy the judgment. *Steele v. Brown*, 2 Va. Cas. 246.

G. Return of Writ.—A return on a writ or process is the short official statement of the officer endorsed thereon of what he has done in obedience to the mandate of the writ, or why he has done nothing. He may have been prevented from obeying the mandate of the writ by an injunction, or by a *supersedeas*, or by the order of the plaintiff or his attorney. A return of any of these facts endorsed on the writ is a sufficient return. *Rowe v. Hardy*, 97 Va. 674, 34 S. E. Rep. 625; 5 Va. Law Reg. 672.

1. Endorsement.

a. In General.—Where a writ of *A. fa.* is returned "not levied by reason of the stay law," it will be presumed in the absence of an endorsement or proof of the date of its receipt by the officer, that it went into his hands after April 30, 1861 (time when stay law took effect), in which case such return was valid. And where by statute it is required that the officer shall return upon a writ of *A. fa.* "whether the money is or cannot be made," a return of "not levied by reason of the stay law" is a return substantially that the money "cannot be made." *Hamilton v. McConkey*, 83 Va. 533, 2 S. E. Rep. 724; *Shipley v. Pew*, 23 W. Va. 495.

The sheriff's failing to mention, in his return of an execution, one of the negroes on whom it was levied, is no ground for reversing a judgment on a forfeited forthcoming bond, in which that negro is mentioned as one of those on whom such execution was levied. See *Jones v. Hull*, 1 H. & M. 212; *Dix v. Evans*, 3 Munf. 308.

In general, the return of the sheriff, of "no effects," on an execution in favour of an assignee of a bond against the obligor, is sufficient to charge the assignor. *Goodall v. Stuart*, 2 H. & M. 105.

An execution was returned endorsed to the effect that on April 14th, 1861, a *A. fa.* had been levied on one slave, the property of defendant, and held up by order of plaintiff. On April 30th, 1861, the stay law was enacted, and continued in force until emancipation. Held, it is not to be presumed from the levy that the judgment was satisfied. *Saunders v. Prunty*, 89 Va. 921, 17 S. E. Rep. 231.

In *Eckhols v. Graham*, 1 Call 492, it was held that the

names of slaves taken upon an execution ought to be endorsed thereon, to prevent purchasers from being deceived.

b. Extra-Official Return.—What a sheriff adds to his official return is extra-official, and such additional extra-official return is not even *prima facie* evidence of any fact therein stated. *Alexander v. Byrd*, 8 Va. 690, 8 S. E. Rep. 577; *Shannon v. McMullin*, 25 Gratt. 211.

2. Presumption as to Levy.—In *Paine v. Tutwiler*, 27 Gratt. 440, where there was nothing to show whether an execution, placed in the hands of the officer, had been levied or not, it was held that after a great lapse of time the court will presume that the execution was levied before the return day thereof. See also, *O'Bannon v. Saunders*, 24 Gratt. 128.

a. Evidence.—Parol evidence is admissible to prove that an execution was levied, though no return was made upon it. *Bullitt v. Winstons*, 1 Munf. 369.

b. Rebuttal of Presumption.—In *Paxton v. Rich*, 8 Va. 373, 7 S. E. Rep. 581, it was held that the presumption, that an execution delivered to an officer has been levied, may be repelled by evidence to show that, about the time when the writ went into the officer's hands, the debtor possessed no leviable property, though there has been a non-return of the writ for fourteen years.

3. Time of Return.—Though as a general rule the officer must return the execution before the return day is past, yet by order of court, a sheriff may be permitted to make or amend a return at any time after the return day. *Bullitt v. Winstons*, 1 Munf. 269; *Baird v. Rice*, 1 Call 24; *Hare v. Niblo*, 4 Leigh 361.

In the absence of a date, or other evidence showing when the return of an officer on a writ was made, it is presumed to have been made at a time when he had the right to make it, and in due time, as the *prima facie* presumption is that the officer has done his duty. *Rowe v. Hardy*, 97 Va. 674, 34 S. E. Rep. 625.

4. Amendment of Return.—Having made return on an execution and on that return, in part, a decree having been entered, in subsequent proceedings against him and his sureties, the sheriff will not be permitted to amend his return, so as to explain it away and enable his sureties to escape liability for his default. *Carr v. Meade*, 77 Va. 142.

But in *Rucker v. Harrison*, 6 Munf. 181, a *supersedeas* to the execution having been awarded, the sheriff was allowed by the court to amend his return after a lapse of seven years from its date. See also, on this point, *Smith v. Triplett*, 4 Leigh 590; *Wardworth v. Miller*, 4 Gratt. 99.

A sheriff cannot amend his return upon an execution after it has been filed, except by motion to the court, upon notice to the creditor. *Hammen v. Minnick*, 32 Gratt. 249.

A sheriff may have leave to amend his return upon an execution, after notice of a motion against him founded on the original return. And the amended return may be made by a deputy who did not make the first return. *Stone v. Wilson*, 10 Gratt. 529.

Upon a motion to quash a second execution in vacation, the judge may, in vacation, allow the sheriff to amend his return on the first execution. *Walker v. Com.*, 18 Gratt. 14.

It was held in *Henry v. Stone*, 2 Rand. 425, that a sheriff can not contradict his return, but must obtain leave of the court to amend it.

5. Conclusiveness of Return.—In an action between the assignees and assignors, the sheriff's return of

nulla bona on the execution against the obligors in the forthcoming bond, though amended after the assignees' action and five years after the return, so as to show the insolvency of both, is conclusive evidence of such insolvency. *Smith v. Triplett*, 4 Leigh 590; *Taylor v. Dundass*, 1 Wash. 92.

A sheriff's return may be contradicted by evidence *alibunde*; in which case the sheriff himself would be a competent witness to prove its truth. But after judgment by default, a party cannot object in an appellate court, to the truth of the return. *Cunningham v. Mitchell*, 4 Rand. 189; *Lathrop v. Lumpkin*, 2 Rob. 49; *Norris v. Crummev*, 2 Rand. 329; *Henry v. Stone*, 2 Rand. 455.

In the absence of proof to the contrary, and especially after a great lapse of time, an execution which had gone into the hands of the sheriff, and is indorsed by him as levied on personal property of the debtor, will warrant two presumptions: first, that the officer levied on sufficient property to pay the debt; and, secondly, that the property had been sold, and the judgment and execution satisfied. *Northwestern Bank of Va. v. Hays*, 16 S. E. Rep. 561, 57 W. Va. 475.

The validity of the return of an officer on a writ of *Aeri facias* is not affected by the fact that the writ is not returned to the office till after the return day thereof. The record is incomplete till the writ is returned, but when returned, the return becomes competent evidence of the facts therein stated, and the parties are entitled to the benefit of their legal effect. *Rowe v. Hardy*, 97 Va. 674, 34 S. E. Rep. 625.

A return upon an execution which the officer has the right to make is conclusive between the parties, and they are interested to have the officer make his return and file the writ with the proper custodian. But neither of the parties can be deprived of the benefit of the return by the failure of the officer to make it at the return day of the writ. The officer may be thereafter compelled to make his return by process of contempt, or by proceeding to enforce the forfeitures and penalties prescribed by law. *Rowe v. Hardy*, 97 Va. 674, 34 S. E. Rep. 625.

A sheriff's or other officer's return upon a forthcoming bond is not conclusive, but only *prima facie* evidence of its truth. *Adler v. Green*, 18 W. Va. 201.

H. Abandonment of Levy.

1. **By Fraudulent Collusion.**—When goods have been taken in execution under a *f. fa.*, a direction given by the creditor to the sheriff to restore the goods to the possession of the debtor, is fraudulent, and destroys the lien of execution on the property; but a mere order to postpone the sale, without collusion, does not affect the lien of the execution. *Fisher v. Vanmeter*, 9 Leigh 18, 33 Am. Dec. 221; *Bullitt v. Winstons*, 1 Munf. 209; *Clayton v. Anthony*, 6 Rand. 305.

2. **By Alias Writ.**—A previous levy of an execution is waived and abandoned by the issuance of another writ. *Eckholz v. Graham*, 1 Call 492.

3. **By Voluntary Relinquishment.**—In *Walker v. Com.*, 18 Gratt. 13, 98 Am. Dec. 681, it was held that an execution creditor cannot voluntarily abandon a valid subsisting levy, and afterwards insist that the judgment has not been discharged and demand a new execution.

I. Garnishment Proceedings.

Whom Summoned.—Under the West Virginia statute regulating garnishment proceedings, it is held that, where a suggestion is issued it is unnecessary that any other person than the one designated, as indebted to, or holding effects of, the judgment

debtor, should be summoned. *Lanham v. Lanham*, 30 W. Va. 222, 4 S. E. Rep. 273.

Personal Representatives.—In *Bickle v. Chrisman*, 76 Va. 678, the court said: "It is well settled that process of garnishment at law will not lie against personal representatives." See also, *Whitehead v. Coleman*, 81 Gratt. 784; *Parker v. Donnelly*, 4 W. Va. 648; *Brewer v. Hutton*, 45 W. Va. 106, 30 S. E. Rep. 81. Compare *Vance v. McLaughlin*, 8 Gratt. 289.

Public Fiduciaries.—In *Aumann v. Black*, 15 W. Va. 773, it was held, a collector of a municipal corporation could not be garnished to enforce the lien of a *Aeri facias*.

Nor can the treasurer of the state be a garnishee in respect to money or effects which he holds strictly in his official capacity. *Rollo v. Andes Ins. Co.*, 23 Gratt. 509.

Corporations.—The shares of a stockholder in a joint stock company, incorporated by and conducting its operations, in whole or in part, in the state are such estate as is liable to be attached in a proceeding instituted for that purpose, by one of the creditors of such stockholder; and such estate may properly be considered, for the purpose of such proceeding, as in the possession of the corporation in which the shares are held, and such corporation may properly be summoned as garnishee in the case. *Chesapeake & O. R. R. Co. v. Paine*, 29 Gratt. 502; *S. V. R. Co. v. Griffith*, 76 Va. 918.

Under the 10th and 11th sections of chapter 141 of Code of West Virginia, pp. 673-674, providing for a suggestion by a judgment creditor, that by reason of the lien of a writ of *Aeri facias* there is a liability on any person other than the judgment debtor and a summons thereon to such third person to answer the suggestion, a judgment can be rendered against such third person, only when he owes a debt to the defendant in the execution or has in his hands personal estate of the defendant in the execution, for which debt or estate an action at law could have been brought against him. And if his liability is purely equitable and could be enforced only in a court of equity, no judgment can be rendered against him in such proceeding as a garnishee. *Swann v. Summers*, 19 W. Va. 115; *Clough v. Thompson*, 7 Gratt. 83; *Penn v. Spencer*, 17 Gratt. 94.

If by any legislation one corporation takes charge of a portion of the property and franchise of another and conducts its business in part, and by such legislation and action it is responsible to render an account in a court of equity for its actings and doings to the first corporation of its creditors, the creditor of the first corporation, who has issued a *Aeri facias* against the property of the first corporation, cannot obtain by the garnishee process a judgment against the second corporation or any of its debtors. *Swann v. Summers*, 19 W. Va. 115.

Effect.—The proceeding by garnishment under an execution and that by attachment have practically the same effect, except that under the former the creditor does not acquire a lien upon the specific property. *Bickle v. Chrisman*, 76 Va. 691; and see especially, on this subject, monographic *note* on "Attachments" appended to *Lancaster v. Wilson*, 27 Gratt. 624.

VI. LIEN OF EXECUTION.

A. Effect of Levy.

1. **In General.**—A *f. fa.* levied at the suit of a creditor, upon the corporeal personal property of the debtor, is unquestionably a security for the debt; it is a direct appropriation, by authority of law, of

specific property of the debtor, for the purpose of satisfying the demand. The lien thereby created is substantial and enduring, as much so as a mortgage or a pledge, and can be defeated only by the act of the creditor. *Humphrey v. Hitt*, 6 Gratt. 526, 52 Am. Dec. 138; *Spence v. Repass*, 94 Va. 716, 27 S. E. Rep. 563; 2 Va. Law Reg. 704.

2. As to Title of Property.—The levy of an execution of *f. fa.* does not divest the defendant in the execution of the property, and transfer the title to the plaintiff or the sheriff. Only a special interest is vested in the sheriff as a mere bailee, to enable him to keep the property safely, and defend it against wrongdoers. It is in the custody of the law, and the sheriff has a naked power to sell it and pass the title of the owner to the purchaser. *Walker v. Com.*, 18 Gratt. 18; *Lusk v. Ramsay*, 8 Munf. 431; *Rhea v. Preston*, 75 Va. 772.

B. Commencement of Lien.—According to statute, a *Neri facias* is a lien only from the time it goes into the hands of the sheriff to be executed, upon all the personal estate of the debtor, with the exception stated in the statute. *Puryear v. Taylor*, 12 Gratt. 401; *Frayser v. R. & A. R. R. Co.*, 81 Va. 392; *Huling v. Cabell*, 9 W. Va. 522, 27 Am. Rep. 562; *Wiant v. Hays*, 38 W. Va. 681, 18 S. E. Rep. 807.

The lien of a *Neri facias* never levied, attaches to all the personal property owned by the debtor, and to all choses in action to which he may be entitled at any time prior to the return day of the *Neri facias*, subject only to the exceptions specified in chapter 141, section 1, of the Code of West Virginia. *Huling v. Cabell*, 9 W. Va. 522.

C. Extent of Lien.

1. Property Subject to Levy.—In *Huling v. Cabell*, 9 W. Va. 530, 27 Am. Rep. 566, it was held that the lien of an execution attaches to all the personal estate of the debtor capable of being levied on, though such property is not levied on.

2. Property Not Subject to Levy.—In *Frayser v. R. & A. R. R. Co.*, 81 Va. 392, the court said: "By the comprehensive terms of the statute, the lien of a *f. fa.*, from the time the writ is delivered to the officer to be executed, extends to all the personal estate of the judgment debtor—although not levied on nor capable of being levied on—with certain enumerated exceptions. See also, to the same effect—that personal property not capable of being levied on, may, nevertheless, be subject to the lien—*Hicks v. Roanoke Brick Co.*, 94 Va. 749, 27 S. E. Rep. 566; *Davis v. Bonney*, 89 Va. 760, 17 S. E. Rep. 229; *Huling v. Cabell*, 9 W. Va. 530, 27 Am. Rep. 566; *Wiant v. Hays*, 38 W. Va. 681, 18 S. E. Rep. 807. See especially, strong editorial, in 4 Va. Law Reg. 255.

3. Title of Creditor under an *Elegit*.—A creditor extending the land of his debtor under an *elegit*, stands, in judgment of law, as if he had taken a lease for years in satisfaction of his debt; and by virtue of such intent, he acquires a title to the premises which may be the subject of adjudication in the court of appeals, as a controversy concerning the title of land. *Lyons v. McGuire*, 22 Gratt. 202.

The officer executing a writ of *elegit* does not deliver to the creditor actual possession of the premises, but only the legal possession, which may be enforced by ejectment, or by writ of unlawful detainer when the cause of action has accrued within three years. *Lyons v. McGuire*, 22 Gratt. 202.

If, after an extent under an *elegit*, the possession of the premises is withheld by the debtor, or some one claiming under him, the tenant, by *elegit*, may recover the same by action, and hold over even after

his term has expired; and this, though his term has expired before the trial of the cause. *Lyons v. McGuire*, 22 Gratt. 202.

D. Assignment of Property Subject to Lien.

Bona Fide Purchasers.—The lien of an execution is held, according to statute, not to affect a *bona fide* assignee of intangible property, for value and without notice of such lien. *Trevillian v. Guerrant*, 31 Gratt. 525; *Charron v. Boswell*, 18 Gratt. 216; *Evans v. Greenhow*, 15 Gratt. 153; *Puryear v. Taylor*, 12 Gratt. 401; *Huling v. Cabell*, 9 W. Va. 522, 27 Am. Rep. 562; *Wiant v. Hays*, 38 W. Va. 681, 18 S. E. Rep. 807.

But these cases also recognize the rule, that if the purchaser has notice of the lien, or does not pay value for the property, he is not protected, and the lien still binds the property in his hands.

In *Evans v. Greenhow*, 15 Gratt. 153, a deed to secure *bona fide* debts was upheld as against an execution creditor.

In West Virginia, by statute, the docketing of the lien is notice, even against a *bona fide* purchaser for value, who buys the property after the return day of the writ. *Wiant v. Hays*, 38 W. Va. 683, 18 S. E. Rep. 809.

E. Priority between Several Liens.

1. General Rule.—As a general rule, where there are several executions against the same property, they take priority in the order in which they were delivered to the officer. *Charron v. Boswell*, 18 Gratt. 216; *Foreman v. Loyd*, 2 Leigh 284, overruling *Jackson v. Heiskell*, 1 Leigh 257.

Hence, according to the general rule, a junior execution creditor, obtains no priority by reason of first discovering assets. *Charron v. Boswell*, 18 Gratt. 216.

2. Common-Law Rule.—In *Humphrey v. Hitt*, 6 Gratt. 527, 52 Am. Dec. 133, it was held that the delivery of the execution to the sheriff was not a lien upon the goods of the debtor; but that it was the levy which made the lien. It followed of course, from this hypothesis, that the execution first levied had priority, even though it was not the first delivered to the officer. This case, however, was decided before the enactment of the statute, declaring that the execution lien should commence from the time of delivery to the officer.

3. Prior Incumbrances.—A deed of trust, which had been given and recorded prior to the issuance, delivery, or levy of a writ of execution, is held to have priority over such execution. *Bank v. Turnbull*, 2 Gratt. 605; *Childers v. Smith*, Gilmer 196.

But in *Pegram v. May*, 9 Leigh 176, the writ of execution had been issued and delivered, but before levy, the debtor made a deed of trust of certain tangible property, which was afterwards levied on in the hands of the purchaser. Held, the lien of execution has priority over the lien of the deed of trust, and the purchaser under the execution is entitled to the property.

4. Subsequent Incumbrances.—It was held in *Puryear v. Taylor*, 12 Gratt. 401, that the mere delivery of the writ to the officer gives the execution priority over a subsequent attachment.

Choses in Action.—An insolvent debtor may, notwithstanding his insolvency, make a valid assignment of a chose in action owned by him, and the *bona fide* assignee for value of such chose in action takes title thereto superior to the lien of a *Neri facias* against such debtor. It is immaterial whether the debtor intended to commit a fraud in making the assignment or not, if the assignee has no notice of such intent, or of the existence of the *f. fa.* and pays

value. *Shields v. Mahoney*, 94 Va. 487, 8 Va. Law Reg. 302, 27 S. E. Rep. 23.

At the time a receiver is appointed at the suit of trust creditors to take possession of a railroad and carry it on, there are a number of executions against the company in the hands of the sheriff; and there are funds derived from income and balances due from employees, in the hands of or due to the company. *Held*, the execution creditors are entitled to have these funds and balances applied to the satisfaction of their debts in preference to the trust creditors. *Gibert v. Washington City, etc., R. Co.*, 83 Gratt. 645; *Frayser v. R. & A. R. Co.*, 81 Va. 388.

5. **Landlord's Lien.**—The landlord's lien, for a year's rent on the goods and chattels of his tenant, does not extend to protect them from being taken by virtue of any execution, except in cases where the said goods and chattels shall be in or upon the demised premises. *Geiger v. Harman*, 8 Gratt. 130; *City of Richmond v. Duesberry*, 27 Gratt. 213; *Wades v. Fig-gatt*, 75 Va. 578; *Crawford v. Jarrett*, 2 Leigh 638; *Upper Appomattox Co. v. Hamilton*, 83 Va. 319, 2 S. E. Rep. 196.

6. **Adjustment of Conflicting Liens.**—A conflict of liens may be adjusted by a petition to the court, the force and effect of whose process is in question, or more satisfactorily by a proceeding in equity, to which all persons concerned should be made parties. *Moore v. Holt*, 10 Gratt. 284; *Charron v. Boswell*, 18 Gratt. 220; *Erskine v. Staley*, 12 Leigh 406.

F. Duration of Lien.

1. **In General.**—In *Carr v. Glasscock*, 8 Gratt. 264, it was held that the lien which a creditor acquires by a levy of his execution upon personal property is, if not enforced by a sale thereof, only temporary, and expires with the authority to sell under the execution. But under Va. Code, § 3002, the lien of a writ of *sesti facias* continues so long as the judgment can be enforced. *Hicks v. Roanoke Brick Co.*, 94 Va. 749, 27 S. E. Rep. 606.

The lien continues after the return day of the execution, and only cases when the right to levy the execution, or to levy a new execution upon the judgment ceases, or is suspended by a forthcoming bond being given and forfeited, or by a supersedeas or other legal process. *Puryear v. Taylor*, 12 Gratt. 401; *Charron v. Boswell*, 18 Gratt. 227; *Trevillian v. Guerrant*, 81 Gratt. 525.

2. **West Virginia Rule.**—The lien, as to the property not leviable, does not end with the return day; but on leviable property, the lien ceases with the return day, unless there has been a levy of the writ, or a docketing of the lien. *Wiant v. Hays*, 88 W. Va. 685, 18 S. E. Rep. 809.

3. **Death of Debtor.**—In *Trevillian v. Guerrant*, 81 Gratt. 525, it was held that the lien of an execution upon the debtor's choses in action, though not enforced in his lifetime, continues after his death as against the other creditors of the debtor. See also, *Frayser v. R. & A. R. Co.*, 81 Va. 388; *Allan v. Hoffman*, 83 Va. 129, 2 S. E. Rep. 602; *Hicks v. Roanoke Brick Co.*, 94 Va. 750, 27 S. E. Rep. 590; *Werdenbaugh v. Reid*, 20 W. Va. 599.

4. **Taking Out Second Execution.**—If a plaintiff sues out a second execution, before the property taken under the first is disposed of, he waives the first, and destroys the lien on the property taken under the first. *Eckhols v. Graham*, 1 Call 492; *McKey v. Garth*, 2 Rob. 33, 40 Am. Dec. 725.

G. Forthcoming or Delivery Bond.

1. **Form of Bond.**—A forthcoming bond should be

made payable to the creditor, and not to the sheriff; the amount of the execution ought to be recited, and the condition should be to deliver the property at the time and place of sale, and not when demanded. If the bond be defective in any of the above instances, or in others, the court may, and ought to quash it on motion. *Downman v. Chinn*, 2 Wash. 189.

The condition of a forthcoming bond ought to set forth, with certainty, the time and place of sale; but it need not state that the day mentioned, is that appointed for the sale. *Irvin v. Eldridge*, 1 Wash. 161; *Wood v. Davis*, 1 Wash. 69.

A forthcoming bond given by the defendant only, without any security, will support a motion, and judgment will be rendered on it in favor of the plaintiff. *Washington v. Smith*, 8 Call 18.

A forthcoming bond, mentioning the persons against whom the execution issued, and that "they were desirous of keeping in their possession, until the day of sale, the property taken by the sheriff," sufficiently describes it as their property. *Bronaugh v. Freeman*, 2 Munf. 266.

A forthcoming bond should not be quashed for the vagueness with which the property named in it is described, the description being: "All of F. J. Calhoun's household and kitchen furniture now in said tenement," referring to that described in the warrant; there being in such case no necessity that an inventory of the property should be made. *Central Land Co. of W. Va. v. Calhoun*, 16 W. Va. 361.

A forthcoming bond is good, although it appoints no place at which the delivery is to be made. *Burwell v. Court*, 1 Wash. 254.

If a forthcoming bond do not recite against whom the execution issued, and upon whose property it was levied, it may be quashed on motion. *Hubbard v. Taylor*, 1 Wash. 259; *Lewis v. Thompson*, 2 H. & M. 100.

If the forthcoming bond recites an execution, and that property has been taken to satisfy it, a variance, between the sheriff's return and the bond, provided the bond agrees with the execution, is unimportant. If the clerk of the court alter a forthcoming bond, it will not prejudice the plaintiff; but the bond will be restored to what it originally was. *Buchanan v. Maynadier*, 6 Call 1.

Where the execution is against four persons, and the forthcoming bond recites that the execution was against three, it is a material variance, for which the bond should be quashed. *Holt v. Lynch*, 18 W. Va. 568.

2. **Validity of Bond.**—If the forthcoming bond include an excess, and the plaintiff after judgment, but during the same term, release the excess, the defect is thereby cured, and the judgment rendered valid. *Bell v. Marr*, 1 Call 47; *Scott v. Hornsby*, 1 Call 41.

Where execution against two is levied on the goods of one, and the latter gives a forthcoming bond with the others as his only surety, such surety, being already bound, is not security such as the law requires. *Garland v. Lynch*, 1 Rob. 546.

The sheriff's fee for taking a forthcoming bond may be included in it. *Bronaugh v. Freeman*, 2 Munf. 266.

If before the act of 1794, the sheriff in taking a forthcoming bond included his commissions on the debt, it was erroneous, but in such case the bond is not void; and the judgment shall be entered for the sum due without the commissions. *Worsham v. Eggleston*, 1 Call 48.

The obligee in a forthcoming bond may also be a surety, and such fact will not render the bond void. *Booth v. Kinsey*, 8 Gratt. 560.

A *f. fa.* is sued out by X and Y on a judgment recovered by them; they endorse on the writ that it is for the benefit of A, and the sheriff levies it and takes a forthcoming bond payable to A. *Held*, the bond is valid. *Meze v. Howver*, 1 Leigh 442.

Where a surety on a forthcoming bond was induced to sign the bond in blank by the false representations of the principal and sheriff as to the amount of the judgment, equity will not grant him relief, the judgment creditor not being a party. But where judgment on the forthcoming bond was rendered on proof of notice by the sheriff, when in fact no such notice had been given, and the surety was induced by the other party to believe that notice would be given, relief will be granted to the surety on the ground of surprise, if he pays the amount for which he supposed he was bound. *Gordon v. Jeffery*, 2 Leigh 410.

3. *Liability on Bonds*.—Parties who voluntarily enter into a forthcoming bond are estopped from all inquiry into the regularity and validity of the levy of the writ of *forti facias* upon which the bond was taken. *Shaw v. McCullough*, 3 W. Va. 260.

A. gave a forthcoming bond, with W. surety. Judgment was rendered on the bond against A., and a *f. fa.* issued. Property was taken, but the *f. fa.* was not returned. These proceedings were no bar to a motion upon the bond against W. *Winston v. Whitlocke*, 5 Call 435.

Where a forthcoming bond is given, and the debtor, on the day of sale, pays to the creditor the full amount of the debt, interest and costs, except the sheriff's commission, the bond will be forfeited, and a motion will lie upon it. *Bernard v. Scott*, 3 Rand. 522.

A judgment is obtained against three persons, and execution is issued thereon, which is levied on the property of one of them, who, thereupon, gives a bond with security for the forthcoming and delivery of the property on the day of sale; and this bond is forfeited. *Held*, the execution and forfeiture of the bond did not discharge and extinguish the original debt, as against the other joint debtors.

The surety of a joint debtor, in a forthcoming bond, becomes, upon the forfeiture thereof, surety for the debt; and when he has discharged it, is entitled to be substituted to all the rights of the creditor against the original debtors, subsisting at the time he became so bound for the debt. *Robinson v. Sherman*, 2 Gratt. 178, 44 Am. Dec. 381.

A judgment cannot be obtained upon a forthcoming bond, bearing date before the 7th of January, 1807, against the sheriff to whom the estate of a deceased obligor has been committed, as against an executor or administrator in ordinary cases;—but the plaintiff must exhibit his claim before the court, according to the act of 1792. *Jackson v. Ewell*, 4 Munf. 426.

Where, on the day of sale mentioned in the forthcoming bond, the property is on the spot before 1 o'clock, but not delivered to the sheriff until after 4 o'clock, this will not be a good delivery under the act of 1821, in certain cases, and the bond will be forfeited. *McKinster v. Garrott*, 3 Rand. 554.

Where a forthcoming bond was given on an execution issued in contravention to the stay law, no advantage can be taken of this fact to defeat the question of substitution between sureties, or change the liability of endorers, however much it may

have been good ground for quashing the execution. *Conaway v. Odbert*, 2 W. Va. 25.

The surety in a forthcoming bond has a right to deliver the property on the day of sale, if he can so that day peaceably obtain possession thereof. *Lusk v. Ramsay*, 3 Munf. 417.

If the sheriff, after taking a forthcoming bond, accept the same goods from the defendant, in discharge of his body from another execution, and prevent the surety in such bond from delivering them on the day of sale therein appointed; a court of equity, on a bill for discovery and injunction, exhibited by the surety, will require the sheriff, and all parties concerned, to answer a charge of fraud and combination, and (whether fraud be established or not) will perpetually enjoin a judgment rendered against the surety upon the forthcoming bond, as unconscionable against him; leaving a plaintiff, in that judgment, to his remedy against the sheriff; and the sheriff to his remedy against the person who indemnified him, or to whom, by mistake, or in his own wrong, he paid the money in satisfaction of the second execution. *Lusk v. Ramsay*, 3 Munf. 417.

The bond executed under the act of May 25, 1850, entitled "an act to prevent the sacrifice of personal property at forced sales," Session Acts 1850-74 ch. 120, p. 162, is a lien on the land of the obligors who are alive, from the return of the bond to the clerk's office; and the surety in the bond paying it off is entitled to be substituted to the lien of the bond upon the land of the principal obligor. *Barger v. Buckland*, 28 Gratt. 560.

If a forthcoming bond fixes a day of sale different from the day of delivery named in the bond, and on the day fixed for the delivery the execution debtor goes to the sheriff or other officer and informs him that the property is at the place of sale, and he does not go there to receive it, and the property is there in fact and ready to be delivered to the officer, this is a satisfaction of the condition of the bond, and there can be no recovery on it. *Adler v. Green*, 18 W. Va. 202.

On the day of sale the property is at the place of sale and consisting principally of household furniture and ornaments in different rooms of the house, and the officer goes through those rooms, has the property in his presence and power, and the execution-debtor does not interfere or prevent a sale of the property; this is such a delivery of the property, as discharges the obligors in the bond from responsibility, notwithstanding the fact that the execution-debtor may claim that a portion of the property is exempt from forced sale under the exemption-law, and third parties may claim a portion of it as their property. *Adler v. Green*, 18 W. Va. 202.

Judgment on a forthcoming bond ought not to be relieved against, in equity, because the bond was forfeited, by a slave having run away, who by the condition, was to be forthcoming. *Cole v. Fenwick Gilmer* 134.

A partial delivery of the goods mentioned in the condition of a forthcoming bond, is not a performance, and the penalty becomes forfeited. But if the sheriff secure and sell what is so delivered, the amount must be credited to the obligor. *Pleasant v. Lewis*, 1 Wash. 274.

If the forthcoming bond be not forfeited at the time when the injunction issues, the penalty is saved; but it is otherwise, if the bond be forfeited before the injunction issues. *Wilson v. Stevenson*, 2 Call 218.

The right to move on a forthcoming bond is not suspended by a *supersedeas* to the original judgment. *Spencer v. Pilcher*, 10 Leigh 490.

A forthcoming bond dated the 1st day of November 1834, being conditioned for the delivery of the property "on the third Monday of November next," it is contended that there could be no breach of the condition until the third Monday in November 1835. Held by the court of appeals (construing the instrument according to the subject-matter and the evident meaning of the parties) that the day for the delivery of the property was the third Monday of November 1834. *Spencer v. Pilcher*, 10 Leigh 490.

4. Actions on Bond.

a. In General.—No formal issue need be joined on a motion on a forthcoming bond, as the pleading may be *ore tenus*, and the court may pronounce judgment on the evidence. *McKinster v. Garrett*, 8 Rand. 554.

An amendment of the return made by an officer on a notice, does not permit him in any wise to change or amend the notice itself; and if he does, the changed or amended notice is a nullity. *White v. Sydenstricker*, 6 W. Va. 44.

A notice of motion for judgment on an undertaking, in which a blank is left for the day on which the motion will be made, and a blank for the name of the party who will make the motion; the name of the party to whom the undertaking is given, and to whom the money is to be paid, being signed at the foot of the notice, as the person giving the same, is sufficient. *White v. Sydenstricker*, 6 W. Va. 44.

Although the judgment on a forthcoming bond should be rendered for a larger sum than that due by the execution, yet if the execution is not made part of the record by bill of exceptions, nor any objection made in the court below, such objection cannot be sustained in the court of appeals. *Burke v. Levy*, 1 Rand. 1.

Executors may maintain an action of debt upon a three month's replevy bond payable to their testator. *Booker v. McRoberts*, 1 Call 242.

An action of debt may be brought upon a defective forthcoming bond, even after an unsuccessful motion had been made on it. *Hewlett v. Chamberlayne*, 1 Wash. 387.

In a judgment on a forthcoming bond, if the record states that the cause was continued until the next day, but does not mention that the defendant was called, it is not error, if the defendant, on the day of the judgment, prays an appeal, and gives bond, in court, to prosecute it. *Wilkinson v. Hendrick*, 5 Call 12.

Though the forthcoming bond be left at the clerk's office before it is forfeited, yet, if the property is not produced on the day of sale, the officer may have the clerk endorse it as filed in the office after the day of sale, and it will operate as a judgment, and as if actually returned to the office after the day of sale. *Central Land Co. of W. Va. v. Calhoun*, 16 W. Va. 361.

Evidence—Officer's Return.—A sheriff's or other officer's return upon a forthcoming bond is not conclusive, but only *prima facie* evidence of its truth. But a forthcoming bond, which provides for the delivery of the property on a day different from the day of sale fixed in the bond, is not a good statutory bond; and the sheriff's, or other officer's return of "forfeited," on such bond is not even *prima facie* evidence of the truth thereof. Such a bond, though not good as a statutory bond, is good as a common-law bond, if there is no other objection to it. *Adler*

v. Green, 18 W. Va. 201; *Wallace v. McCarty*, 8 W. Va. 193.

A sheriff's return may be contradicted by evidence *alibide*; in which case the sheriff himself would be a competent witness to prove its truth. But after judgment by default, a party cannot object in an appellate court, to the truth of the return. *Cunningham v. Mitchell*, 4 Rand. 189.

A motion on a forthcoming bond can only be made on the date to which the notice is given, unless the defendant be called, and the motion entered and continued. *Parker v. Pitts*, 1 Hen. & M. 4.

On a joint notice to all the obligors in a forthcoming bond, the plaintiff may take judgment against one of the defendants. *Glaessel v. Dellma*, 2 Call 303.

A *f. fa.* is directed to the sheriff of Campbell, but is delivered to and levied by the sergeant of Lynchburg, who takes a forthcoming bond upon it, reciting that the writ had been directed to the sergeant. *Held*, the writ gave no authority to the sergeant, and no warrant to him to take the forthcoming bond, and that the bond is variant from the execution and therefore the bond ought to be quashed. It is competent to the obligors in a forthcoming bond to move to quash it for irregularity. *Couch v. Miller*, 2 Leigh 545.

Upon a motion to quash a forthcoming bond, for defects apparent on the face of the execution on which it was taken, an appellate court will regard the execution as part of the record, though not made so by any express order to that effect. *Couch v. Miller*, 2 Leigh 545.

A notice upon a forfeited forthcoming bond, given to a regular term of a court which the judge fails to attend, is sufficient to authorize an award of execution on the bond, at a special term. *Wooten v. Bragg*, 1 Gratt. 1.

Even after execution has been awarded on a forthcoming bond, the bond may be quashed on the motion of the creditor, to enable him to have execution on the original judgment, if the case be one in which the execution on the forthcoming bond has proved unavailing, without any default of the creditor. *Garland v. Lynch*, 1 Rob. 545.

A judgment on a forthcoming bond, instead of awarding execution thereon, is that the plaintiff recover a debt against the defendant. *Held*, though irregular in form this is substantially right. *Harpers v. Patton*, 1 Leigh 306.

Where there is a material variance between a forthcoming bond and the execution upon which it is taken, the bond should be quashed. But where the forthcoming bond in its condition recites that the amount due on the execution with the fee for taking the bond and the sheriff's commissions is larger than is in fact due, this is not a variance for which the bond will be quashed, but judgment should be rendered for the actual amount due. *Holt v. Lynch*, 18 W. Va. 567.

Where *non est factum* is pleaded to a motion on a forthcoming bond, the court may render judgment without the intervention of a jury; or they may empanel a jury to try the issue at its discretion. *Burke v. Levy*, 1 Rand. 1.

A writ of *hæc facias* against an administratrix, "to be levied, as to certain damages and costs, of the goods and chattels of her intestate, and as to other damages and costs of her own goods and chattels," was returned "executed on certain slaves the property of the administratrix, and a forthcoming bond taken," &c. The bond being given by the administratrix, *eo nomine*, but expressing that the *f. fa.* was

against the goods and chattels of the said administratrix, was decided to be variant from the *A. fa.* and therefore quashed. *Glascok v. Dawson*, 1 Munf. 605.

The act of May 28, 1870, entitled an act to prevent the sacrifice of property at forced sales, acts of 1869-70, ch. 120, p. 162, does not require three months' notice of a motion on a forthcoming bond, where the bond was forfeited before the passage of the act. *Goolsby v. Strother*, 21 Gratt. 107.

b. On Appeal.—An appellate court will not reverse the judgment of an inferior court, overruling a motion to quash an undertaking or forthcoming bond made to the sheriff, simply because it appears that the undertaking was executed after the return day of the writ of *seri facias*. *Harwood v. Creel*, 8 W. Va. 579.

In reviewing a judgment by default on a forthcoming bond, the appellate court will compare it with the execution on which it was taken. *Glascok v. Dawson*, 1 Munf. 605.

A. B. & C. execute a forthcoming bond, to release the goods of A. taken in execution. C. pays the debt, and moves against B. as a principal in the bond. There is nothing in the bond to show whether B. was principal or surety. B. contends that he was only a surety jointly with C. The court below gives judgment for C. on the motion. No evidence is in the record to show whether B. was surety or principal. The judgment was affirmed in this court, as it will be presumed, that the court below had evidence before them, that B. was a principal and not a surety. *Cunningham v. Mitchell*, 4 Rand. 189.

If a *supersedeas* to a judgment (execution being levied, and a forthcoming bond taken), be issued before the day of sale; and thereupon, the property be not forthcoming; the penalty of the bond is saved, and no motion lies upon it. *Rucker v. Harrison*, 6 Munf. 181.

In a motion on a forthcoming bond, the defendant is not allowed to prove that the execution issued against another person of the same name who is now dead. *Downman v. Downman*, 2 Call 508.

One forthcoming bond may be taken on several executions. *Winston v. Com.*, 2 Call 290.

Where a judgment upon a forthcoming bond is obtained against a defendant, having legal notice, and appearing by attorney, but not moving to quash the bond, nor stating by plea or bill of exceptions, any variance between it and the execution, the appellate court is not to reverse the judgment on the ground of such variance. *Bronaughs v. Freeman*, 2 Munf. 266.

A forthcoming bond, being inserted in the transcript of the record, is to be taken as the bond on which the court gave judgment, without any certificate by the clerk to that effect.

If a judgment quashing a forthcoming bond be reversed, the appellate court will not proceed to give judgment for the plaintiff, unless it regularly appear that the defendants had legal notice of the motion, or appeared to oppose it. If, therefore, there be no bill of exceptions, making the notice, stated in the record, a part thereof, and it does not appear by the judgment itself, that the defendants had legal notice, or appeared in the court below, the cause should be sent back, to give the plaintiff an opportunity to prove his notice, and the defendants to make any defence thereto, which their case may admit of, according to law. *Beale v. Wilson*, 4 Munf. 880.

5. Effect of Bond.—An execution lien upon the property of a debtor is not released by his giving a

forthcoming bond, but continues until such bond is forfeited. *Lusk v. Ramsay*, 3 Munf. 417.

If a forthcoming bond be quashed, the lien of the execution prevails. *Rhea v. Preston*, 75 Va. 73.

A forfeited forthcoming bond stands as a security for the debt, and while in force no execution can be taken out, or other proceedings be had at law, to enforce the original judgment; such forfeiture of the bond has the effect of a judgment. Yet, even where forfeited, the bond is merely a suspension and not an absolute satisfaction of the judgment; for if it be faulty on its face, or the security when taken be insufficient, or the obligors, though solvent when the bond is taken, become insolvent afterwards, the plaintiff may for these or other good reasons, on his motion, have the bond quashed and be restored to his original judgment. *Rhea v. Preston*, 75 Va. 73; *Taylor v. Dundass*, 1 Wash. 92; *Puryear v. Taylor*, 12 Gratt. 408; *Downman v. Chinn*, 2 Wash. 189; *Lusk v. Ramsay*, 3 Munf. 417; *Trevillian v. Guerrant*, 11 Gratt. 528; *Randolph v. Randolph*, 3 Rand. 499; *Irvine v. Eldridge*, 1 Wash. 161; *Jones v. Myrick*, 8 Gratt. 179; *Frayser v. R. & A. R. Co.*, 81 Va. 393.

Until the forthcoming bond be forfeited there is no satisfaction of the execution. *Cooke v. Piles*, 2 Munf. 153; *Lusk v. Ramsay*, 3 Munf. 417.

Neither is there a satisfaction where the bond, though forfeited, is invalid. *Rhea v. Preston*, 75 Va. 73.

A forthcoming bond forfeited has the force of a judgment so as to create a lien upon the lands of the obligors, only from the time the bond is returned to the clerk's office. And there being no evidence that the bond was returned to the clerk's office before the day on which there was an award of execution thereon by the court, it will be regarded as having been returned to the office on that day. *Jones v. Myrick*, 8 Gratt. 179.

If a forthcoming bond be delivered, by the sheriff to the plaintiff, before notice thereupon be given to the defendants, execution may be awarded upon it, though it has not been filed in the clerk's office. *Eppe v. Colley*, 2 Munf. 523.

Though a forthcoming bond is forfeited, and not quashed, yet in equity the lien of the original judgment still exists; and if the obligors in the bond prove insolvent, so that the debt is not paid, a court of law will quash the bond so as to revive the lien of the original judgment. And a court of equity, having jurisdiction of the subject, will treat the bond as a nullity, and proceed to give such relief as the creditor is entitled to under his original judgment. *Jones v. Myrick*, 8 Gratt. 180.

A sheriff or other officer levying a writ of *seri facias* takes a forthcoming bond, and the property therein named is delivered upon the day of sale, but for the want of bidders is not sold, he can take another forthcoming bond under the statute. But a sheriff or other officer, who takes a second forthcoming bond for the property included in the first bond, is estopped from denying that the property was delivered in performance of the condition of the first bond. *Adler v. Green*, 18 W. Va. 201.

VII. DISCHARGE AND SATISFACTION

A. By Levy on Corporal Property.—A levy on sufficient personal property to satisfy the execution, is *prima facie* a satisfaction and discharge of the judgment. *Taylor v. Dundass*, 1 Wash. 95; *Bullitt v. Winstons*, 1 Munf. 282; *McKenzie v. Wiley*, 27 W. Va. 68; *Sherman v. Shaver*, 75 Va.

This presumption of satisfaction from levy may, however, be rebutted, by showing that it was not so treated by the creditor, and occasioned no loss to the debtor; though to the extent of the latter's loss the levy is conclusively a satisfaction. *Com. v. Byrne*, 20 Gratt. 207; *Walker v. Com.*, 18 Gratt. 47; *Rhea v. Preston*, 75 Va. 758.

The *prima facie* satisfaction resulting from levy, becomes absolute if the property be wasted or lost by reason of the fault or neglect of the officer, and the plaintiff must, in such case, seek his remedy against the officer. *Walker v. Com.*, 18 Gratt. 47; *Harman v. Oberdorfer*, 83 Gratt. 497; *Sherman v. Shaver*, 75 Va. 1.

Where the property levied on is left with the debtor and the levy abandoned, the lien is discharged, and other creditors may resort to such property in like manner as if no execution has issued. *Rhea v. Preston*, 75 Va. 758.

Where the defendant elognes or removes the property out of the reach of the officer, without the consent of either him or the plaintiff, there is no satisfaction. Neither is there a satisfaction if the property is restored or abandoned at the request of the defendant. *Walker v. Com.*, 18 Gratt. 45.

B. Satisfaction in Favor of Third Person.—In *Baird v. Rice*, 1 Call 18, 1 Am. Dec. 497, a judgment had been recovered against a principal debtor and his surety; the execution issuing thereon was levied on the property of the principal; the plaintiff, on receiving part of the money, gave the execution debtor further time, and ordered the officer to restore the goods to him. *Held*, by this procedure the judgment was discharged at law, and the surety, not having acquiesced in the agreement for further time, was discharged in equity. See also, *Bullitt v. Winstons*, 1 Munf. 269; *McKenzie v. Wiley*, 27 W. Va. 658; *Gatewood v. Goode*, 23 Gratt. 880.

But a mere countermand of an execution by a creditor after it goes into the hands of the sheriff, but before it is levied, does not release a surety of the execution debtor. *Humphrey v. Hitt*, 6 Gratt. 509, 52 Am. Dec. 133; *Knight v. Charter*, 22 W. Va. 422; *Ambler v. Leach*, 15 W. Va. 677.

Neither does the release of the levy of an execution upon property of surety release his co-surety, as they are joint principals as respects each other and the principals. *Alexander v. Byrd*, 85 Va. 690, 8 S. E. Rep. 577.

C. By Payment.

1. To Attorney.—In *Harper v. Harvey*, 4 W. Va. 541, the court said: "The payment of a judgment or decree to the attorney of record, who obtained it, before his authority is revoked, and due notice of such revocation given to the defendant, is valid and binding on the plaintiff so far as the defendant is concerned. *Yoakum v. Tilden*, 8 W. Va. 167. But it must be a payment of money, or if not a payment of money, it must be accepted by the plaintiff as money or the attorney must have special authority to receive it. *Smock v. Dade*, 5 Rand. 689." See also, *Pidgeon v. Williams*, 21 Gratt. 251; *Johnson v. Gibbons*, 27 Gratt. 637; *Hill v. Bower*, 18 Gratt. 364; *Smith v. Lamberts*, 7 Gratt. 141; *Evans v. Greenhow*, 15 Gratt. 159; *Kent v. Chapman*, 18 W. Va. 485; *Gilkeson v. Smith*, 15 W. Va. 44; *Low v. Settle*, 22 W. Va. 357.

2. By Third Persons.—A sheriff may purchase a debt, in his hands for collection by execution, if he act *bona fide*. The creditor holds the title, and he may transfer it to whom he will, and it makes no

difference that the advance is made at the instance of the debtor, provided there is no intention to extinguish the debt, and the judgment is assigned as a continuing security. *Rhea v. Preston*, 75 Va. 757; *Hall v. Taylor*, 18 W. Va. 544; *Beard v. Arbuckle*, 19 W. Va. 135; *Neely v. Jones*, 16 W. Va. 625, 37 Am. Rep. 794.

Subrogation.—A sheriff or other officer, who pays an execution in his hands for collection, without an assignment at the time, of the judgment on which it is founded, or the debt, is not entitled to be subrogated to the lien of the creditor whose debt he has paid, as against other creditors having liens by judgment or otherwise. *Clevinger v. Miller*, 27 Gratt. 740; *Kendrick v. Forney*, 22 Gratt. 748; *Beard v. Arbuckle*, 19 W. Va. 135.

3. Time of Payment.—A sheriff or other officer has no authority to receive payment under an execution after the return day thereof, unless the execution has been previously levied. Such payment would not bind the creditor; nor would it impose any liability upon the sureties of the sheriff in his official bond. *Grandstaff v. Ridgely*, 30 Gratt. 1; *O'Bannon v. Saunders*, 24 Gratt. 138; *Chapman v. Harrison*, 4 Rand. 336; *Cockerell v. Nichols*, 8 W. Va. 159.

Where it does not appear from the evidence that the execution was levied by the sheriff before the return day thereof had passed, a payment made to the sheriff upon such execution, after such return day had passed, is not binding upon the creditor, unless it appears that such payment was made to the sheriff by the direction or consent of the debtor. *Cockerell v. Nichols*, 8 W. Va. 159.

VIII. RELIEF AGAINST EXECUTION.

Though an execution is sued out irregularly and unlawfully, it is not void, but at most only voidable. Until it is avoided it must be regarded as a valid execution, and cannot be avoided by plea or proof in a collateral suit. *Beale v. Botetourt*, 10 Gratt. 231.

A. Motion to Quash.

1. In General.—It was held in *Lowther v. Davis*, 33 W. Va. 132, 10 S. E. Rep. 20, that a motion to quash is the proper remedy where an execution has been issued without authority of law. See also, *Taylor v. Dundass*, 1 Wash. 94; *Downment v. Chinn*, 2 Wash. 189.

In *Hamilton v. Shrewsbury*, 4 Rand. 427, there is a *dictum* to the effect that, where the sale, under a valid execution, is void, on account of the interest or improper conduct of the sheriff, the court from which the execution issued, may correct such abuse of its own process, by quashing the execution. See also, *Hendricks v. Dundass*, 2 Wash. 50.

Where an execution is issued by the clerk, who has no authority to do so, the court may quash the execution. *Shackelford v. Apperson*, 6 Gratt. 451.

In *State v. Brookover*, 38 W. Va. 141, 18 S. E. Rep. 476, it was held that an execution issued upon a judgment after two years from its rendition, without an order of court allowing its issuance, is properly quashed.

Upon a motion to quash a second execution in vacation, the judge may, in vacation, allow the sheriff to amend his return on the first execution. *Walker v. Com.*, 18 Gratt. 51; *Bullitt v. Winstons*, 1 Munf. 269.

If on a motion to quash an execution, the relief of the party depends upon a matter of fact, the court has a discretion to direct a jury to try the facts. *Smock v. Dade*, 5 Rand. 689, 16 Am. Dec. 780.

A tender of money in payment of a judgment, will not authorize the quashing an execution issued thereon, unless the tender is followed by the payment of the money into court, and a motion to enter satisfaction on the record. *Shumaker v. Nichols*, 6 Gratt. 592.

2. **After Payment of Judgment.**—Where a judgment had been paid before an execution thereon has been issued, it is proper to quash such execution upon motion. *Hall v. Taylor*, 18 W. Va. 544; *Howell v. Thomason*, 34 W. Va. 794, 12 S. E. Rep. 1088; *Smock v. Dade*, 5 Rand. 689, 16 Am. Dec. 780; *Crawford v. Thurmond*, 3 Leigh 85.

3. **When Judgment Set Aside.**—When a judgment is set aside, the execution which issued upon it falls with it, without any express order to quash the execution. *Ballard v. Whitlock*, 18 Gratt. 235.

4. **In Equity.**—The courts of chancery may quash executions irregularly sued out on their decrees, and forthcoming bonds taken under them, on motion made on notice, in a summary way. *Windrum v. Parker*, 2 Leigh 361; *Snively v. Harkrader*, 30 Gratt. 492.

5. **Notice of Motion.**—The motion to quash, as provided by statute, must be "after reasonable notice," and such notice, whatever may be the ground on which the notice is based, does not of itself suspend the execution of the writ. *Snively v. Harkrader*, 30 Gratt. 492.

It was held in *Ballard v. Whitlock*, 18 Gratt. 235, that, where the defendants being present by their counsel when the motion to quash an execution was made, they had reasonable notice of such motion.

In *Reinhard v. Baker*, 18 W. Va. 805, it was held that the length of notice of a motion to quash an execution, is a reasonable time, to be judged by the circumstances of each case; and that such motion may be made either by the plaintiff or defendant in the execution, and after the return day of the execution. See also, *Hendricks v. Dundass*, 2 Wash. 50.

6. **Parties to Motion.**—A motion to quash a writ of execution must be made in the name of the party on the record, and must be against the other party on the record; a stranger to the writ can only make the motion in the name of a legal party to the process. *Wallop v. Scarborough*, 5 Gratt. 1.

7. **Time When Motion Must Be Made.**—The motion to quash the execution need not necessarily be made before the writ has been returned, but may as well be made after the return. *Beale v. Botetourt*, 10 Gratt. 278; *Hendricks v. Dundass*, 2 Wash. 50; *Taylor v. Dundass*, 1 Wash. 92; *Reinhard v. Baker*, 18 W. Va. 805.

If, however, the writ has been returned *nulla bona*, a motion to quash will not lie. *Beale v. Botetourt*, 10 Gratt. 278.

In *Reinhard v. Baker*, 18 W. Va. 805, it was held, that if the money made by the sale of the property is still in the sheriff's hands, the writ may be quashed.

8. **On Appeal.**—An appeal from or *supersedeas* to, an order quashing an execution against two defendants, need not, if one of them die, be revived against his personal representative, but should be proceeded on as to the other only. *Bullitt v. Winstons*, 1 Munf. 269.

Execution is awarded on a forthcoming bond against the principal and the surety therein bound; the principal alone obtains an injunction to stay proceedings at law, which injunction is dissolved. *Held*, the surety is not liable for the damages incurred by the principal for retarding the execution

by an injunction; and if an execution issue against the surety as well as principal for such damages, it ought, on the surety's motion, to be quashed. The execution should be so moulded, as to exempt the surety from the damages, and to make the principal who incurred them alone liable therefor. *Garnett v. Jones*, 4 Leigh 638.

A tender of money in payment of a judgment will not authorize the quashing an execution issued thereon, unless the tender is followed by the payment of the money into court, and a motion to enter satisfaction on the record. A tender of money in payment of a judgment, will not authorize a court of equity to stop the execution, where there is neither allegation or proof that the defendant in the execution kept the money on hand for the discharge of the judgment. *Quære*: If a court of equity will interfere to arrest an execution on a judgment at law, on the ground that the money had been tendered before execution issued. *Shumaker v. Nichols*, 6 Gratt. 592.

A *supersedeas* will not lie where an execution has improperly issued upon a forthcoming bond. The injured party may move to quash the execution, and the judgment on that motion, if erroneous, may be corrected on an appeal or *supersedeas*. *Burwell v. Anderson*, 2 Wash. 194.

If the clerk of an inferior court, misconceive a judgment, and issue execution against any person not properly a party thereto, the remedy is not by *supersedeas* or writ of error, but by motion to quash the execution; and if such motion be overruled, an appeal may be taken to the court of error, or application may be made for a writ of error or *supersedeas* to the order overruling such motion. *Moss v. Moss's Adm'r*, 4 Hen. & M. 293.

B. Injunction.

1. **In General.**—Where an execution is irregularly issued, and the remedy by motion to quash is inadequate because of the formalities and delay incident thereto, it is competent for the judge in vacation to restrain proceedings upon it, by an injunction order. *Shackelford v. Apperson*, 6 Gratt. 61; *Snively v. Harkrader*, 30 Gratt. 487.

It was held, in *Crawford v. Thurmond*, 3 Leigh 85, that where a judgment had been satisfied by payment in full, before the delivery of the execution to the sheriff, further proceedings on such execution may be enjoined by a court of equity, though there was a remedy at law, by motion to quash. The latter remedy, under the circumstances, was not as safe and convenient as the former.

If a debtor under arrest by virtue of *ca. sa.* obtains an injunction against the execution, the sheriff is bound to discharge him from custody. *Ross v. Paythress*, 1 Wash. 120.

Equity will take jurisdiction by injunction to preserve the inheritance; and when a mill is about to be dismantled by execution—creditors of the owner, who have levied on the fixtures attached thereto, equity will interfere to prevent it. *Pattum v. Moore*, 16 W. Va. 428.

A defendant in an execution files a bill to enjoin the execution on the ground that a previous execution sued out on the same judgment had been levied by the sheriff on the property of another defendant in the execution, sufficient to discharge it. In such case the bill must be filed in the county in which the judgment was recovered; and the circuit court of another county has no jurisdiction of the case. In such case it is not necessary that the objection to the jurisdiction should be made by demurrer or plea.

but it may be taken at the hearing of the cause. *Beckley v. Palmer*, 11 Gratt. 625.

The courts of chancery have jurisdiction in all cases where property taken in execution on behalf of the commonwealth is claimed by any person under a mortgage or deed of trust. *Moore v. Auditor*, 8 H. & M. 232.

Upon the dissolution of an injunction on a judgment, the damages for retarding execution by the injunction, should be computed on the aggregate of principal, interest and costs, appearing due on the judgment at the date of the injunction. And the damages should be ascertained, and the precept to levy them inserted in the body of the execution. *Washington v. Parks*, 6 Leigh 581.

2. *Adequate Remedy at Law*.—Where, however, the remedy at law is full, summary, adequate, and complete, a court of equity will not assume jurisdiction to enjoin an execution. *Hall v. Taylor*, 18 W. Va. 544; *Howell v. Thomason*, 34 W. Va. 794, 12 S. E. Rep. 1088; *Morrison v. Speer*, 10 Gratt. 228; *Crawford v. Thurmond*, 3 Leigh 85; *Jarrell v. Eddins*, 2 Pat. & H. 579.

In *Shumaker v. Nichols*, 6 Gratt. 592, it was held that a tender of payment of a judgment, unless followed by actual payment into court, or to the creditor, did not entitle the debtor to the right to enjoin an execution.

The trustees or *cestui que trust* cannot go into a court of equity to enjoin a sale of trust effects under an execution issued and levied by virtue of a subsequently acquired judgment, there being a complete and adequate remedy at law. *Kuhn v. Mack*, 4 W. Va. 186.

In *Williamson v. Ong*, 1 W. Va. 84, a judgment had been confessed in favor of the plaintiff, subject to sundry credits. Execution was issued thereon, without indorsing the credits. After levy had been made the defendant gave the plaintiff notice that he would move to quash the execution because of the variance from the judgment, occasioned by the failure to endorse the credits in the execution. Previous to the sale, however, the clerk who issued the execution endorsed the credits on it. *Held*, that no injury resulted to the defendant by the endorsement of the credits after issuance of the execution, and that it was error in the lower court to quash the execution for that reason.

A party claiming that he has not been credited for all the money paid by him to the sheriff, on an execution, may have any injustice done to him in that respect corrected by the court from whence the execution issued; and it is not a case for an injunction and relief in equity. *Morrison v. Speer*, 10 Gratt. 228.

In a case where, by virtue of an agreement between a judgment debtor and a judgment creditor, the judgment ought to be entered as satisfied, but in lieu thereof the creditor has an execution issued and levied upon the goods of the debtor, the latter cannot obtain relief by injunction in a court of equity, for the reason that he has a complete and adequate remedy at law. *Howell v. Thomason*, 34 W. Va. 794, 12 S. E. Rep. 1088.

Where the debtor in an execution objects that a previous execution has been levied by the sheriff upon sufficient property to satisfy the judgment, and that he has improperly misapplied the proceeds of the sale of the property, or if he insists that payment has been made to the sheriff which has not been credited on the execution, if he has an opportunity to apply to the court of law from which the execu-

tion issued, for redress, he has no right to come into equity for relief. *Beckley v. Palmer*, 11 Gratt. 625.

3. In Favor of Strangers.

a. *General Rule*.—Generally a stranger, whose property has been or is threatened to be wrongfully levied upon, has a complete and adequate remedy at law, and hence is not entitled to an injunction. *Bowyer v. Creigh*, 3 Rand. 26; *Baker v. Rinehard*, 11 W. Va. 238; *White v. Stender*, 24 W. Va. 615; *Dunn v. Baxter*, 30 W. Va. 672, 5 S. E. Rep. 214; *Allen v. Freeland*, 3 Rand. 170; *Rollins v. Hess*, 27 W. Va. 570.

b. *Qualifications*.—Where, however, the remedy at law is inadequate, owing to the nature of the property or other peculiar circumstances, an injunction will be allowed. *Bowyer v. Creigh*, 3 Rand. 26; *Allen v. Freeland*, 3 Rand. 170; *Kelly v. Scott*, 5 Gratt. 479; *Sims v. Harrison*, 4 Leigh 346; *Randolph v. Randolph*, 6 Rand. 194; *Green v. Phillips*, 26 Gratt. 752; *McMillan v. Ferrell*, 7 W. Va. 223; *Walker v. Hunt*, 2 W. Va. 401; *Patton v. Moore*, 16 W. Va. 428; *Wilson v. Butler*, 3 Munf. 559; *McFarland v. Dilly*, 5 W. Va. 185.

c. *Writ of Error*.—Upon an appeal, from the judgment of an inferior court, errors in the execution or replevy bond, issued or taken after the judgment, will not be noticed. They are merely ministerial acts, and must be corrected in the same court upon motion; and if, on such motion, that court give an erroneous opinion, the party injured may then appeal and have it corrected in the appellate court. *Leftwich v. Stovall*, 1 Wash. 306; *Moss v. Moss*, 4 H. & M. 314.

An execution of an inferior court used as evidence upon the trial of the cause, will be regarded by the appellate court as part of the record without *certiorari*. *Preston v. Auditor*, 1 Call 471.

The writ of *supersedeas* stays the proceedings in the state they were when it was allowed, and, therefore, when the execution of a judgment is suspended for a given time, and no *supersedeas* is allowed until after the expiration thereof, and an execution is sued out and possession of property delivered to the plaintiff, no writ of restitution will be awarded until the cause is decided. *Kregio v. Fulk*, 3 W. Va. 74.

d. *Audita Querela*.—The *audita querela* is entirely superseded, in the Virginia practice, by the proceeding by motion to quash, as the latter is the cheaper and more convenient mode. *Windrum v. Parker*, 2 Leigh 367; *Smock v. Dade*, 5 Rand. 644.

IX. SALE UNDER EXECUTION.

The third and last step after the issuance of the execution, is the sale of the property. Then and not until then, the plaintiff may be said to have gotten to the end of his suit, at least as far as the defendant is concerned, and to the extent of the value of the property. *Walker v. Com.*, 18 Gratt. 43; *Rhea v. Preston*, 75 Va. 757.

a. *When Valid, Though Irregular*.—A sale of property under an execution, by the sheriff, is *bona fide*, though irregular; and the purchaser leaves the property with the debtor in the execution. *Held*, the sale is valid, and the property is not liable to the creditors of the debtor in execution. Irregularities in the sale, if any, did not affect the validity thereof, the same having been acquiesced in by both the plaintiff and the defendant in the execution. *Carr v. Glasscock*, 3 Gratt. 354.

If the sale, under a valid execution, is void on account of the interest or improper conduct of the sheriff, the court may quash the execution. But a fair purchaser under a sheriff's sale, without knowledge of any improper conduct on the part of the offi-

cer, acquires a valid title to the property purchased, and the remedy of the injured party is by action of law, for damages, against the sheriff. *Hamilton v. Shrewsbury*, 4 Rand. 427.

Where land sold under a judicial decree contained but 89 acres instead of 90 as described in the deed, it was held, upon objection by the purchaser, that, as it was a sale in gross, and not by the acre, the purchaser was not entitled to an abatement of the purchase money. *Jones v. Tatum*, 19 Gratt. 720.

A deed from a sheriff, which conveys all "the right, title and interest, vested in the sheriff by law, in and to eight negroes, conveyed by a debtor to his children," without naming the negroes, is sufficiently descriptive to pass them. The identity of the negroes is matter of proof, and as soon as they are identified, the deed operates on them. *Shirley v. Long*, 6 Rand. 795.

B. When Property Sold Left with Debtor.—A purchaser of property sold under an execution, leaves it in the possession of the original owner, but possession thereof is taken by the administrator of the purchaser before creditors have acquired a specific lien thereon by judgment and execution. *Held*, it is not liable to the original owner's debts. *Carr v. Glascock*, 3 Gratt. 343.

C. Sale Delayed by Plaintiff.—A plaintiff by directing the sheriff to put off the sale of property taken in execution, to a day after the return day, and to allow the property to remain in the possession of the debtor, releases the latter's sureties altogether, from that or any subsequent execution,—such direction being without their concurrence. *Bullitt v. Winstons*, 1 Munf. 269.

D. Sale of Equity of Redemption.—At a sale by the sheriff of an equity of redemption surrendered by a debtor in execution, the whole amount of the debt secured by the deed of trust on the land, is stated to be due, when in fact the debtor is entitled to a credit thereon. In a suit by the insolvent debtor setting up such claim, the creditor in the execution is a necessary party. *Tiffany v. Kent*, 2 Gratt. 231.

In selling an equity of redemption, the sale will be out and out—not of a moiety only, but the whole; and as between lands aliened, the whole of the tract aliened last will be sold before any part of the tract aliened first; the sales stopping when the debt has been satisfied, or when lands have been sold equal to half the aggregate value of the whole lands. *McClung v. Beirne*, 10 Leigh 304, 34 Am. Dec. 739.

E. Sale under Second of Two Executions.—Whilst on the one hand, where an officer holding two executions sells under the second, the title of the purchaser is good against the plaintiff in the first, and the remedy of the latter is against the officer, so on the other hand the purchaser at such sale cannot invoke the lien of the first execution, in aid of a title acquired at a sale made under the second. Therefore, where a slave was levied upon under a *f. fa.* delivered to a constable before any conveyance of the slave by the debtor, and other executions issued after such conveyance, under which (and not under the first *f. fa.*) the evidence tended to prove that the slave was sold, it was *held*, in an action brought by the grantee in the conveyance against the purchaser at the sale, that the title of the purchaser must be referred to the process under which the sale was made. *Eckhols v. Graham & Others*, 1 Call 492; *McKey v. Garth*, 2 Rob. 83, 40 Am. Dec. 725.

F. Statutes Regulating Sales.—The act of May 28, 1870, *sep. acts* 1869-70, p. 162, to prevent the sacrifice of personal property at forced sales, which requires

the officer selling personal property, for a debt contracted before the 10th of April 1865, when required by the debtor, to sell upon a credit of twelve months, is not unconstitutional, as impairing the obligation of the contract, or as being in violation of sec. 4, article 11, of the state constitution, prohibiting the enactment of a stay law. The bonds taken at sales under this act are in the nature of forthcoming bonds; and the creditor is not bound to receive them as so much paid on his debt. *Garland v. Brown*, 23 Gratt. 173.

The act of the 19th of Jan. 1802, (Rev. Code, vol. 1, c. 295, p. 425) which authorizes clerks of courts to issue writs of *venditioni exponas* in certain cases, is prospective only, in its operation, and consequently does not extend to cases existing before it was passed. *Com. v. Hewitt*, 2 Hen. & M. 181.

A party may, without any previous notice, move the court to direct an execution to be issued, (where the clerk refuses to issue one,) or to quash an execution; and it will be so far considered a cause depending, that either party may appeal from the decision of the court on such motion. *Com. v. Hewitt*, 2 Hen. & M. 181.

G. Caveat Emptor.—Purchasers at an execution sale are bound to take notice of all errors apparent on the record, and are chargeable with notice as to whether the proper persons were parties to the suit. *Lamar v. Hale*, 79 Va. 147; *Hall v. Hall*, 30 W. Va. 72, 5 S. E. Rep. 260.

H. Purchase by Officer at His Own Sale.—A sale by a sheriff will be vacated, if he raises doubts, or makes impressions unfavorable to a fair sale, and then buys the property at an under rate. *Carter v. Harris*, 4 Rand. 190.

I. When Sale Enjoined.—Where the sheriff in levying an execution takes property of a third person, equity will enjoin the sale of such property, under the execution. *Whitton v. Terry*, 6 Leigh 189.

K. Sale of Debtor's Unascertained Interest.—A sale by the sheriff of the interest of an execution debtor in an estate, before it is ascertained, is void; and the purchaser, if he took possession of the property, will be liable for the rents, hires and other profits of the property, and for the value of such of it as he has sold or otherwise converted to his own use, or has been lost by his act or wilful neglect; and he will be entitled to be reimbursed for the amount paid by him to the sheriff for the property. *Penn v. Spencer*, 17 Gratt. 85, 91 Am. Dec. 575; *Clough v. Thompson*, 7 Gratt. 33; *Guerrant v. Anderson*, 4 Rand. 328.

L. Distingas against Sheriff's Executors.—In *Harrison v. Tomkins*, 1 Call 295, it was held that no *distingas* lies against the executors of a sheriff to oblige them to sell property taken by him in his lifetime, under a writ of *fieri facias*.

X. LIABILITY OF OFFICER.

A. Where Levy is Made.—When an execution has been placed in the hands of an officer, in the absence of evidence that he did not levy it, he and his sureties will be liable for the debt to the creditor. *O'Bannon v. Saunders*, 24 Gratt. 138; *Chapman v. Harrison*, 4 Rand. 386; *Ballard v. Thomas*, 19 Gratt. 24; *Tyree v. Wilson*, 9 Gratt. 61; *Grandstaff v. Ridgely*, 30 Gratt. 15; *Paine v. Tutwiler*, 27 Gratt. 444.

B. For Failure to Levy.—If an officer fails to levy an execution when he might do it, he and his sureties are liable for the debt. *O'Bannon v. Saunders*, 24 Gratt. 138.

In *Huffman v. Leffell*, 32 Gratt. 41, where the officer failed to levy on property claimed by the debtor as

homestead, before an indemnifying bond which he demanded from the creditor was given, by reason of which the debt was lost, it was held that the officer was excusable for not levying, and hence not liable.

But see, *Sage v. Dickinson*, 33 Gratt. 361, where the facts were similar to those in the above case of *Huffman v. Leffell*, 32 Gratt. 41, except that the property levied on was released, and no indemnifying bond was demanded or required by the officer; here he was held liable for the loss of the debt.

C. For Levy on Wrong Property.—If a deed of trust be fair and the sale under it be fair also, a sheriff who levies an execution, (issued against the goods and chattels of the debtor in the deed,) on the property so fairly sold and in the possession of the purchaser, is a trespasser, and an action will lie against him. *Clayton v. Anthony*, 6 Rand. 285; *Sangster v. Com.*, 17 Gratt. 124; *Garrett v. Hutchison*, 36 Va. 872, 11 S. E. Rep. 406.

D. Fine for Not Returning Execution.—In *Bierne v. Mann*, 5 Leigh 364, a sheriff was fined for failure to make return of an execution, and it was held that equity will not assume jurisdiction to relieve the officer and his sureties from liability on the fine. See also, *McDowell v. Burwell*, 4 Rand. 317; *Fletcher v. Chapman*, 2 Leigh 560.

If the sheriff neglects to return an execution, at the request of the plaintiff, he is not liable to a fine. *Bullock v. Goodall*, 3 Call 44.

E. Indemnifying Bond.—According to statute, the officer may, before levy of an execution, demand of the creditor an indemnifying bond, where any doubt arises as to the right to levy. This bond is conditioned to indemnify the officer or any claimant against all damages which may be sustained by reason of the levy, and also to warrant and defend to any purchaser of the property such estate as is sold. *Davis v. Davis*, 2 Gratt. 363; *Dabney v. Catlett*, 12 Leigh 363; *Aylett v. Roane*, 1 Gratt. 284; *Hewlett v. Chamberlayne*, 1 Wash. 367; *McClun v. Steel*, 2 Va. Cas. 256; *Johnstons v. Meriwether*, 3 Call 523; *Crawford v. Jarrett*, 2 Leigh 630; *Stone v. Pointer*, 5 Munf. 290.

F. For Non-Payment.—A county creditor provided for in the levy of an execution, is not bound to apply to the sheriff or his deputies for payment, before he proceeds to enforce payment of his debt by the sheriff and his sureties. But when the plaintiff in execution does not reside in the same county, with the sheriff, there must be a demand of payment, before an action can be maintained on the sheriff's official bond. *Ballard v. Thomas*, 19 Gratt. 14; *Grandstaff v. Ridgely*, 30 Gratt. 1; *Tyree v. Donnelly*, 9 Gratt. 64.

It seems that since the attorney at law, who prosecutes a suit and obtains judgment, has full power to receive the money recovered when levied by execution, a demand made by him of the sheriff by whom it is levied, is sufficient to authorize a motion against such sheriff for non-payment. *Wilson v. Stokes*, 4 Munf. 455.

XI. SUPPLEMENTARY PROCEEDINGS.

A. By Statute.—The power given by section 4, chapter 218 of the Acts of 1872-3, to the commissioner to attach a defendant, who refuses to answer the interrogatories propounded to him as provided therein, is constitutional. And the act authorizing courts to appoint commissioners in chancery is constitutional. *Lewis v. Rosler*, 19 W. Va. 61.

B. Order for Payment or Delivery of Property.—Under the fifth section of chapter 141 of the Code a commissioner may in the manner prescribed by that section compel the debtor to convey his real estate lying out of this state to satisfy the creditor's judgment: but he is not authorized to compel the debtor to execute an assignment of his chose in action for such purpose. *Spang v. Robinson*, 24 W. Va. 327.

C. Writ of Capias Pro Fine.—The common-law writ of *capias pro fine* is unrepealed, and may be used by the Commonwealth. Where there is a judgment in favour of the Commonwealth for a fine and costs of prosecution, the writ may issue for the fine and the costs; but where the judgment is for the costs without a fine, the writ is not a proper process to enforce the judgment. Where a party is imprisoned upon a *capias pro fine* for a fine and costs, he can only obtain his discharge from imprisonment by paying the fine and costs. *Commonwealth v. Webster*, 8 Gratt. 702.

XII. EXECUTION AGAINST THE PERSON.

A. Priorities.—Several creditors recover judgments against N., and sue out writs of *ca. sa.* upon which he is taken and charged in execution; then F. recovers judgment against the same debtor, and sues out *elegit* on which his lands are extended, and a moiety delivered to F., and then the debtor is regularly discharged from custody under the writs of *ca. sa.* as an insolvent debtor, putting into his schedule the whole of lands which had been extended under F's *elegit*. Held, the lien of the writs of *ca. sa.* executed, given by the statute, 1 Rev. Code, ch. 134, § 10, does not overreach and avoid the extent under F's *elegit*. *Foreman v. Loyd*, 2 Leigh 284, *overruling* *Jackson v. Heiskell*, 1 Leigh 257.

Where after the rendition of the judgment but before the *ca. sa.* was executed, mortgages were executed by the debtor to secure debts to other creditors, it is held that the judgment lien was destroyed by the actual service of the *ca. sa.*, and the mortgagees were entitled to precedence. *Rogers v. Marshall*, 4 Leigh 425.

On a judgment against several, the service of a *ca. sa.* on one, and the execution and forfeiture of a forthcoming bond by him, does not extinguish the lien of the judgment upon the land of the others. *Leake v. Ferguson*, 2 Gratt. 419.

B. Title to Property.—Upon the taking of the insolvent debtor's oath, the land of the insolvent vests in the sheriff of the county where the land lies, without any deed from the insolvent; and a deed from him attempting to convey it to the sheriff of another county is inoperative. *Ruffners v. Lewis*, 7 Leigh 720; *Syrus v. Allison*, 2 Rob. 200.

An endorsement of the name of the sheriff on the bond before action brought, is a sufficient assignment thereof; and the action may be maintained by the creditor as assignee, without writing out the assignment; or the assignment may be written out in the progress of the trial after the jury is sworn. *McGuire v. Pierce*, 9 Gratt. 167.

C. Alias and Pluries Executions.—If a debtor be arrested on a *ca. sa.* and discharged by order of the creditor or his agent, no other execution can be had on the same judgment or decree. But if a debtor in custody under a *ca. sa.* be permitted to escape, the creditor is entitled to another execution against the debtor as well as to an action against the sheriff for the escape. *Windrum v. Parker*, 2 Leigh 361; *Noyes v. Cooper*, 5 Leigh 186; *Fawkes v. Davison*, 8 Leigh 554.

A writ which purports to be a *pluries capias*, but which is without date, and is not attested by the clerk, is wholly null and void as process. *Hickam v. Larkey*, 6 Gratt. 210.

D. Prison Fees.—If a debtor be able to pay his own prison fees, the jailor cannot demand them of the creditor. And the presumption is, that the debtor is able to pay them, until the contrary be shown by the jailor. *Rose v. Shore*, 1 Call 540.

Under the act of 12th February, 1823, ch. 30, §§ 2 and 3, concerning jailors, a written notice of the imprisonment of the debtor is necessary from the jailor to the creditor, his agent or attorney, to enable the jailor to recover his fees for supporting the debtor under the creditor's execution. The knowledge by the creditor, that his debtor is in jail under his execution, will not dispense with the written notice. Sixty days (after the notice) must expire before the jailor's right, to move for his fees, accrues; and he cannot recover for fees due prior to his notice. *Zimmerman v. Buzzard*, 2 Va. Cas. 406.

The creditor of an insolvent prisoner, who has the liberty of the rules, is bound to give security for the prison fees; but the sheriff cannot legally discharge him, unless he be actually insolvent, and, being so, the plaintiff having notice thereof, refused to pay his fees, or to give bond for the payment thereof. *Meredith v. Duval*, 1 Munf. 76.

E. Return.—An execution against the person, and the officer's return thereof, though sued by an officer other than the officer to whom it was directed, will not for that reason be quashed. *Purcell v. Richardson*, 4 H. & M. 404; *Turner v. Harris*, 1 Rob. 475.

A *capias ad respondendum* is made returnable to the next term generally, instead of the first day of the term as the statute requires; the writ is executed before the term and returned to the first day; an office judgment is entered at rules; at the ensuing term, defendant moves to quash the writ and all the proceedings on it at rules, on the ground that the writ being returnable to term generally, was void; and the court overrules the motion. *Held*, the motion was rightly overruled. *Hare v. Niblo*, 4 Leigh 359.

F. Discharge from Custody.

By Payment.—It seems that where a *capias ad satisfaciendum* is executed at any time before the return-day thereof, the sheriff may receive property tendered by the debtor, in discharge of his body out of custody, and appoint a day of sale posterior to the return-day; and that a bond for the forthcoming of such property is good in law, though dated after such return-day. *Dix v. Evans*, 3 Munf. 308.

Where a party imprisoned upon a *capias pro fine* for a fine and costs, he can only obtain his discharge from imprisonment by paying the fine and costs. *Com. v. Webster*, 8 Gratt. 702.

By Oath of Insolvency.—A county court, or justices of peace in the country, to whom a debtor in execution applies to have the oath of insolvency administered to him, and to be thereupon discharged, have no discretion to administer or refuse to administer the oath, but are bound to administer it, though they may be of opinion that the debtor has effects not put into his schedule to be surrendered which he fraudulently conceals. *Harrison v. Emmerston*, 2 Leigh 764; *Shirley v. Long*, 6 Rand. 737.

By Prison-Bonds Bonds.—Upon a writ of *ca. sa.* sued out for debt, the debtor is taken in execution by the sheriff, who permits him to go at large, upon his giving a bond to the sheriff with condition that he will surrender himself into custody under the pro-

cess, on a day certain, the debtor does voluntarily surrender himself into the custody of the sheriff upon the process, accordingly; and, then, wishing to have the benefit of the prison rules, gives a prison-bonds bond with sureties. *Held*, the debtor was legally in custody of the sheriff at the time the prison-bonds bond was given, and so this bond is good and binding on the sureties. *Carthrae v. Clarke*, 5 Leigh 268.

If the prisoner depart from the rules by an illegal discharge from the sheriff, the creditor, having an assignment of the bond has his election to bring suit upon it, or to sue the sheriff. *Meredith v. Duval*, 1 Munf. 76.

There is a joint judgment and execution against two, who have been arrested and committed to prison. They may jointly execute a prison-bonds bond. *McGuire v. Pierce*, 9 Gratt. 167.

By Injunction.—If a debtor in execution obtain an injunction, the sheriff is bound to discharge him from custody. *Ross v. Poythress*, 1 Wash. 122.

448 *Danville Bank v. Waddill.

March Term, 1876, Richmond.

I. Limitations.—“Stay Law.”—In an action of *assumpsit*, on the plea of the statute of limitations, the time from the 2d of March 1866, to the 1st of January 1869, is to be left out of the computation.

II. Same—Instructions—Exception te.—To an action of *assumpsit* there is a plea of payment and of the statute of limitations. On the trial the plaintiff asks the court to instruct the jury that in passing upon the plea of the statute they must leave out of the computation of time all the period extending from the 2d of March 1866 to January 1st, 1869. The court refuses to give the instruction, and plaintiff excepts. The jury find a general verdict for the defendant, and there is judgment accordingly. *Held*:

1. **Same—Same—Error—New Trial.**—That the appellate court will reverse the judgment for the error in refusing the instruction, and send the case back for a new trial.

2. **Same—Same—Same—When Awarded.**—This will always be done, unless the appellate court can see from the whole record, that even under correct instructions a different verdict could not have been rightfully found, or unless it is able to see that the erroneous ruling of the trying court could not have influenced the verdict. The *onus* is upon the appellee to show this, and where there are distinct issues a general verdict is not sufficient in general to show it.

This was an action of *assumpsit* in the circuit court of the town of Danville, brought in March 1872 by the Danville Bank against Pleasant Waddill. The declaration contained the common counts, and also a

***Limitations—Stay Law.**—As to the effect of the suspension of the running of the statute of limitations, see *Connecticut, etc. Co. v. Duerson*, 28 Gratt. 690, citing the principal case, and also, *Johnston v. Gill*, 27 Gratt. 587. The principal case is again cited in *Justis v. English*, 30 Gratt. 573. See further, *Marrison v. Householder*, 79 Va. 628; 4 Min. Inst. (2d Ed.) 567; *Barton's Law Pr.* (2d Ed.) 79.

†**Instructions.**—See monographic note to *Womack v. Circle*, 29 Gratt. 192, on “Instructions Generally.”

special count, in which it was alleged that in April 1865 the Danville Bank delivered to Waddill \$4,865 in gold, to be by him kept and to be delivered to the plaintiff when demanded.

449 *The defendant appeared and filed the pleas of payment, and the statute of limitations; on which issues were made up.

On the trial of the cause the plaintiff moved the court to instruct the jury as follows:

Evidence having been introduced before the jury at the trial of this cause, tending to show that the right of action set forth and relied on in the plaintiff's declaration, first accrued on the 30th of May 1865, on notion of the plaintiff by counsel the court instructs the jury that in passing upon the issue raised in the cause by the plea of the statute of limitations pleaded by the defendant, they shall leave out of the computation of time all the period extending from the 1st of March 1866 to the 1st of January 1869. But the court refused to give the instruction.

The jury found a verdict in the following words: "We the jury find a verdict for the defendant." The plaintiff thereupon moved the court to set aside the verdict and grant a new trial; but the court overruled the motion, and rendered a judgment in favor of the defendant; and the plaintiff excepted. The exception contains the instruction asked by the plaintiff and refused by the court, as above stated. On the application of the plaintiff this court awarded a supersedeas.

E. Barksdale, Flournoy and Dabney, for the appellant.

Ould & Carrington, for the appellee.

Staples J. In an action of assumpsit brought in the circuit court of Pittsylvania by the Danville Bank against Waddill, the issues were made up on the pleas of non assumpsit, and the statute of limitations. 50 On the trial the plaintiff asked the court to instruct the jury, "that in passing upon the issue raised by the statute of limitations, they shall leave out of the computation of time all the period extending from the 1st of March 1866 to the 1st day of January 1869." The court refused to give this instruction; and the plaintiff excepted. Thereupon the jury rendered their verdict in the following words: "We the jury find a verdict for the defendant;" which verdict the plaintiff moved the court to set aside, and grant it a new trial; but the motion was overruled; and the plaintiff gained excepted.

There is no doubt but that the court erred in refusing to give the plaintiff's instruction. Indeed, this is not seriously controverted by the counsel for the defendant. The only question, then, we have to consider is, whether a new trial is to be granted. The rule almost universally recognized is, that a misdirection of the trying court is always a ground of reversal, unless it can be plainly seen from the bill of ex-

ceptions that the error did not and could not affect the verdict. *Kincheloe v. Tracewells*, 11 Gratt. 587; *Noyes v. Shepherd*, 30 Maine R. 173; *Graham and Waterman on New Trials*, 869.

In *Wiley et als. v. Givens*, 6 Gratt. 277, 285, this court went much farther. In that case, an erroneous instruction having been given in the court below, it was argued that this court ought not to reverse on that ground, if upon the whole record it appeared that the judgment was substantially correct. But it was held, that the appellate court could look no farther than to the propriety of the instruction given; and if it was erroneous, the judgment would be reversed and a new trial granted. That decision was followed by this court in *Rea's adm'x v. Trotter*, 26 Gratt. 585.

451 Whatever may be said of the ruling in these two cases, it will not be disputed, that whenever an erroneous instruction is given, or what is the same thing, a correct one refused, the judgment will be reversed, unless the appellate court can see from the whole record, that even under correct instructions a different verdict could not have been rightly found, or unless it is able to perceive that the erroneous ruling of the trying court could not have influenced the jury.

The learned counsel maintains, that such was the case here, as is proved by a general verdict for the defendant; that such a verdict is responsive to both issues; that the jury would have found a verdict for the defendant, even if the court had given the instruction; for they have found for the defendant upon the plea of non assumpsit as well as upon the plea of the statute of limitations: and so, with or without the instruction, the result would have been the same.

The defect in this argument is, in assuming that a general verdict is necessarily a finding upon all the issues in favor of the party for whom it is rendered. It is certainly more regular in practice, and in some cases it is essential, that the finding shall respond to all the issues. The cases of *Hite's heirs v. Wilson*, 2 Hen. & Munf. 268; *Jones' ex'or v. Henderson*, 4 Munf. 492, furnish illustrations of this rule. In the latter case issues were joined on the "pleas of payment and fully administered;" the jury found for the defendant, "the having fully administered," &c. A judgment on this verdict was reversed by this court, on the ground that the issue on the plea of payment had not been tried. The reasons upon which this decision was based are too obvious to require comment.

On the other hand cases often occur in which the finding of one issue is decisive of the case, and renders a consideration of the others wholly unnecessary or immaterial. In *French v. Hanchett*, 12 Pick. R. 15, and *Inhabitants of Sutton v. Inhabitants of Dana*, 1 Metc. R. 383, may be found illustrations of this principle.

In 1 Rob. Prac. 365, (old ed.) it is said, where there are several issues, and the jury is of opinion that the defendant ought to succeed upon any one of them, it is common to find a general verdict in his favor. This observation is in accord with the experience of any lawyer familiar with the practice in the inferior courts of the state. Can we affirm that the jury did not pursue this course in the case before us. Is it not to be inferred they did pursue it. They had been told in effect by the court, that the claim of the plaintiff was barred by limitation; why should they give themselves the trouble to consider it upon its merits. One of the issues was of easy solution under the instruction of the court; the other depended upon difficult questions of evidence, conflicting testimony requiring careful examination. Is it not more reasonable to suppose that the verdict was based upon the law as expounded by the court, rather than the troublesome controverted question of fact. We cannot assert that this was done: we cannot assert that it was not done. In this state of uncertainty, a reversal is the inevitable result of the misdirection. Where the chances are equal, that the verdict resulted from the error of the judge, a new trial will be granted. 3 Graham & Waterman on New Trials, 872. In Wardell v. Hughes, 3 Wend. R. 418, Marcy J. in commenting upon a somewhat similar case, said: If the verdict was found on the first ground it ought to be set aside for the misdirection of the judge; if on the latter ground, the evidence being of such a character, it might be regarded as insufficient to show the assent of *More, it should not be disturbed. Inasmuch therefore as the verdict may have resulted from the misdirection of the judge—and I think that there is an equal chance that it did—a new trial ought to be granted.

The result of all the authorities and of the reasoning on the subject is, that the onus is upon the party in whose favor the error was committed. The onus is upon him clearly to show that the error did not and could not affect the merits.

If the matter be doubtful, if the pleadings point to two distinct propositions, and the verdict may be referred to either, without indicating which, unless indeed the court is able clearly to perceive that the finding would have been the same without the instruction, the judgment will be reversed and a new trial granted.

The learned counsel for the defendant has depicted in strong language the injustice which he supposes may result to the defendant without any means of redress. He insists, that in this case, the defendant, being successful, could take no bill of exceptions; he must necessarily accept the verdict as the jury renders it. It is sufficient to say, that a party, in whose favor an instruction is given or refused is fully apprised by the exception taken, that the ruling may be the subject of review by an appellate court. If he means to rely upon the fact that the misdirection did not affect

the finding of the jury, he must take care that the record so shows beyond all controversy. He has only to ask that the verdict may be so extended as to cover in unmistakable terms all the issues, or so many of them as are sufficient to show the grounds upon which the jury proceeded. If he fails in this, he cannot justly complain that an error occasioned by himself leads to a reversal of his judgment.

454 *For these reasons the judgment of the circuit court is reversed, and the case remanded for a new trial; upon which the circuit court is to give the instruction if again asked for.

Moncure P. and Anderson J. concurred in the opinion of Staples J.

Christian J. dissented.

Judgment reversed.

455 *Norfolk & Petersburg R. R. Co. v. Ormsby.*

March Term, 1876, Richmond.

[17 Am. Ry. Rep. 321.]

1. *Negligence—Ordinary Care.*†—The terms negligence and ordinary care are correlative terms. Ordinary care depends on the circumstances of the particular case, and is such care as a person of ordinary prudence under the circumstances would have exercised.
2. *Same—Railroads on City Streets—Injury to Children.*‡—A railroad company running its cars through a populous street of a city, on which many children live, must omit nothing which can be done by the company and its agents to prevent injury to children on the street.
3. *Contributory Negligence of Children.*—A child two years and ten months old cannot be capable of contributory negligence, so as to relieve a railroad company from liability for its own negligence.
4. *Same—Imputed Negligence of Parent.*§—Negli-

*For monographic note on Damages, see end of case.

†*Negligence—Ordinary Care.*—In *Bertha Zinc Co. v. Martin*, 93 Va. 805, 22 S. E. Rep. 899, JUDGE BUCHANAN, delivering the opinion said: "Ordinary care depends upon the circumstances of the particular case, and is such care as a person of ordinary prudence, under all the circumstances, would have exercised." This was the doctrine laid down by this court in the case of the *Norfolk & Petersburg R. R. Co. v. Ormsby*, 37 Gratt. 455, and which has been reiterated in subsequent cases as late as the case of *Richlands Iron Co. v. Elkins*, 90 Va. 249, 251, 17 S. E. Rep. 899."

In West Virginia, see *Fowler v. B. & O. R. Co.*, 25 W. Va. 568, citing the principal case with approval: 15 Am. & Eng. Enc. Law 38 *et seq.*

‡*Railroads on City Streets.*—In *N. & W. R. Co. v. Burge*, 84 Va. 63, 4 S. E. Rep. 21, it was held that a railroad company running its trains on city streets must use greater care than in less frequented localities, and any neglect of precautions proper in such case, constitutes negligence, citing the principal case; also, *B. & O. R. Co. v. McKenzie*, 81 Va. 71, and *Petersburg R. Co. v. Hite*, 81 Va. 737. The principal case is also cited in *Va. Mid. R. Co. v. White*, 84 Va. 503, 5 S. E. Rep. 573.

§*Contributory Negligence of Children—Imputed Neg-*

gence of the parent or guardian of an infant child injured by a railroad car, cannot constitute contributory negligence on the part of the child, so as to exonerate the company. *Lynch v. Norden*, 41 Eng. C. L. R. 422, approved; *Hatfield v. Roper*, 21 Wend. R. 615, disapproved.

5. Evidence of Injuries.—In an action for injuries involving the loss of an arm, plaintiff may introduce evidence to show what must be the effect of his injuries in disqualifying him from pursuits requiring two hands.

This was an action of trespass on the case in the corporation court of Norfolk, brought in December 1869, by Charles Ormsby, an infant, by his next friend, against the Norfolk and Petersburg Railroad Company. The declaration set out:

For that whereas the defendants before and at the time of the committing of the grievances hereinafter mentioned, to-wit, on the 30th day of August, in the year 1869, were the owners of a certain railroad, to-wit, *of a railroad from the said city of Norfolk, which connects with the Southside railroad, at or near the city of Petersburg, and of a certain engine and cars, then under the care and management of certain servants of the said defendants; nevertheless the said defendants, by their said servants, so carelessly, negligently and improperly behaved and conducted themselves in and about the management, control, and direction of the said engine and cars, that the same, by and through the default, carelessness, negligence, and improper conduct of the said servants of the said defendants, then with great force and violence were driven and struck against the said plaintiff, by means whereof the right arm of the plaintiff was so fractured and injured that it became necessary to amputate the same, and the said arm was thereupon amputated, and he was otherwise greatly wounded, bruised, and injured, and so remained for a long space of time; and also by means of the premises the plaintiff was so maimed as to be disabled for the remainder of his life. To the damage of the said plaintiff of \$30,000.

The issue was made upon the plea of "not guilty;" and the cause came on to be tried at the May term of the court 1872, when the jury found a verdict in favor of the plaintiff, and assessed his damages at \$8,000. The defendant thereupon moved the court to set aside the verdict and grant it a new trial, on the ground that the verdict was contrary to the law and the evidence. But

Negligence of Parent.—As sustaining the doctrine of the principal case, see *Roanoke v. Shull*, 97 Va. 426, 34 S. E. Rep. 34; *N. & W. R. Co. v. Groseclose*, 88 Va. 270, 13 S. W. Rep. 454; *Trumbo v. City Street-Car Co.*, 89 Va. 782, 17 S. E. Rep. 124; *Gunn v. Ohio R. R. Co.*, 42 W. Va. 678, 26 S. E. Rep. 549, all citing the principal case. See also, *Dicken v. Liverpool, etc., Co.*, 41 W. Va. 511, 23 S. E. Rep. 582, 7 Am. & Eng. Enc. Law (2d Ed.) 405, 445.

The principal case is again cited in the following decisions: *R. & D. R. Co. v. Norment*, 84 Va. 177, 4 S. E. Rep. 211; *N. & W. R. Co. v. Harman*, 83 Va. 564, 8 S. E. Rep. 251; *Simmons v. McConnell*, 86 Va. 498, 10 S. E. Rep. 886; *Jones v. O. D. C. M.*, 82 Va. 148.

the court overruled the motion, and rendered judgment according to the verdict. To this opinion of the court the defendant excepted; and the court certified the following as the facts proved upon the trial.

That on the morning of the last day of August, 1869, between the hours of 457 nine and ten o'clock, the *agents of the defendant carried two flat cars loaded with lumber, from its depot in the city of Norfolk down its track on Widewater street, in the said city, and left them in front of McCullough's lumber-yard, on said street, to be unloaded, and one other flat car loaded with lumber, further down the said street, and left the same in front of Murdock Howell's lumber-yard on said street, to be unloaded; that the said flat cars remained at the place at which they were respectively left, until between four and five o'clock in the afternoon of that day, when the said agents of the defendant left the said depot with a locomotive and five box cars in front of it, loaded with freight for the Boston steamer, the purpose being to carry the said box cars down Widewater street to Town Point, near the foot of said street, to be unloaded and to gather up and carry back to the depot the three flat cars that had been left on said street loaded with lumber during the forenoon. When the said locomotive and box cars reached McCullough's lumber-yard, the two flat cars left there in the morning having been unloaded, were coupled on the said train, the said agents with the locomotive, five box cars and two flat cars, then proceeded on in the direction of Murdock Howell's lumber yard, on said street, for the purpose of coupling on to the flat car left at that point in the forenoon, to be unloaded. That on the said train when it left the depot, there were G. W. Alsop, the engineer; a fireman, whose name was not given; J. T. Roberts, the yard master; James Pierce, switchman, and a colored train hand named Smith Vass. That the said J. T. Roberts was stationed on a brake-wheel two feet above the top of the fifth box car, being the next one to the flats, and the said Pierce and the said Vass were stationed on the foremost flat car, after they were coupled on at

458 *McCullough's lumber yard. That while the train moved from the depot down Widewater street, the bell on the engine was rung continually by the fireman, until the train reached Market Square, a point on the said track between the depot and Howell's lumber-yard, and at that point the fireman left the train, by the permission of the engineer; and from that point by the engineer until the train reached the flat car at Howell's lumber yard. That when the said front of the said train reached the United engine house, situated on said street, at a point about two hundred and twenty feet from the flat car in front of Murdock Howell's lumber-yard, it was moving at a rate of speed between two and three miles an hour. That about that point a signal was given to the engineer by the yard master, Roberts, to slacken the speed of the

train in order to couple on to the flat car in front of Howell's lumber yard, which signal was heard and obeyed by the engineer. That at the time the moving train came in contact with the stationary flat car, the engine was running with steam from the boiler shut off, and was propelled solely by the steam in the dry pipe, the train was moving very slowly; the engineer on the train used all the appliances known to his business, to make the train move as slow as possible in order to couple. It is not possible to move a train slower than one mile per hour, it is very difficult to move at all at this rate; ordinarily, when using every appliance, the rate is one and one-half miles per hour; that during the whole time that the said train was moving from the depot westward, to collect the flats left on the track in the forenoon, the engine bell was rung, a man was on top of one of the box cars, and two men on the flat car at the extremity of the train, by way of

459 lookout, to give signals *to the engineer in charge of the engine; that the man on the box car blew a whistle as he deemed necessary, and that these were the precautions usual and customary when the defendant was moving a train on said street. That the said James Pierce and Smith Vass, who were stationed on the front flat car attached to the moving train, and whose business it was to couple the stationary flat car to the moving train, attempted to effect the said coupling, but failed to do so, because the coupling pin which was left on the stationary car in the forenoon had by some means been removed during the day. That the said Pierce, when the moving train was within two cars of, or seventy-five or eighty feet of the stationary flat car, discovered that the coupling pin had been removed, and jumped from the flat car on which he was standing, and ran back to the engine for the purpose of getting another. That it had been customary to leave the coupling pins on the freight cars, which were detached and left on the track to be loaded or unloaded. That in Portsmouth the coupling pins left with the cars were so commonly thrown away by mischievous boys, or stolen by negroes, that the train master was put to great inconvenience, and adopted the plan of attaching them permanently to the cars. That when the train struck the stationary car and failed to make a coupling, the said stationary car was driven back on the track about one-half of its length, its whole length being from twenty-seven to thirty feet; and if the attempt to couple had been successful, the said stationary flat car would have been driven back not more than three feet. That at the time of the concussion of the moving train with the stationary car, the said stationary car had been discharged of about one-half of its load of lumber; that on

460 the day on which the *plaintiff received his injury, some time between ten o'clock A. M. and two o'clock P. M., one of the agents of the defendant, F. M. Ironmonger, whose business it was to su-

perintend the railroad track on Widewater street and attend to the moving of the trains, was passing along said street, and saw a small boy, whom he supposed to be the plaintiff, in rear of the wheel of the said stationary flat car in front of Mr. Howell's lumber-yard, and in a very dangerous position, and drove him away from said car in the direction of the residence of Mrs. Ormsby, mother of the plaintiff; that Mrs. Ormsby, the mother of the plaintiff, lived in a tenement on Widewater street, between the United engine-house and the flat car standing in front of Mr. Howell's lumber-yard, being about one hundred and eighty feet distant from the engine-house, and about forty feet distant from the said stationary car; that on the afternoon of the last day of August, 1866, about three and a half o'clock, she, Mrs. Ormsby, being sick at the time, having become the mother of an infant about four days before, and her husband being absent from home, directed the servant to mind her children; that the servant took them into the kitchen; that when the servant brought in the dinner, the plaintiff followed her; that she directed the servant to get a basin of water and wash the plaintiff's face; that the plaintiff, hearing her give this direction to the servant, ran to the front door, which opened on Widewater street; that there were two lower rooms in her house, one immediately in the rear of the other, that the front room was occupied by her as a grocery and the rear room as a sitting-room, that the door opening upon Widewater street and the door between the two rooms are immediately opposite each other; that at the time she was lying

461 upon a lounge in the back *room, which was in a position that enabled her to command a view of the front door; that while the plaintiff was standing in the front door, in full view of the mother, she directed the servant, who had brought the basin of water, to go directly and bring the plaintiff; that the plaintiff, hearing this direction to the servant, ran out upon the street; that the servant went immediately after the plaintiff, going out of the back door and through a lane leading to Widewater street; that the servant was gone not over two or three minutes, and when she returned, brought the plaintiff in her arms, with his right arm mangled and hanging by his side; that the plaintiff at the time of the injury was two years and ten months old, having been born in the month of October, 1866.

At the time the plaintiff ran out the front door on Widewater street, there were three persons standing in front of the United engine-house and one other person standing in front of a house three or four doors between Mrs. Ormsby's residence, all being on the north side of the said railroad track; that the last named person was about sixty feet from the said stationary car, looking in the direction of the moving train at the time it came up to the stationary car; that the plaintiff was not seen by any of these

persons or by any of the defendant's agents on the moving train until the flat car had been put in motion by the said moving train, which was moving westwardly; that then the witness standing west of the said flat car, and looking eastwardly in the direction of the moving train, saw the plaintiff lying about six feet west of and beyond the said flat car, with his arm upon the track and the rest of his body on the north side thereof, looking as though he had stumbled and fallen and was struggling to get up; that when the plaintiff was

462 first seen by the persons *standing in front of the United engine-house, he was being carried around by the wheel of the flat car, which had been put in motion by the moving train, and he was not seen by any of the agents of the defendant until he had been taken from under the wheel and was being carried in the direction of his mother's house by a colored woman; that when the moving train came in contact with the stationary car there was a colored man standing on the said car engaged in throwing off lumber, and the said colored man was not in the employment of the defendant.

That the neighborhood in which Mrs. Ormsby, the mother of the plaintiff, lived, on Widewater street, was thickly settled, and there were a great many children living in the houses on both sides of Widewater street in that neighborhood; that the plaintiff's mother had a nurse employed, whose duty it was specially to attend to the plaintiff, and his said mother never permitted him to go on the street; that since the injury was received the plaintiff has been very troublesome, has complained of pain in his breast, and has required constant attention; that after the injury was received, by which the plaintiff's right arm was mangled and nearly severed from his body, it became necessary to amputate, and that it was amputated and removed from the socket at the shoulder; that the loss of the arm is injurious to the plaintiff's health, that it leaves his right lung more or less unprotected, and creates a predisposition to sickness, such as pneumonia, pleurisy, and other pulmonary complaints; that owing to the loss of the arm, the plaintiff's right side will not develop as well as his left, and his general health will be affected; that he cannot engage in manual labor requiring the use of two hands, and in order to make a livelihood he will have to resort to some other employment.

463 *That on the 26th January, 1867, the select and common councils of the city of Norfolk adopted an ordinance in the words and figures following to-wit: "That the Norfolk and Petersburg Railroad Company be and they are hereby authorized and granted the right and privilege to enter upon and lay the track of their road in any and upon such of the streets of this city as the directors of said company may deem fit, proper, and prescribe for their use and purposes, either in the loading or unloading of cars, as well as the transit of cars, engines

and trains, on the express condition, however, that the speed of their cars, engines, or trains shall not within the limits of the city exceed a rate of five miles per hour."

That although the defendant was permitted by the said ordinance to run its cars and engines through the streets at a rate of speed not exceeding five miles an hour, the instructions given to all the agents and employees of the road were not to exceed the rate of four miles an hour, and always to ring the bell and to give all the necessary and proper signals above mentioned, in passing through the said street; and that the witnesses of the plaintiff, one of whom was sixty feet, and the others about one hundred and eighty feet from the stationary car, watched the train as it moved down the said street, and did not hear the sound of the engine bell, and did not see or hear any signal by those on said train. And these are all the facts proved.

On the trial of the cause the defendant excepted to various opinions and rulings of the court. The first was to the refusal of the court to give to the jury certain instructions asked, and the giving one of them with a modification. They are as follows:

464 *Instruction No. 1. If the jury believe from the evidence, that the defendants were not guilty of negligence, but were exercising ordinary care in the management of their engine and cars at the time of the injury complained of in the plaintiff's declaration, they must find for the defendant.

Instruction No. 2. If the jury believe from the evidence, that the plaintiff at the time the injury complained of was sustained, was only two years and ten months of age, and was permitted by his parents to go on the railroad track of the defendant on Widewater street, without placing him under the charge of some one capable of taking care of him and protecting him from injury, then the said parents were guilty of negligence and a want of proper care for the child, and such negligence and want and proper care in thus permitting the plaintiff to be exposed to injury on the said railroad track, furnishes the same answer to an action by the child for such injury, as would the negligence or other fault of an adult plaintiff; and if the jury further believe from the evidence, that the injury complained of in the plaintiff's declaration would not have happened but for such negligence and want of proper care on the part of the parents, then they must find for the defendants.

Instruction No. 3. If the jury believe from the evidence, that the plaintiff at the time of the injury complained of was so concealed either behind or under the stationary car as not to be visible to the agents of the defendant, and that the said agents of the defendant at the time of the said injury were exercising ordinary care and watchfulness, and the said engine was not running exceeding the rates of one or two

465 *miles per hour, then there was not

such negligence on the part of the defendants as renders them liable in this action, and the jury will therefore find for the defendant.

Instruction No. 4. The defendants to maintain the issue on their part, having introduced evidence tending to prove that in the forenoon of the day on which the plaintiff received the injury complained of, the defendant sent a flat car loaded with lumber, to a point on their railroad track on Widewater street opposite the lumber yard of Murdock Howell, for the purpose of delivering the said lumber to the said Howell; that in the afternoon of the same day the defendants sent an engine with a train of five box cars and three flats, (the box cars being all together next to the engine), from the depot down Widewater street for the purpose of collecting the cars on the said street and taking them out to the depot; that the engine was pushing the said train down the said track; that one of the employees of the defendants was stationed upon the top of the rearmost box car to look out for obstructions upon the track, and, if any such obstructions appeared, to notify the engineer; that two train hands of the said defendants were stationed on the rearmost flat car of the moving train for the purpose of coupling on to stationary cars along the track; that the employee of the defendant stationed as aforesaid on the top of the rearmost box car, when the moving train got within about one hundred and eighty feet of the stationary car in front of Murdock Howell's lumber-yard, gave a signal to the engineer to slacken his speed for the purpose of coupling with the said car, which was obeyed by the engineer, and afterwards gave another signal when

466 the moving train had approached *very near to the aforesaid stationary car, in order to notify the engineer to run still slower, which signal was also obeyed by the engineer; that the said employee so stationed on the top of the rearmost box car was constantly on the lookout for obstructions upon the railroad track; that he saw none except the stationary car aforesaid; that the train at a distance of one hundred and eighty feet from the stationary car was running between two and three miles per hour; that at the time the moving train struck the stationary car it was moving as slowly as it could be moved; that when the train struck the stationary car the shock or concussion was not greater than is usually the case; that the force with which the moving train came against the stationary car was so feeble as to drive the stationary car back not exceeding ten or fifteen feet; that the two employees of the defendants, whose duty it was to make a coupling with the stationary car, failed to do so because some one, while the stationary car was standing on the track in front of Howell's lumber-yard, had removed the coupling pin, and another had to be gotten from the engine before the coupling could be effected; that the bell upon the locomotive was regularly and continuously rung from the time

the train left the depot until the train struck the stationary car aforesaid; that the said employee stationed on the top of the rearmost box car, although constantly on the lookout, did not see the plaintiff until after he had received the injury complained of; that the said plaintiff was so concealed at the time, either behind or under the stationary car, as to be wholly invisible to the said employee; that none of the said employees saw the plaintiff until after he had received the injury complained of; and that

one of the said employees, whose duty 467 it was to assist in *coupling the train to the flat car, jumped from the train about twenty steps above the stationary car and went back to the engine for a coupling pin; that he, too, was on the lookout for obstructions upon the railroad track, and that he did not see the plaintiff until after he had received the injury complained of; that it was the custom of the said defendants, in running their trains through Widewater street, to have on their trains a sufficient number of hands to look out for obstructions and guard against accidents, and that on the occasion when the injury complained of was received the said defendants had the usual number of hands on the train, and used the customary precautions against accident.

The court instructs the jury, that if they believe the evidence proves what it tends to prove, the defendant has not been guilty of negligence or want of ordinary care, and therefore is not liable for damages in this suit.

Instruction No. 5. The court instructs the jury, that the plaintiff is not entitled to recover damages for the injury complained of, if they believe from the evidence that the plaintiff's own negligence contributed directly to the injury, although they may further believe from the evidence that the defendants did not use proper care and caution in running their cars at the time said injury was sustained.

Instruction No. 6. The court instructs the jury, that as an infant is chargeable with the negligence of his parents or guardian in permitting him to be exposed to the risk of injury, and is debarred from recovering damages in the same cases in which he

would be precluded from recovering if 468 he were of full age *and had been

himself guilty of such negligence, the plaintiff in the case is not entitled to recover damages from the injury complained of, if they believe from the evidence that his parents' negligence contributed directly to that injury, although they may further believe from the evidence that the defendants did not use proper care and caution in running their cars at the time said injury was sustained; unless they farther believe from the evidence that the defendants were aware of the said parents' negligence, and failed to use proper care and caution to avoid the injury.

Instruction No. 7. If the jury believe from the evidence that the plaintiff, at the time the injury complained of was sustained,

was only two years and ten months of age, and was permitted by his parents to go unattended on the railroad track of the defendants on Widewater street, then the said parents were prima facie guilty of negligence and a want of proper care for the child; and such negligence and want of proper care, in thus permitting the plaintiff to be exposed to injury on the said railroad track, furnishes the same answer to an action by the child for such injury as would the negligence or other fault of an adult plaintiff; and if the jury believe further from the evidence that the injury complained of in the plaintiff's declaration would not have happened but for such negligence or want of proper care, then they must find for the defendant.

Instruction No. 8. The court instructs the jury that the plaintiff is not entitled to recover damages for the injury complained of, if they believe from the evidence that the defendants were using ordinary care and caution in the pursuit of their lawful business at the time said injury was sustained.

469 *Instruction No. 9. If the jury believe from the evidence that the injury complained of in the declaration was occasioned by the plaintiff's throwing himself in the way of a moving train of cars belonging to the defendant, and that he was run over before the agents of the defendants having charge of the said train could prevent it, they must find for the defendants.

But the court refused to give the instructions numbered 2, 3, 4, 5, 6, 7, 8, and 9, and gave the instruction numbered 1, with the following modification:

Modification of Instruction No. 1. The terms negligence and want of ordinary care are correlative terms. If the defendants are guilty of negligence as alleged in the declaration, the plaintiff is entitled to recover; if the defendants exercised ordinary care the plaintiff is not entitled to recover. Ordinary care depends on the circumstances of the particular case, and is such care as a person of ordinary prudence under the circumstances would have exercised. For instance, the defendants while running along their road through the country would not be required to take the same care as when passing a crossing where the highway crosses their road—they must exercise a greater degree of care; and when they enter the city and pass along the streets where many persons are passing; and where there are dwelling houses on each side of the street, they must exercise greater care. If under all the circumstances of the case, looking to all the evidence in the case, you believe the defendants exercised such care as a prudent man would have exercised under the circumstances, then the defendants are not liable. But should you believe the defendants guilty of negligence in running their cars, yet if you believe the plaintiff by his negligence contributed to the injury, the defendants are not liable.

470 *To ascertain whether the plaintiff was guilty of negligence you will apply the same rules as to the defendant; if, looking to his age and the circumstances, you think he exercised such care as was reasonably to be expected of a child of that age, then the defendants are liable, though the plaintiff by his act did contribute to the injury. If you believe that the parents of the child did not exercise ordinary care in allowing their child to be on the street without an attendant, yet the defendants are liable; this is an action brought by the child, it is his cause of action and he is not responsible for the negligence of the parents.

The second exception is as follows:

The plaintiff, to maintain the said issue on his part, offered to give in evidence to the jury that on the last day of August 1869 he had been injured by the cars of the defendant running against him on Widewater street within the limits of the city of Norfolk; to which evidence the defendant, by its counsel, objected as improper to go to the jury because of the variance between the said evidence and the allegations contained in the declaration. But the court being of opinion that there was no variance, overruled the objection to the said evidence, and permitted the same to go to the jury.

The third exception was as follows:

The plaintiff to maintain the issue on his part, introduced a witness, Dr. James D. Galt, to prove that owing to the injury which he had received, and the loss of his arm, he was incapacitated from the pursuit of the ordinary vocations of life which required the use of two hands, and would be compelled to resort to some other means of obtaining a livelihood. To which evidence the defendant, by its counsel, objected as improper to go to the jury. But

471 the court being of *opinion that the said evidence was proper, overruled the objection and permitted it to go to the jury.

Upon the application of the defendant a supersedeas was awarded by one of the judges of this court.

The case was elaborately argued in printed notes by Goode & Chaplain, for the appellant, and by Scarborough, Duffield & Sharp, for the appellee.

Moncure P. delivered the opinion of the court.

This is a writ of error and supersedeas to a judgment of the court of the corporation of the city of Norfolk, rendered on the 28th day of May 1872 in an action of trespass on the case, wherein Charles Ormsby, an infant, suing by James Ormsby, his next friend, was plaintiff, and the Norfolk and Petersburg railroad company were defendants. The injury complained of in the declaration was, that the defendants so negligently conducted their engine and cars as to strike them with great force and violence against the plaintiff, by means whereof his right arm was so fractured and injured

that it became necessary to amputate the same, and it was thereupon amputated, and he was otherwise greatly wounded and injured, and by means of the premises the plaintiff was so maimed as to be disabled for the remainder of his life. Issue was joined on the plea of not guilty, which was tried by a jury; and a verdict was rendered in favor of the plaintiff, whose damages were assessed at \$8,000. Whereupon the defendants moved the court to set aside the verdict and grant a new trial, upon the ground that the verdict was contrary to the law and the evidence. But the court overruled the motion, and the defendants excepted to the opinion of the court, and tendered a bill of exceptions, which 472 was *made a part of the record. The facts proved on the trial of the cause were certified by the court; and judgment was rendered in pursuance of the verdict.

On the trial of the cause the defendants excepted to various opinions and rulings of the court, besides the opinion and ruling of the court in overruling their motion for a new trial, and tendered their several bills of exceptions, which were also made a part of the record. To the judgment aforesaid, the defendants applied to a judge of this court for a writ of error and supersedeas, which were accordingly awarded. The errors complained of are assigned in the petition for said writ, and are founded on the said bills of exceptions. The case was argued before this court with great ability and learning; and we will now proceed to consider and dispose of the questions presented by the record in the order in which they arise.

First—We are of opinion that the court below did not err in overruling the motion of the defendants to set aside the verdict of the jury and grant a new trial, upon the ground that the said verdict was contrary to the law and evidence.

The defendants contend that the injury complained of in this case did not proceed from any fault or neglect on their part; and that if it proceeded from their neglect at all, there was such contributory negligence on the part of the plaintiff or his parents in regard to the cause of the injury as exonerates them (the defendants) from liability to him therefor. We will consider each of these grounds of defence; and,

First, whether the injury proceeded from any fault or neglect on the part of the defendants?

Could the injury have been avoided by the use of any reasonable means which might and ought to have been used by the defendants? We are constrained to 473 *say that it could. In running cars propelled by steam along a railroad over the streets of a populous city, where there are a great many children, the greatest care and precaution are necessary, and ought to be used, to avoid danger to human life. The injury complained of in this case was caused by the running of the flat car at Howell's over the plaintiff, who had

fallen on the railroad track just beyond the car; and the running of that car over the plaintiff was caused by its being propelled by the engine and moving train before it had been coupled with that train; whereas it ought and might conveniently have been coupled with that train before it was set in motion. The facts are certified, that if the coupling had been done before the flat at Howell's lumber yard was set in motion, the injury would not have occurred; for, in that case, the flat car would not have been propelled more than three feet, and so would not have touched the plaintiff, who was "lying about six feet west of and beyond the said flat car, with his arm on the track, and the rest of his body on the north side thereof, looking as though he had stumbled and fallen, and was struggling to get up." Whereas, "when the train struck the stationary car, and failed to make a coupling, the said stationary car was driven back on the track about one-half of its length, its whole length being from twenty-seven to thirty feet." In consequence of which the flat not only reached the plaintiff lying on the track, but passed over him, and carried him several times around the car wheel. Why was not this connection made? Because there was no coupling pin then there with which to make it. Why was not one there? It is said that one had been left there with the flat in the morning, as had been 474 the usual *practice in such cases, but that somebody had taken it away.

Why was not such a probable danger guarded against by fastening the pin to the flat, so that it could not be taken away? or, why was not the precaution used of bringing a pin with the moving train, to be sure of being ready to make the connection at once? It is certified "that in Portsmouth the coupling pins left with the cars were so commonly thrown away by mischievous boys, or stolen by negroes, that the train master was put to great inconvenience, and adopted the plan of attaching them permanently to the cars." Why was not the same precaution used in Norfolk, where the obvious danger of loss of the pins must have been just as great as in Portsmouth? Again, why was not the obvious precaution used—of making an examination before the stationary flat at Howell's was set in motion, to see if there was anybody or anything under or near the car which could be injured by its being set in motion? This would have taken very little time, and given very little trouble. There were several hands on the moving train, either one of which, without stopping the train, could have made the examination. It may be said that it was not probable there was any person or thing under or near the flat which could be hurt, as nothing was seen by those on the train or by the bystanders. Nothing, it seems, was carefully looked for by them. But was it so improbable as to excuse such a want of caution when human life and limb were at stake? A flat had been left standing in the street of a populous city

from between nine and ten o'clock in the morning until between four and five o'clock in the afternoon of the day on which the injury complained of was done. Was it strange or extraordinary that the

475 *plaintiff, a child only two years and ten months old, should have been found on the track under or near the car then standing just in front of his mother's door, and only forty feet therefrom? A flat left nearly all day in the street might naturally be expected to be a play place for the neighboring children.

We are therefore of opinion, that the injury complained of in this case proceeded from the negligence of the defendants, who are therefore liable therefor; unless they can be exonerated from such liability on the ground of contributory negligence. We therefore proceed now to consider:

Secondly. Whether there was such contributory negligence on the part either of the plaintiff or his parents, in regard to the cause of the injury, as exonerates the defendants from liability to him therefor.

In regard to any negligence on the part of the plaintiff himself, it has not been contended, and cannot be, that he was old enough to be guilty of any, or, at all events, that he was guilty of any in this case. And in regard to any negligence of his parents, or either of them, if such negligence can be imputed to him, about which we will presently enquire, when we come to consider the case upon the instructions, we think it very clear that there was in fact no such negligence on their part. The facts which are certified in the record are conclusive on this subject; and we will not repeat them, as they may be seen by reference to the certificate.

We therefore conclude, on this branch of the subject, that the court below did not err in overruling the motion of the defendants to set aside the verdict, upon the ground that it was contrary to the law and evidence.

476 *Second. We are of opinion, that the court did not err in refusing to give the instruction asked for by the defendant, numbered two, three, four, five, six, seven, eight and nine; nor in giving instruction numbered one, with certain modifications.

The second instruction is objectionable on two grounds: First, the plaintiff was not "permitted by his parents," as the instruction assumes, "to go on the railroad track of the defendants on Widewater street, without placing him under the charge of some one capable of taking care of him and protecting him from injury;" and, secondly, the said instruction imputes to the infant plaintiff the assumed negligence of his parents; for which, even if there had been any such negligence, as in fact there was not, the infant plaintiff would not have been responsible. On this question, as to the liability of infants for the neglect, imputed to them, of their parents, there ap-

pears to be much conflict in the cases, many, and perhaps most of which were cited in the arguments of the learned counsel. But without following them through their review of the cases, we deem it sufficient to say, that we concur in the principle of the case of *Lynch v. Nurdan*, 1 Ad. & El., N. S., 29, 41 Eng. Com. Law R. 422, and others of that class; which decide that the neglect of parents and guardians is not imputable to infant children and wards in such cases; and that we do not concur in the principle of the case of *Hartfield v. Roper*, 21 Wend. R. 615, and others of that class, which decide the contrary.

The third instruction is objectionable, because it was calculated to mislead the jury, and was apparently contradictory. Though the plaintiff might not have been actually visible to the agents of the

477 defendants, *he might have been seen by them, certainly, if they had looked for him, as they ought to have done. In other words, they ought to have made sure, as they might have done, that there was no person under or behind the stationary car when they set it in motion. And besides, they ought to have coupled the moving train with the stationary car before they set the latter in motion; in which case they would have guarded against all injury to persons visible or invisible.

The fourth instruction is objectionable, for reasons already given in regard to the first assignment of error.

The fifth instruction is objectionable, because it imputes negligence to the plaintiff, of which, from his tender years, he was not capable.

The sixth and seventh instructions are objectionable, for reasons already stated, because they hold the plaintiff responsible, by imputation, for the supposed negligence of his parents.

The eighth instruction embodies a general truth which seems to be unobjectionable in itself; but it is clearly embraced in the first instruction as modified by the court.

The first instruction, as modified by the court, is unobjectionable, and embodies all the law which seems to apply to the case, or to be necessary to enable the jury to decide it properly.

Third. We are of opinion that the court below did not err in overruling the objection of the defendants on the ground of the supposed variance mentioned in their "bill of exceptions number two;" being of opinion that there was no such variance.

Fourth. We are of opinion, that the said court did not err in overruling the ob-

478 jection of the defendants *to the evidence mentioned in their "bill of exceptions number three."

Upon the whole, we are of opinion, that there is no error in the judgment of the court below, and that it ought to be affirmed.

Judgment affirmed.

DAMAGES.**I. General Principles.**

- a. Object of the Law of Damages.
- b. Kinds of Damages—Compensatory and Punitive.
- c. Distribution of Damages.
- d. Interest Not Allowed on Damages.

II. Natural and Proximate Cause and Consequence.

- a. Generally.
- b. Requisites of Recovery.
- c. General Rule in Cases of Contract.
- d. Expected Profits or Gains.
- e. Expenditures Made Because of Breach of Contract.

III. Uncertain, Speculative and Contingent Damages.**IV. Liquidated, Stipulated or Stated Damages.****V. Nominal Damages.****VI. Punitive, Exemplary and Vindictive Damages.**

- a. Generally.
- b. Object of Punitive Damages.
- c. Rule for Awarding Compensatory or Punitive Damages.
- d. Aggravating Circumstances Necessary.
- e. Instances That Prove the Rule.
- f. Actual Malice Not Necessary.
- g. Punitive Damages Belong Alone to Actions of Tort.
- h. Liability of Master in Punitive Damages for Servant's Wrong.
- i. The Term "Ratification" Construed.
- j. The Aggravating Circumstances Must Appear in Declaration.
- k. Evidence of Defendant's Wealth and Standing.
- l. Punitive Damages a Question for the Jury.

VII. Measure of Damages.

- a. Generally.
- b. Damages That Admit of Definite Estimate.
- c. Damages That Do Not Admit of Definite Estimate.
- d. Damages for Pain and Suffering.
- e. Instances That Prove the Rule.
- f. Breach of Contract—Measure of Damages—Generally.
- g. Measure of Damages in Particular Cases.

VIII. Mode of Estimating Damages.

- a. In Actions for Personal Injuries.
(Jury May Take in Consideration:)
 1. The Mental Suffering.
 2. Physical Suffering and Pain.
 3. Loss of Time.
 4. Degree and Probable Duration of Injury.
 5. Medical Expenses.
 6. Permanent Reduction of His Capacity to Earn Money.
 7. Family Dependent on Him for Support.
 8. Mental and Physical Suffering of Deceased's Family.
- b. Other Torts.
 1. Injuries to Character.
 2. Counsel Fees.
 3. Credit and Business Standing.
 4. Injury to Business.
 5. Mental Anguish.
 6. Humiliation—Indignity—Insult.
 7. Fact That Legislature May Act.

IX. Mitigation of Damages.**X. Prospective Damages.**

- a. The General Rule Stated.
- b. Injury Must Be Permanent.
- c. Successive Action for the Consequences of the Same Injury.
- d. Injury Must Be Temporary.

XI. Pleading and Practice.

- a. Amount of Damages Omitted in Declaration—Effect.
- b. Declaration—Counts—Claim of Damages.
- c. Summons—Copy—Variance.
- d. Damages Not to Exceed Amount Claimed in Declaration.
- e. Principal and Interest Together May Exceed Amount Claimed.
- f. Verdict in Excess of Amount—Plaintiff May Release Amount in Excess.
- g. When Damages May Exceed Amount Laid in Declaration.
- h. Debt on Bond—Jury Need Not Assess Damages.
- i. Declaration—Allegation—Particular Injury.
- j. Special Damages—Must Aver in Declaration.
- k. Judgment by Default—Writ of Inquiry.
- l. Jurisdiction—Justices of the Peace.
- m. Motion to Recover Money—Damages for Breach of Contract.
- n. Joint Tort Feasors—Assessment of Damages.
- o. Damages in Appellate Court.

I. GENERAL PRINCIPLES.

a. **Object of the Law of Damages.**—"The object of the law is to give amends or reparation." *JONES, J.*, in *Peshine v. Shepperson*, 17 Gratt. 472, 485, 94 Am. Dec. 468, or as expressed by *RILEY, J.*, in *Burruss v. Hines*, 94 Va. 413, 416, 26 S. E. Rep. 875. "The general rule in awarding damages is to give compensation for pecuniary loss; that is, to put the plaintiff in the same position, so far as money can do it, as he would have been if the contract had been performed or the tort not committed." See also, *Alleghany Iron Co. v. Teaford*, 96 Va. 372, 31 S. E. Rep. 525.

b. **Kinds of Damages—Compensatory and Punitive.**—Damages are either actual or compensatory, exemplary or punitive. As expressed by *RILEY, J.*, in *Norfolk, etc., R. Co. v. Neely*, 91 Va. 540, 22 S. E. Rep. 867, "Actual or compensatory damages are the measure of the loss or injury sustained, while exemplary or punitive damages are something in addition to full compensation, and something not given as his due, but for the protection of the public."

c. **Distribution of Damages.**—"The manner in which the damages are to be distributed is no concern of the defendant, and not under the control of the plaintiff. It is a question for the jury exclusively, not involved in the issue." *STAPLES, J.*, in *B. & O. R. Co. v. Wightman's Adm'r.* 29 Gratt. 441, quoted and approved in *N. & W. Ry. Co. v. Stevens' Adm'r.* 97 Va. 684, 34 S. E. Rep. 525.

In an action for damages by administrator for the wrongful killing of his intestate, if the jury fail to direct how the damages shall be distributed, the administrator after having paid all attorney's fees and costs shall distribute it according to the statute of distribution. *Powell's Adm'r v. Powell*, 84 Va. 415, 4 S. E. Rep. 744.

Damages—Compromise—Distribution.—The money received by an administrator upon a compromise of an action for damages for the killing of his intestate, must after paying the costs and attorney's fees, be distributed according to the statute of distribution. *Powell's Adm'r v. Powell*, 84 Va. 415, 4 S. E. Rep. 744.

d. Interest Not Allowed on Damages.—In an action for a tort, interest on the damages from the date of the injury is not allowed. But should the jury in their verdict allow such interest, the court should not set the whole verdict aside, but only the interest, entering judgment for the damages alone. *Brugh v. Shanks*, 5 Leigh 508, citing and following *Garrard v. Henry*, 6 Rand. 110; *Austin's Ex'or v. Jones*, Gilmer 341.

Rent Arrears.—Interest is not recoverable by way of damages, in an action of debt for rent arrears. *Cooke v. Wise*, 3 H. & M. 468; *Skipwith v. Clinch*, 2 Call 257; *Newton v. Wilson*, 3 H. & M. 470; *Mickie v. Lawrence*, Ex'or, 5 Rand. 871.

II. NATURAL AND PROXIMATE CAUSE AND CONSEQUENCE.

a. Generally.—The law does not hold a person responsible in damages for the remote consequences of his act, but only for those which are natural and proximate and necessarily result from the wrongful act. *Burruss v. Hines*, 94 Va. 413, 26 S. E. Rep. 875; *Slaughter v. Denmead*, 88 Va. 1019, 14 S. E. Rep. 833; *Peshine v. Shepperson*, 17 Gratt. 472, 94 Am. Dec. 468; *James v. Adams*, 8 W. Va. 568; *Kendall Bank Note Co. v. Comm'rs of Sinking Fund*, 79 Va. 563; *Crescent Horseshoe, etc., Co. v. Eynon*, 95 Va. 152, 27 S. E. Rep. 685.

Difficulty Found in Applying Rule.—The general rule that a person is responsible in damages, for all injuries that are the natural and proximate result of his wrongful act, is well settled, but difficulty is often found in applying the rule to a particular case. *Burruss v. Hines*, 94 Va. 413, 26 S. E. Rep. 875.

b. Requisites of Recovery.—The plaintiff must not only show that he has sustained damages, by reason of his rights being violated, but must show with reasonable certainty the extent of such damages. And he must also show that such damages are the natural and proximate result of the injury complained of. *Burruss v. Hines*, 94 Va. 413, 26 S. E. Rep. 875.

In *Fowkes v. Southern Ry. Co.*, 96 Va. 742, 2 S. E. Rep. 464, the facts were these: The plaintiff, a married woman, in a pregnant condition was told by the ticket agent of the defendant company, that she would make close connection with a train on another railroad, at a certain point on defendant's line, for her destination, which was her father's home. On the train's reaching the junction where she was to catch her train, she found that there would be no train for her destination that day. The day was hot and sultry, and a storm was brewing. There was no station where she could wait or any accommodation at the place. She finally succeeded in hiring a buggy to convey her to her father's house, eight miles distant; as a result of the jolting of the ride, the wetting she got and her worrying, she became sick, had abdominal pains, hemorrhage from the womb, and finally a miscarriage, and some months afterwards another miscarriage. Since that time she has been in bad health. *KERTZ, P.*, in delivering the opinion of the court said: "It is not only requisite that damage, actual or inferential, should be suffered, but this damage must be the legitimate sequence of the thing amiss. The maxim of the law here applicable is, that in law the immediate and not the remote cause of any event is regarded. In other words, the law always refers the injury to the proximate, not to the remote cause. If an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last

cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause, and refuse to trace it to that which was more remote. To the proximate cause we may usually trace consequences with some degree of assurance; but beyond that we enter a field of conjecture, where the uncertainty renders the attempt at exact conclusions futile. If the wrong and the resulting damage are not known by common experience to be naturally and usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, then the wrong and the damage are not sufficiently conjoined and concatenated as cause and effect to support an action. The negligent act proved in this case was committed at the time the ticket was purchased, and it seems to us manifest that a most prudent and experienced man, acquainted with all the circumstances which existed at that moment, could never have foreseen or anticipated the consequences that supervened. It might reasonably have been anticipated that a failure to make the connection at *Mosely Junction* would involve delay and inconvenience, but not that the plaintiff would procure a buggy, and in the face of a storm, in her delicate condition, drive over a rough road to her father's house, and that a miscarriage would be the result."

c. General Rule in Cases of Contracts.—Only such damages can be recovered for a breach of contract, as can fairly and reasonably be considered as naturally arising from the breach of the contract in question, according to the usual course of things, or as having been in the contemplation of the parties when the contract was made, as a probable result of a breach of it. *Slaughter v. Denmead*, 88 Va. 1022, 14 S. E. Rep. 833, citing and approving *Kendall Bank Note Co. v. Comm'rs of Sinking Fund*, 79 Va. 563; *Alleghany Iron Co. v. Teaford*, 96 Va. 372, 31 S. E. Rep. 525.

d. Expected Profits or Gains.—"A plaintiff will not ordinarily be allowed to give evidence of or to recover profits or expected gains, for it is generally conjectural whether there will be any profits or gains. The prohibition against the recovery of profits or gains, when not excluded as unnatural or remote, is due mainly to the inability to prove with reasonable certainty that the injury prevented the receipt of profits or gains, and their amount. But if it be shown that the loss of profits or gains was the natural and proximate result of the wrongful act, and their extent is also satisfactorily proved, they may be recovered." *RILEY, J.*, in *Burruss v. Hines*, 94 Va. 413, 416, 26 S. E. Rep. 875; citing *Bolling v. Colver*, 26 Gratt. 36. Says the court, in *Kendall Bank Note Co. v. Comm'rs of Sinking Fund*, 79 Va. 563, 572, "Profits or advantages, which are the direct and immediate fruits of the contract entered into between the parties, are part and parcel of the contract itself, entering into and constituting a portion of its very elements—something stipulated for, and the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation. They are presumed to have been taken into consideration, and deliberated upon before the contract was made, and formed, perhaps the only inducement to the arrangement." Cited and approved in *Trigg et al. v. Clay et al.*, 88 Va. 335, 13 S. E. Rep. 434. See also, *Alleghany Iron Co. v. Teaford*, 96 Va. 372, 31 S. E. Rep. 525; *Hare v. Parkersburg*, 24 W. Va. 554; *Patton & Shaver v. Elk River Nav. Co.*, 13 W. Va. 250.

The general rule seems to be that the party injured by a breach of contract, is entitled to recover all his damages, including gains prevented, as well as losses sustained, provided they are certain, and such as might naturally be expected to follow the breach. It is only uncertain and contingent profits, therefore, which the law excludes; not such as being the immediate and necessary result of the breach of contract, may be fairly supposed, to have entered into the contemplation of the parties when they made it, and are capable of being definitely ascertained by reference to establish market rates, or other like definite *criteria*, according to the case. *James & Mitchell v. Adams*, 8 W. Va. 569.

e. Expenditures Made Because of Breach of Contract.—In order to recover such expenditures, it must be made to appear, that they could be fairly and reasonably considered as naturally arising from a breach of the contract in question, or that they were contemplated by the parties in question at the time of the making of the contract. *Slaughter v. Denmead*, 88 Va. 1019, 14 S. E. Rep. 833, citing *Kendall Bank Note Co. v. Comm'rs of Sinking Fund*, 79 Va. 563. In *Slaughter v. Denmead* (*supra*), plaintiff was not allowed to recover expenditures made in recovering cord wood washed away by winter and spring freshets on account of defendant having failed to transport such wood in November as per its agreement.

III. UNCERTAIN, SPECULATIVE AND CONTINGENT DAMAGES.

Damages which are in their nature uncertain, speculative or contingent, cannot be recovered. *Burruss v. Hines*, 94 Va. 413, 26 S. E. Rep. 875; *James v. Adams*, 8 W. Va. 568; *Slaughter v. Denmead*, 88 Va. 1019, 14 S. E. Rep. 833; *Trigg et al. v. Clay et al.*, 88 Va. 330, 13 S. E. Rep. 434; *Kendall Bank Note Co. v. Comm'rs of Sinking Fund*, 79 Va. 573; *Peshine v. Shepperson*, 17 Gratt. 472.

IV. LIQUIDATED, STIPULATED OR STATED DAMAGES.

Parties entering on an agreement, may avoid all questions of future damage, as a result of the breach of the contract, by agreeing upon a definite sum which shall be paid by the party in default to the other contracting party. And in such a case, the party violating the agreement is not responsible in damages, for any sum greater than that stipulated, whatever may be the real damage. *Welch et al. v. McDonald*, 85 Va. 500, 8 S. E. Rep. 711.

V. NOMINAL DAMAGES.

Whenever a party has violated the rights of another, the party whose rights have been so violated, has a cause of action against the other for damages, but in the absence of proof of some actual damage resulting from the wrongdoer's act, nominal damages only can be recovered. *Building, L. & W. Co. v. Fray*, 96 Va. 559, 32 S. E. Rep. 58; *Watts v. N. & W. R. Co.*, 39 W. Va. 196, 19 S. E. Rep. 521; *Hare v. Parkersburg*, 24 W. Va. 554; *Newbrough v. Walker*, 8 Gratt. 16.

Burden on Plaintiff to Show Actual Damage.—Where an actionable wrong by the defendant is shown, the plaintiff may recover nominal damages from the mere fact of such wrong; but, if compensatory damages are asked, the plaintiff must in some way show, by evidence, data and means by which the jury can ascertain and fix the amount of damages. The jury cannot go by merely arbitrary conjecture. *Watts v. N. & W. R. Co.*, 39 W. Va. 196, 19 S. E. Rep.

521. See *Hare v. Parkersburg*, 24 W. Va. 554; *Newbrough v. Walker*, 8 Gratt. 16.

Breach of Covenant.—In an action for breach of the covenant of "good right to convey" the property in question, nominal damages only can be recovered, where, before actual injury is sustained, the title to the property is perfected by instrument. *Building, L. & W. Co. v. Fray*, 96 Va. 559, 32 S. E. Rep. 58.

VI. PUNITIVE, EXEMPLARY AND VINDICTIVE DAMAGES.

a. Generally.—The Virginia and West Virginia cases, with the exception of the three early West Virginia cases of *Pegram v. Stortz*, 31 W. Va. 23, 6 S. E. Rep. 485; *Beck v. Thomson*, 31 W. Va. 439, 7 S. E. Rep. 447; *Wilson v. Wheeling*, 19 W. Va. 223, 42 Am. Rep. 780, which were overruled in *Mayer v. Probe*, 40 W. Va. 246, 22 S. E. Rep. 58, hold, that where a tort is committed under aggravating circumstances, punitive, exemplary or vindictive (which terms are synonymous, *Mayer v. Probe*, *supra*) damages may be recovered of the wrongdoer. *Borland v. Barrett*, 76 Va. 128, 44 Am. Rep. 152; *Norfolk, etc., R. Co. v. Anderson*, 90 Va. 1, 17 S. E. Rep. 757; *Peshine v. Shepperson*, 17 Gratt. 472; *Harman v. Cundiff*, 82 Va. 239; *Fishburne et al. v. Engledove*, 91 Va. 548, 22 S. E. Rep. 354; *Mayer v. Probe*, 40 W. Va. 246, 22 S. E. Rep. 58; *Turner v. N. & W. R. Co.*, 40 W. Va. 675, 22 S. E. Rep. 88; *Ricketts v. C. & O. Ry. Co.*, 33 W. Va. 433, 25 Am. St. Rep. 901, 10 S. E. Rep. 801; *Downey v. C. & O. Ry. Co.*, 3 W. Va. 732; *Matthews v. Warner's Adm'r*, 29 Gratt. 570; *Forbes et al. v. Hagman*, 75 Va. 168; *Bolton et al. v. Vellines*, 94 Va. 393, 26 S. E. Rep. 847; *Blackwell v. Landreth*, 90 Va. 748, 19 S. E. Rep. 791.

b. Object of Punitive Damages.—The object of vindictive or exemplary damages, is, not only to recompense the party injured, but to punish the offender, and deter others from like offending in the future. *N. & W. R. Co. v. Neely*, 91 Va. 539, 22 S. E. Rep. 367; *Blackwell v. Landreth*, 90 Va. 748, 19 S. E. Rep. 791; *N. & W. R. Co. v. Anderson*, 90 Va. 1, 17 S. E. Rep. 757; *Mayer v. Probe*, 22 S. E. Rep. 58, 40 W. Va. 246, disapproving and overruling *Pegram v. Stortz*, 6 S. E. Rep. 485, 31 W. Va. 220; *Beck v. Thomson*, 31 W. Va. 439, 7 S. E. Rep. 447, in so far as they hold that a wrongdoer cannot be punished in a civil suit by punitive damages, in a proper case.

c. Rule for Awarding Compensatory or Punitive Damages.—"The law awards the former (compensatory or actual damages) only where in the unlawful act there is an absence of intentional wrong, fraud or malice, or where the act is not oppressively or recklessly committed, while the latter (punitive or exemplary damages) are given where the wrongful act is done with a bad motive, or with such gross negligence as to amount to positive misconduct, or in a manner so wanton or reckless as to manifest a wilful disregard of the rights of others." *RILEY, J.* in *Norfolk, etc., R. Co. v. Neely*, 91 Va. 540, 22 S. E. Rep. 367.

d. Aggravating Circumstances Necessary.—All the cases hold that, in order to enable a party to recover punitive damages, the act complained of must be accompanied by circumstances of aggravation, such as fraud, malice, oppression, or such circumstances that show an absolute disregard of the rights of others. *Vinal v. Core*, 18 W. Va. 1; *Wilson v. City of Wheeling*, 19 W. Va. 223; *Blackwell v. Landreth*, 90 Va. 748, 19 S. E. Rep. 791; *Forbes et al. v. Hagman*, 75 Va. 168; *Bolton et al. v. Vellines*, 94 Va. 393, 26 S. E. Rep. 847. See also, *Peshine v. Shepperson*, 17 Gratt. 472; *Borland v. Barrett*, 76 Va. 128;

Harman v. Cundiff, 82 Va. 239; *Fishburne et al. v. Engledove*, 91 Va. 548, 22 S. E. Rep. 354; *N. & W. R. Co. v. Wysor*, 82 Va. 250; *N. & W. R. Co. v. Lipscomb*, 90 Va. 137, 17 S. E. Rep. 809; *Downey v. C. & O. Ry. Co.*, 28 W. Va. 732; *Mayer v. Frobe*, 40 W. Va. 246, 22 S. E. Rep. 58; *Parsons v. Harper*, 16 Gratt. 64.

e. Instances That Prove the Rule.—In *Norfolk*, etc., *R. Co. v. Neely*, 91 Va. 539, 22 S. E. Rep. 367, the conductor, under an honest impression that he was doing his duty, unlawfully expelled plaintiff from the car, but in doing so was guilty of no rudeness or violence. The ejection was effected quietly and respectfully, the plaintiff offering no resistance. *Held*, that (clearly not a case for exemplary or punitive damages) actual damages only could be recovered.

In *Borland v. Barrett*, 76 Va. 128, defendant made an unprovoked and wanton attack upon plaintiff, in the dining room of a hotel. *Held*, case for punitive damages.

Where a party wrongfully sues out a distress warrant against another, he is not liable in punitive damages, in the absence of fraud, malice, oppression or other aggravating circumstances. *Fishburne et al. v. Engledove*, 91 Va. 548, 22 S. E. Rep. 354, citing and following *Peshine v. Shepperson*, 17 Gratt. 472.

In *Norfolk & W. R. Co. v. Lipscomb*, 90 Va. 137, 17 S. E. Rep. 809, where a passenger with wife and two children, one very sick, bought at B. tickets to W. and was assured by defendant's officials that a through sleeper was attached to the train. Entering sleeper, he paid for two berths, and was assured by its conductor that it would go through. Suddenly, without notice to him, sleeper was cut loose, and the train went on carrying off his baggage, including the child's clothing and medicine, part whereof was lost. Sleeper was left on the track at night when it was too late to get into a hotel or drug store. This distressing situation was produced by the negligence of the defendant's officials, of whom said conductor was one.

The court in holding the company not responsible in punitive damages says: "But it is not clear that the company can be held to respond in any other measure of damages than such as are compensations for the actual injury sustained. The record discloses that the officers of the company were themselves mistaken, negligently mistaken it may be conceded, yet we perceive in the record no indication of any malicious purpose or evil intent. It was an honest mistake, and one much regretted by those in fault as soon as it occurred, and disclaimed by the company, and everything within reasonable bounds done to alleviate the unfortunate condition of the plaintiff. Such baggage as was discovered was put off at a station and reclaimed by the company's servants as the train passed on which the plaintiff ultimately travelled. The valise was lost and should be paid for, but that does not appear otherwise than as an accident. But there was no insult, no disrespect, either before or after the sleeper was cut loose."

f. Actual Malice Not Necessary.—To entitle a person to recover of another vindictive or punitive damages, actual malice need not be shown. Where the act complained of is attended by such circumstances, as show a wilful disregard for the rights of others, malice will be inferred. *Borland v. Barrett*, 76 Va. 128, cited and approved in *N. & W. R. Co. v. Anderson*, 90 Va. 1, 17 S. E. Rep. 757. See *Daingerfield v. Thompson*, 33 Gratt. 136.

"An improper motive may be inferred from a

wrongful act based on no reasonable ground; and such improper motive constitutes malice in law; the act need not be prompted by anger, malevolence or vindictiveness." The court in *Bolton et al. v. Vellines*, 94 Va. 393, 26 S. E. Rep. 847, citing and approving *Forbes et al. v. Hagman*, 75 Va. 168.

g. Punitive Damages Belong Alone to Actions of Tort.—*N. & W. R. Co. v. Wysor*, 82 Va. 250.

"Where the action is for a breach of contract, the vicious intention of the defendant can have no effect on the damages." *GREEN, J.*, in *Pegram v. Stortz*, 31 W. Va. 220, 6 S. E. Rep. 485.

h. Liability of Master in Punitive Damages for Servant's Wrong.—A master is liable, to the extent of compensatory damages, for the unlawful act of his servant, committed in the course of his employment, whether ratified or not, but not in punitive damages, unless he has ratified such act. *N. & W. R. Co. v. Neely*, 91 Va. 539, 22 S. E. Rep. 367; *N. & W. R. Co. v. Anderson*, 90 Va. 1, 17 S. E. Rep. 757; *N. & W. R. Co. v. Lipscomb*, 90 Va. 137, 17 S. E. Rep. 809; *Ricketts v. C. & O. Ry. Co.*, 33 W. Va. 433, 25 Am. St. Rep. 901, 10 S. E. Rep. 801; *Downey v. C. & O. Ry. Co.*, 28 W. Va. 732; *Talbot v. W. Va., etc., Ry. Co.*, 42 W. Va. 560, 26 S. E. Rep. 311.

i. The Term "Ratification" Construed.—Both the Virginia and West Virginia courts liberally construe the term "ratification;" thus in both *Ricketts v. C. & O. Ry. Co.*, *supra*, and *Downey v. C. & O. Ry. Co.*, *supra*, the court quotes approvingly the following language from "Patterson on Railway Accident Law" page 471, "but such authorization or ratification can be evidenced either by an express order to do the act, or an express approval of its commission, or by an antecedent retention of a servant of known incompetency, or by a subsequent retention or promotion of the negligent servant."

j. The Aggravating Circumstances Must Appear in Declaration.—Where there are no allegations in the declaration of such facts that would show that the wrongful act was accompanied with circumstances of aggravation, or no general allegation of *alta anormia*, under which circumstances of aggravation might be proved, punitive or vindictive damages, which are special damages, cannot be recovered; only such damages as are the natural and proximate consequence of the lawful act, may be recovered in such a case. *Peshine v. Shepperson*, 17 Gratt. 472, cited and approved in *Fishburne et al. v. Engledove*, 91 Va. 548, 22 S. E. Rep. 354; *Lee v. Hill*, 84 Va. 919, 6 S. E. Rep. 473.

k. Evidence of Defendant's Wealth and Standing.—Evidence of the defendant's wealth and standing in the community, may be considered, where the evidence shows a case for punitive damage, not to show his ability to pay heavy damages, but to show the probable weight and effect his words, as in an action of slander, would have upon the community. *Harman v. Cundiff*, 82 Va. 239, citing *Womack v. Circle*, 29 Gratt. 210.

l. Punitive Damages a Question for the Jury.—In cases where punitive damages are proper, the amount of damages is a question that is peculiarly within the province of the jury, and their verdict will not be disturbed unless it appear that they were actuated by passion, prejudice, undue influence, or unless the amount is grossly excessive. *Borland v. Barrett*, 76 Va. 137, citing *Peshine v. Shepperson*, 17 Gratt. 472. See *Blackwell v. Landreth*, 90 Va. 748, 19 S. E. Rep. 791; *Fishburne v. Engledove*, 91 Va. 548, 22 S. E. Rep. 354.

VII. MEASURE OF DAMAGES.

a. **Generally.**—The object of the law is to give compensation for the injury suffered. Where the loss is merely pecuniary, and admits of definite estimate, it is proper enough to speak of compensation, which implies the notion of equivalents. But that word becomes inappropriate, where the injury is not merely pecuniary, and does not admit of definite estimate. It is more appropriate to say that the object of the law is to give amends or reparation. The injury done depends upon the rights that are violated, and the extent of the violation, and the amends or reparation in damages must be measured accordingly. *Peshine v. Shepperson*, 17 Gratt. 472, 485.

b. **Damages That Admit of Definite Estimate.**—Where the damages admit of definite and pecuniary estimate, the object of the law, is to give compensation for the injury suffered, and the verdict of the jury must be limited to the actual pecuniary loss of the plaintiff. *Peshine v. Shepperson*, 17 Gratt. 472.

c. **Damages That Do Not Admit of Definite Estimate.**—Where the damages do not admit of definite estimate, and there is no legal measure of damages the law leaves the amount entirely to the sound discretion of the jury, and the court will not disturb the verdict of the jury unless the amount awarded is so large or small as to indicate that the jury acted under the impulse of some undue motive or some gross error or misconception of the subject. *N. & W. R. Co. v. Shott*, 92 Va. 34, 22 S. E. Rep. 811; *Bertha Zinc Co. v. Black's Adm'r*, 88 Va. 308, 18 S. E. Rep. 452; *Norfolk v. Johnakin*, 94 Va. 285, 26 S. E. Rep. 890; *Ward v. White*, 86 Va. 212, 9 S. E. Rep. 1031; *Benn v. Hatcher*, 81 Va. 25; *Farish v. Reigle*, 11 Gratt. 697; *Richmond Ry., etc., Co. v. Garthright*, 92 Va. 635, 24 S. E. Rep. 267; *Daingerfield v. Thompson*, 33 Gratt. 136; *N. & W. R. Co. v. Ampey*, 98 Va. 108, 25 S. E. Rep. 226; *Richlands Iron Co. v. Elkins*, 90 Va. 249, 17 S. E. Rep. 890; *Va. Mid. R. Co. v. White*, 84 Va. 498, 5 S. E. Rep. 573; *Blackwell v. Landreth*, 90 Va. 748, 19 S. E. Rep. 791; *Fishburne v. Engledove*, 91 Va. 548, 22 S. E. Rep. 354; *Borland v. Barrett*, 76 Va. 128; *Peshine v. Shepperson*, 17 Gratt. 472; *N. & W. R. Co. v. Draper*, 90 Va. 245, 17 S. E. Rep. 888; *Miller v. Shenandoah Pulp Co.*, 38 Va. 558, 18 S. E. Rep. 740.

"To justify the granting of a new trial on the ground that the damages awarded are excessive, the verdict must be so out of the way as to evince passion, prejudice, partiality or corruption in the jury." The court in *Benn v. Hatcher*, 81 Va. 33. In *N. & W. R. Co. v. Ampey*, 98 Va. 108, 25 S. E. Rep. 226, where plaintiff sued for the loss of an arm and was given \$3,500 damages, *RILEY, J.*, in delivering the opinion of the court said, "There is no legal measure of damages in a case of this kind, and their estimation is peculiarly within the province of the jury, who are deemed especially competent to determine such matters. It is well settled that the court will not disturb the verdict in such a case, unless the amount allowed is so great as to evince prejudice, partiality, or corruption on the part of the jury, or that they were misled by some mistaken view of the case."

"Where a case depends upon the tendency and weight of evidence, and the jury and judge who tried the case concur in the weight and influence to be given to the evidence, it would be an abuse to the appellate powers of this court to set aside a verdict and judgment, because the judges of this court, from the evidence as it is written down, would not have concurred in the verdict." The court in *Benn*

v. Hatcher, 81 Va. 33, citing and approving *Hill's Case*, 2 Gratt. 596; *Blosser v. Harshbarger*, 21 Gratt. 214.

d. **Damages for Pain and Suffering.**—"No method has yet been devised, nor scales adjusted, by which to measure or weigh the value in money the degree of pain and anguish of a suffering human being. * * * and the verdict of a jury will not be set aside on the ground of excessive damages, unless the damages be so great as to indicate that the jury was actuated by partiality or prejudice." *RILEY, J.* in *Richmond Ry. Co. v. Garthright*, 92 Va. 635, 24 S. E. Rep. 267, quoted and approved in *Norfolk v. Johnakin*, 94 Va. 287, 26 S. E. Rep. 890. See also, *Farish v. Reigle*, 11 Gratt. 697; *Benn v. Hatcher*, 81 Va. 33; *N. & W. R. Co. v. Shott*, 92 Va. 34, 22 S. E. Rep. 811.

e. **Instances That Prove the Rule.**—The court in *Farish v. Reigle*, 11 Gratt. 697, affirmed a judgment for \$9,000 damages, where plaintiff had his head severely cut, leg broken, from which a stiff joint followed, which his physician testified would continue through life, and in consequence of his injuries he was confined in a house near the place where the accident occurred for six months, and incurred doctor's bills to the amount of \$250.

In *Norfolk v. Johnakin*, 94 Va. 285, 26 S. E. Rep. 890, a verdict of \$5,000 was affirmed, where the evidence showed that the plaintiff (a young lady) was severely injured, by reason of which she was an invalid and cripple for two years; and during which time she suffered excruciating agony every day.

In *N. & W. R. Co. v. Anderson*, 90 Va. 1, 17 S. E. Rep. 757, \$2,000 damages was held not to be excessive, where plaintiff was maliciously, but not violently ejected from car. But in *N. & W. R. Co. v. Neely*, 91 Va. 539, 22 S. E. Rep. 367, the plaintiff was without violence or malice ejected from defendant's train. The jury thinking it a case for exemplary damages, found a verdict for \$800, which the appellate court set aside, as excessive, holding that the plaintiff was entitled to compensatory damages only, in the absence of circumstances of aggravation.

A verdict for \$1,000 damages for throwing a man from a truck, cutting his face and bruising him. The plaintiff suffered no permanent injury. Affirmed. *Richmond Ry., etc., Co. v. Garthright*, 92 Va. 635, 24 S. E. Rep. 267.

In *N. & W. R. Co. v. Shott*, 92 Va. 34, 22 S. E. Rep. 811, the plaintiff, a mail clerk, got a verdict for \$7,000 damages, for personal injuries received through the gross negligence of the railway company. Judgment affirmed.

In *N. & W. R. Co. v. Ampey*, 98 Va. 108, 25 S. E. Rep. 226, the plaintiff, a young able-bodied man, who depended wholly on manual labor for a livelihood, was allowed \$3,500 damages for the loss of an arm.

Plaintiff's skull was negligently broken, a part of which was removed, leaving brain unprotected, his capacity for work impaired. Held, \$2,500 damage not excessive. *Richlands Iron Co. v. Elkins*, 90 Va. 249, 17 S. E. Rep. 890.

\$5,500 damages not too much, where plaintiff had both legs and thighs broken, and one of the legs were so badly injured that it had to be amputated. *R. & D. R. Co. v. Rudd*, 88 Va. 648, 14 S. E. Rep. 381.

In *Daingerfield v. Thompson*, 33 Gratt. 136, the court affirmed a judgment for \$3,000 given plaintiff for an injury sustained by him in his foot, which necessitated amputation of the leg below the knee; that his health was greatly impaired, and business suffered by reason of his wound.

In *Borland v. Barrett*, 76 Va. 128, \$10,000 punitive damages, was held not excessive, for maliciously breaking a bottle over plaintiff's head in the dining room of a hotel, inflicting a scalp wound only.

In *Bertha Zinc Co. v. Black's Adm'r*, 88 Va. 308, 13 S. E. Rep. 452, the court reversed the judgment of the lower court in setting aside a verdict for \$10,000 damages as excessive, where deceased came to his end, through the negligence of the company, and left a wife and number of children. Deceased was old, infirm and a common laborer.

In *D. & W. R. Co. v. Brown*, 90 Va. 340, 18 S. E. Rep. 278, plaintiff recovered \$7,500 damages, for a broken thigh, which also occasioned a consequent shortening of his leg.

\$2,000 damages for a permanent injury to one's foot. *Held*, not excessive. *N. & W. R. Co. v. Burge*, 84 Va. 63, 4 S. E. Rep. 21.

\$1,375 for dangerously wounding a person, by reason of which he suffered much and was in bed for several months. No permanent injury. *Held*, not inadequate. *Ward v. White*, 86 Va. 212, 9 S. E. Rep. 1021.

A verdict for \$5.00 was set aside in *Blackwell v. Landreth*, 90 Va. 748, 19 S. E. Rep. 791, as being inadequate in an action for slander of a girl of unblemished reputation by false imputations upon her chastity.

f. Breach of Contract—Measure of Damages—Generally.—As has been seen compensation to the party injured is the cardinal rule in assessing damages and this rule applies with particular force to cases of breach of contract. The object of the law, in such cases, is to put the injured party in such circumstances as he would have been had the other party carried out his part of the contract. *Burruss v. Hines*, 94 Va. 418, 26 S. E. Rep. 875; *James v. Adams*, 8 W. Va. 508; *Trigg et al. v. Clay et al.*, 88 Va. 380, 13 S. E. Rep. 494; *Kendall Bank Note Co. v. Comm'rs of the Sinking Fund*, 79 Va. 573; *Peshine v. Shepperson*, 17 Gratt. 472; *Alleghany Iron Co. v. Teaford*, 96 Va. 372, 31 S. E. Rep. 525; *James v. Kibler's Adm'r*, 94 Va. 165, 26 S. E. Rep. 417; *Hare v. Parkersburg*, 24 W. Va. 554; *Patton & Shaver v. Elk River Navigation Co.*, 13 W. Va. 259.

Where a party is not permitted to perform his part of the contract, by the fault of the other party, he may recover any damages he may have suffered by not being allowed to perform his part of the contract, such as wages paid to idle employees, and costs of keeping his plant in readiness; he may also recover the profits he would have made had he been allowed to carry out his part of the contract. *Alleghany Iron Co. v. Teaford*, 96 Va. 372, 31 S. E. Rep. 525.

Where party fails to accept property at a stipulated price at a designated place, according to his contract, the measure of damages, is the difference between the amount it would have cost plaintiff to have the property at the designated place, and the amount defendant agreed to pay for such property. *Alleghany Iron Co. v. Teaford*, 96 Va. 372, 31 S. E. Rep. 525; *Hare v. Parkersburg*, 24 W. Va. 554. In this last case *GREEN, J.*, said: "It seems to me, there was no impropriety in the jury ascertaining the amount of damage the plaintiff below sustained in consequence of the breach of this contract by calculating what it would have cost him to perform his contract and taking that from what he was under the contract to get for the delivering of this * * *." See also, *Patton & Shaver v. Elk River Nav. Co.*, 13 W. Va. 259.

g. Measure of Damages in Particular Cases.

For Abandonment by Lessee of His Contract of Rent.

—The measure of damages to the lessor in such a case is generally the amount of the rent that would have accrued during the term of rental, had the lessee carried out his part of the contract. But if the lessor succeeds in rerenting the property before the lessee's term expires, then the measure of damages is the difference between the amount lessee contracted to pay, and the sum lessor receives from the new tenant. If the lessor suffers no actual damage, he is nevertheless entitled to nominal damages for the breach of the contract. *James et al. v. Kibler's Adm'r*, 94 Va. 165, 26 S. E. Rep. 417.

For Breach of Contract to Pay Money.—"For the breach of a contract to pay money, no matter what the amount of inconvenience sustained by the plaintiff, the measure of damages is the interest on the money only." The court in *Bethel & Co. v. Salem Imp. Co.*, 98 Va. 354, 25 S. E. Rep. 304.

For Failure to Deliver Stock.—Where it is agreed to deliver stock of fluctuating value on a certain day, the measure of damages for failure to make such delivery, is not the nominal amount of said stock, but the true value of it, on the day agreed on for its delivery. *Bull v. Douglas, Adm'r*, 4 Munf. 308. See also, *Groves v. Graves*, 1 Wash. 1; *Reynolds v. Wailer's Heir*, 1 Wash. 164. In *Gray v. Kemp et al.*, 88 Va. 201, 16 S. E. Rep. 225, the court held, that in such a case the plaintiff might recover the highest price the stock would have brought in market at any time after the day agreed on for its delivery.

I have this day, Sept. 26, 1890, borrowed of Mrs. P. five thousand dollars, in stock of the state of Virginia, on which interest is payable semi-annually; and for the repayment of the same, with the accruing interest, I bind myself, my heirs, &c., witness, &c., K. The stock was borrowed to be converted into money, and was sold in November for \$4,755. *Held*, P. is entitled to the value of the stock at the time of the loan. *Davis, Trustee, v. Knight*, 24 Gratt. 406.

For Unlawfully Taking Part of Land—Railroads.—Railroad company, without authority, erected expensive improvements on plaintiff's land. Becoming insolvent, its franchises and property were purchased by another company. *Held*, the purchaser is liable for the land taken without considering the benefit from the construction of the railroad, and for the damage to the residue of the land. In such a case, the amount of the damages, as respects the residue of the land, is the difference in the market value of the land before and after the taking thereof; and as respects the land taken, including said improvements, is the fair cash market value of the land and said improvements at the time of the taking in view of the uses to which they have been put; and it was not error to refuse to allow a witness to testify that he had donated similar property to the company. *Richmond & Mecklenburg R. R. Co. v. Humphreys*, 90 Va. 425, 18 S. E. Rep. 901.

For Property Unlawfully Sold.—The measure of damages for a party whose property has been unlawfully sold by a wrong-doer, is the value of the land at the date of the sale. *Sims v. Tyrer*, 96 Va. 14, 30 S. E. Rep. 443.

For Undermining Foot-Path—Death of Licensee.—In an action by the personal representative of a licensee of a foot-path, against the owner of the lands, for causing the death of such licensee, by carelessly and negligently undermining said foot-path, the measure of damages is such sum as to the jury may seem fair and just under all the circumstances of the case, not exceeding the amount claimed in the

declaration. *N. & W. R. Co. v. DeBoard's Adm'r*, 91 Va. 700, 22 S. E. Rep. 514.

For Destroying Pass Way.—The measure of damages, recoverable of a railroad company, for destroying a pass way over one's lands, is not merely the injury to the part of the land made inaccessible. *N. & W. R. Co. v. Carter*, 91 Va. 587, 22 S. E. Rep. 517.

For Wrongful Distress.—In an action to recover damages for wrongfully distraining property for rent not due, the measure of damage, in the absence of circumstances of aggravation, such as fraud, malice, oppression, etc., is such damages as are the natural and proximate result of the injury complained of. *Fishburne v. Engledove*, 91 Va. 548, 22 S. E. Rep. 354.

For Failure to Transmit Message.—Where a telegraph company has received a message for transmission and the usual charges according to their regulations, it is bound to transmit the message faithfully and promptly, whether it be in "cipher" or "intelligible," and should the company negligently fail to transmit such message altogether, or to transmit it faithfully and promptly, it will become liable to an action for damages by the party aggrieved, and the measure of damages in such case is such loss as the party aggrieved has sustained by reason of the wrongful act of the company in violation of the duties imposed on it by law. A more precise statement of the rule is: The company is liable to all the direct damages which both parties would have contemplated as flowing from the breach of the contract or violation of the duty, if, at the time, they had bestowed proper attention to the subject, and had been fully informed of all the facts. *Western Union Telegraph Co. v. Reynolds Bros.*, 77 Va. 173.

For Alteration of Telegram.—Plaintiff wired his brokers in Mobile to buy 500 bales of cotton for him. In transmission the number was by the mistake of the telegraph company, changed to 2500. *Held*, the measure of damages was the amount lost on the sale at Mobile of the excess of the cotton above that ordered, or if not sold then, what would have been the loss on the sale of the cotton of Mobile in the condition and circumstances in which it was when the mistake was ascertained, including in such loss all the proper costs and charges thereon. *Washington & N. O. Tel. Co. v. Hobson & Son*, 15 Gratt. 122.

Sheriff for Default of Deputy.—A sheriff against whom a judgment is rendered for the default or misconduct of his deputy, is entitled to recover of that deputy, not only the amount of the judgment, but all costs and damages connected with such judgment. *Stowers, Adm'r of Bragg, v. Smith's Ex'x*, 5 Munf. 401.

In *Holcomb v. Flournoy*, 2 Call 433, the court refused to interfere with an award that allowed a sheriff to recover against his deputy, on a bond to "have harmless" the sheriff by reason of any default or misconduct of the deputy, all damages and expenses necessarily incurred by him, and damages for his trouble and anxiety which were caused by the deputy's default.

On Indemnifying Bond.—The proper measure of damages in an action on a bond, to indemnify a sheriff for the sale of property, seized under execution, is the actual value of the property seized and sold, with interest in the way of damages, on the amount of the value, from the day fixed on by the jury, as the time at which the property is to be

valued, until the time of the trial. *Crump v. Ficklin*, 1 Patt. & H. 201.

On Injunction Bond.—In an action on an injunction bond with condition "to pay all such costs as may be awarded against the plaintiff, and all such damages as shall be incurred in case the said injunction be dissolved," fees paid to counsel in the injunction suit cannot be recovered as damages, although the bill be a pure bill of injunction. *Wisecarver & d. v. Wisecarver*, 97 Va. 452, 34 S. E. Rep. 56.

Upon Warranty of Soundness of Animal.—For upon a warranty of the soundness of an animal sold, the measure of damages is the difference between the value of the animal sound as warranted, and his value at the time of the sale in the condition he really was; and the price at which the animal was sold is the proper evidence of value at that time, if sound to the extent of the warranty. And the rule is the same whether the purchaser offers to return the animal or not. *Thornton v. Thompson*, 4 Gratt. 121.

Trover and Conversion.—In trover and conversion the plaintiff may recover an amount greater than the value of the thing converted. *Pearpoint v. Henry*, 2 Wash. 192.

For Prematurely Filing Mechanic's Lien.—A sub-contractor files a mechanic's lien before completion of the work, contrary to Code, § 2476. *Held*, he is liable to an action for damages for injury thereby done the contractor. In such action the declaration should charge some special damage to plaintiff, as the language of the alleged lien does not necessarily import injurious defamation; but it is not necessary to give the name of any one whose custom has been lost to the plaintiff, nor to state that the alleged lien has been ended by limitation or decree. *Moore v. Both*, 80 Va. 107, 15 S. E. Rep. 520.

For Destroying Fruit Trees.—The measure of damages for destroying by fire an orchard of fruit trees is the value of the trees destroyed; not "the cost of replacing the trees the first proper season for planting after the burning, and the value of the care and labor bestowed on said trees by plaintiffs before the burning, with interest on the value of the care and labor from the time it was bestowed. *N. & W. R. Co. v. Bohannon*, 85 Va. 298, 7 S. E. Rep. 296.

For Property Lost by Carrier.—Says the court in *Tompkins v. Kanawha Board*, 21 W. Va. 222, "The general rule is, that where personal property is being shipped to a certain place for sale, and a loss occurs, the measure of damages is the difference between the price at which the property was bought, and its market value at the place of and at the time when it should have been delivered. *Boyd v. Gumberson*, 14 W. Va. 1. This rule is established to ascertain what the party had in fact lost. But where he has actually contracted to sell the property in the place where it is to be delivered at a specified price that price at which it was so contracted to be sold is the best evidence of its value, and of the loss which its owner had sustained."

VIII. MODE OF ESTIMATING DAMAGES.

a. In Actions for Personal Injuries, the jury may always take in consideration, in estimating the damages to be allowed,

1. **The Mental Suffering** the plaintiff has undergone. *N. & W. Ry. Co. v. Marpole*, 97 Va. 594, 34 S. E. Rep. 44; *Parsons v. Harper*, 16 Gratt. 64; *R. & D. E. Co. v. Norment*, 84 Va. 167, 4 S. E. Rep. 211; *Vinal v. Core*, 18 W. Va. 1; *Riley v. Railway Co.*, 27 W. Va. 16; *Dalgerfield v. Thompson*, 33 Gratt. 136; *Borland v. Barrett*, 76 Va. 128, any

2. **Physical Suffering and Pain** he has undergone on account of the injury complained of, *Ampey's Case*, 93 Va. 110, 25 S. E. Rep. 226; *N. & W. Ry. Co. v. Marpole*, 97 Va. 594, 34 S. E. Rep. 462; *Parsons v. Harper*, 16 Gratt. 64; *R. & D. R. Co. v. Norment*, 84 Va. 167, 4 S. E. Rep. 211; *Riley v. Railway Co.*, 27 W. Va. 145; *Bolton et al. v. Vellines*, 94 Va. 393, 26 S. E. Rep. 847; *Daingerfield v. Thompson*, 33 Gratt. 136; *Borland v. Barrett*, 76 Va. 128, his

3. **Loss of Time**, *Riley v. Railway Co.*, 27 W. Va. 145; *Parsons v. Harper*, 16 Gratt. 64; *Vinal v. Core*, 18 W. Va. 1; *Bolton et al. v. Vellines*, 94 Va. 393, 26 S. E. Rep. 847; *Daingerfield v. Thompson*, 33 Gratt. 136; *Borland v. Barrett*, 76 Va. 128; *R. & D. R. Co. v. Norment*, 84 Va. 167, 4 S. E. Rep. 211, and the

4. **Degree and Probable Duration of Injury**, *Daingerfield v. Thompson*, 33 Gratt. 136; *R. & D. R. Co. v. Norment*, 84 Va. 167, 4 S. E. Rep. 211; *N. & P. R. Co. v. Ormsby*, 27 Gratt. 455, any

5. **Medical Expenses** the plaintiff may have incurred by reason of the injury, *R. & D. R. Co. v. Norment*, 84 Va. 167, 4 S. E. Rep. 211; *Farish v. Reigle*, 11 Gratt. 697; *Riley v. Railway Co.*, 27 W. Va. 145; *Wilson v. City of Wheeling*, 19 W. Va. 323; *Daingerfield v. Thompson*, 33 Gratt. 136; *Borland v. Barrett*, 76 Va. 128; also the

6. **Permanent Reduction of His Capacity to Earn Money** for himself or those dependent on him, *Riley v. Railway Co.*, 27 W. Va. 145; *Wilson v. City of Wheeling*, 19 W. Va. 323; *Daingerfield v. Thompson*, 33 Gratt. 136; *Borland v. Barrett*, 76 Va. 128; *R. & D. R. Co. v. Norment*, 84 Va. 167, 4 S. E. Rep. 211; *N. & P. R. Co. v. Ormsby*, 27 Gratt. 455, and the fact that he has a

7. **Family Dependent on Him for Support** may be taken into consideration where he is permanently injured, or has died from his injuries. *B. & O. R. Co. v. Wightman's Adm'r*, 29 Gratt. 481.

"All the cases agree that where the deceased has left a widow and children it is proper for the jury, in assessing the damages, to estimate the value of the support and maintenance properly derived from the deceased, the amount realized by him from his usual occupation, as also the loss of his care, nurture and instruction." *B. & O. R. Co. v. Wightman's Adm'r*, *supra*.

8. **Mental and Physical Suffering of Deceased's Family**.—In an action to recover damages for the death of a son occasioned by the wrongful act of another, it is error to instruct the jury, that in estimating the damages, they may take in consideration the effect the news of the son's death had upon the nervous system of the mother. As there is no necessary or probable connection between negligence which results in the death of a son, and the consequent nervous condition of his mother. *N. & W. Ry. Co. v. Stevens' Adm'r*, 97 Va. 631, 34 S. E. Rep. 525.

b. Other Torts.

1. **Injury to Character**.—The jury may take in consideration, in a proper case, the injury one's character receives, as in a case of malicious prosecution, slander, etc. *Vinal v. Core*, 18 W. Va. 1.

2. **Counsel Fees**.—"The general rule is that counsel fees are not recoverable as damages, but on the trial of an action for malicious prosecution or false imprisonment, where exemplary damages are recoverable, the fees paid or incurred to counsel for defending the original suit of prosecution may be proved, and, if reasonably and necessarily incurred, may be taken into consideration by the jury in the averment of damages." *RILEY, J.*, in *Burruss v. Hines*, 94 Va. 413, 420, 26 S. E. Rep. 875, citing *Par-*

sons v. Harper, 16 Gratt. 64. See also, *Vinal v. Core*, 18 W. Va. 1; *Bolton et al. v. Vellines*, 94 Va. 393, 26 S. E. Rep. 847.

3. **Credit and Business Standing**.—The jury in assessing the damages may take in consideration the loss of credit and business standing of the plaintiff.

In *Peshine v. Shepperson*, 17 Gratt. 472, where the defendant entered the store of the plaintiff at night-time, in collusion with his clerk, and carried off most of his stock, the court, by *JOYNES, J.*, said: "That such acts are well calculated to injure the credit and business standing of a merchant, and that such will always be their effect, to a greater or less extent, seems too obvious to require proof by argument or illustration. They involve an imputation, in the harshest form, upon his credit and also upon his integrity. * * * * * The damages resulting from the credit and business standing of the plaintiff, * * *, were therefore properly recoverable, as natural, proximate and necessary consequences of the acts of the defendants."

4. **Injury to Business**.—Certain wrongful acts will necessarily injure the business of the person whose rights are violated, and when such is the case, the jury may consider the injury to plaintiff's business, in assessing the damages. *Peshine v. Shepperson*, 17 Gratt. 472. See *Daingerfield v. Thompson*, 33 Gratt. 136. And in such a case, to ascertain the damages, the nature and extent of the merchant's business, whether profitable or not, are proper subjects of inquiry. *Peshine v. Shepperson*, (*supra*).

5. **Mental Anguish**.—In an action by a father, for the seduction of his daughter, the jury may take in consideration the mental anguish of the father, in estimating the damages. *Riddle v. McGinnis*, 22 W. Va. 253.

6. **Humiliation—Indignity—Insult**.—In an action for false imprisonment the jury may, in estimating the damages, take into consideration, the humiliation, indignity and insults borne by plaintiff. *Vinal v. Core*, 18 W. Va. 1. See *Borland v. Barrett*, 76 Va. 128.

7. **Fact That Legislature May Act**.—Upon the trial of an issue to ascertain the amount of damages sustained by a ferry franchise by the erection and operation of a bridge, the jury are to regard the franchise as permanent, and in estimating the damage cannot take into consideration the fact that the legislature may repeal the law creating the exclusive privilege of transporting persons and things across the river within half a mile of the ferry. *Mason v. Harper's Ferry Bridge Co.*, 20 W. Va. 223.

IX. MITIGATION OF DAMAGES.

Effect of Insurance Money Received by Deceased's Family.—In *B. & O. R. Co. v. Wightman's Adm'r*, 29 Gratt. 481, 26 Am. Rep. 384, the court held that evidence to the effect, that deceased at the time of his death held policies on his life to the amount of \$5,000, for the benefit of his wife and children, and that since his death the amount of such policies had been paid over to his widow and children, was properly held inadmissible. The court, in passing on this question, said by *STAPLES, J.*, "We think the court did not err in refusing to admit this evidence. It was clearly calculated to mislead the jury as to the issues they were to try. The mere fact that the family of the deceased received money from some other source would not justly influence the measure of compensation to be made by the defendant for injuries attributable to the misconduct of

its employees and agents. The party effecting the insurance paid the full value for it, and there is no equity in the claim of the defendant to the benefit of a contract for which it gave no consideration. It is said that LORD CAMPBELL, the author of the English act, was of opinion that the money received on a policy of insurance by the family of the deceased, might be taken into account in assessing the damages. In this country the courts have uniformly held the contrary; and this view is the more just and reasonable."

Fact That Plaintiff Brought on the Injury by His Misconduct.—In *Matthews v. Warner's Adm'r*, 29 Gratt. 570, 26 Am. Rep. 396, it was held that the jury might, in assessing the damages, take into consideration, the fact that plaintiff's deceased, in a way, brought on his death, by cursing defendant repeatedly before the fatal shot.

Property Illegally Taken — Evidence That Similar Property Was Donated.—In an action against a railroad company, for the value of land illegally taken by it, and for damages to the residue, evidence that another party donated similar land to the company is proper. *R. & M. R. R. Co. v. Humphreys*, 90 Va. 425, 18 S. E. Rep. 901.

X. PROSPECTIVE DAMAGES.

a. The General Rule Stated.—Prospective damages are, as a general rule, recoverable, when the cause of action is complete, and the prospective damages are reasonably certain. *James v. Kibler*, 94 Va. 165, 26 S. E. Rep. 417; *Hargreaves v. Kimberly*, 26 W. Va. 787, 53 Am. Rep. 121; *Smith v. Point Pleasant, etc., R. Co.*, 23 W. Va. 453; *Rogers v. Coal River, etc., Co.*, 19 S. E. Rep. 401, 39 W. Va. 272; *Watts v. N. & W. R. Co.*, 19 S. E. Rep. 521, 39 W. Va. 196.

b. Injury Must Be Permanent.—Where it is proven that the cause of the injury to the property in question, is of a permanent nature, and the damage is permanent, then the rule is that all damages, both past and prospective, may be recovered in one suit. *Hargreaves v. Kimberly*, 26 W. Va. 787, 53 Am. Rep. 121; *Smith v. Point Pleasant, etc., R. Co.*, 23 W. Va. 453; *Rogers v. Coal River, etc., Co.*, 19 S. E. Rep. 401, 39 W. Va. 272; *Watts v. N. & W. R. Co.*, 19 S. E. Rep. 521, 39 W. Va. 196.

c. Successive Action for the Consequences of the Same Injury.—"It seems to me that in all those cases, where the cause of the injury is in its nature permanent, and a recovery for such injury would confer a license on the defendant to continue the cause, the entire damage may be recovered in a single action; but, where the cause of the injury is in the nature of a nuisance and not permanent in its character, but of such a character that it may be supposed, that the defendant would remove it, rather than suffer at once the entire damage, which it might inflict, if permanent, then the entire damage cannot be recovered in a single action; but actions may be maintained from time to time, as long as the cause of the injury continues." The court, in *Hargreaves v. Kimberly*, 26 W. Va. 799, quoted and approved in *Rogers v. Coal River, etc., Co.*, 39 W. Va. 272, 19 S. E. Rep. 401, 404; *Watts v. N. & W. R. Co.*, 19 S. E. Rep. 521, 39 W. Va. 196.

d. Injury Must Be Temporary.—But where the cause of the injury to the property is not of a permanent nature, but only of a temporary character, the rule is that only such damages may be recovered as have actually accrued, at the date of the institution of the action, and subsequent actions must be maintained to recover any future damage. *Hargreaves v. Kimberly*, 26 W. Va. 787, 53 Am. Rep. 121; *Rogers v. Coal*

River, etc., Co., 19 S. E. Rep. 401, 39 W. Va. 272; *Watts v. N. & W. R. Co.*, 19 S. E. Rep. 521, 39 W. Va. 196.

XI. PLEADING AND PRACTICE.

a. Amount of Damages Omitted in Declaration.—Effect of.—After verdict, the damages having been left blank in the declaration, the court will inspect the writ and supply them from it. *Digges v. Norris*, 3 H. & M. 268; *Hook v. Turnbull*, 6 Call 85.

In *Craghill et al. v. Page et al.*, 2 H. & M. 448, which was an action of debt on a bond with a collateral condition, no damages were laid in the declaration; nevertheless the judgment was sustained.

In debt on a bond, damages need not be laid in the declaration or found by the jury. *Taylor & Co. v. McClean*, 3 Call 557. See *Woodson v. Johns*, 1 Munf. 230.

b. Declaration—Counts—Claim of Damages.—A declaration contains several counts, and no damages are claimed at the end of each count, but the entire declaration concludes: "In all to the damage of the plaintiff \$500, and therefore they sue," this claim of damages must be regarded as on account of the wrongs named in each several count, and therefore a verdict and judgment may on such a declaration be rendered for damages. *Postlewaite v. Wise*, 17 W. Va. 2, cited and approved in *Hoffman v. Dickson*, 81 W. Va. 142, 6 S. E. Rep. 58.

c. Summons—Copy—Variance.—Original summons stated damages at \$5,000; copy at \$1,500. The variance could be taken advantage of only by plea in abatement (§ 3259); and, at least, was waived by failure to object before verdict. *R. & D. R. Co. v. Edd*, 88 Va. 648, 14 S. E. Rep. 361.

d. Damages Not to Exceed Amount Claimed in Declaration.—Greater damages cannot be awarded than are claimed in the declaration. *Hook v. Turnbull*, 6 Call 85; *Pearpoint v. Henry*, 2 Wash. 192; *Ga. Home Ins. Co. v. Goode & Co.*, 95 Va. 751, 30 S. E. Rep. 381; *Cahill v. Pintony*, 4 Munf. 371; *Winslow et al. v. Commonwealth*, 2 H. & M. 459.

e. Principal and Interest Together May Exceed Amount Claimed.—But this restriction is confined to the principal alone, and does not affect the interest that may be allowed thereon. *Cahill v. Pintony*, 4 Munf. 371; *Ga. Home Ins. Co. v. Goode & Co.*, 95 Va. 757, 30 S. E. Rep. 386.

f. Verdict in Excess of Amount—Plaintiff May Release Amount in Excess.—If the jury find a verdict for a larger amount than is claimed in the declaration, the plaintiff may release so much of the amount that is in excess of that claimed by him in his declaration, and take judgment for the remainder, and unless he does so a new trial should be awarded. *Cahill v. Pintony*, 4 Munf. 371; *Hook v. Turnbull*, 6 Call 85; *Tennant's Ex'or v. Gray*, 5 Munf. 494.

g. When Damages May Exceed Amount Laid in Declaration.—In debt upon a bond with a collateral condition, the jury may assess damages beyond those laid in the declaration, if the penalty be sufficient to cover them. *Payne v. Elizey*, 2 Wash. 18; *Winslow et al. v. Commonwealth*, 2 H. & M. 459; *Johnstons v. Meriwether*, 3 Call 523.

TUCKER, J., in *Winslow v. Commonwealth* (supra) says: "In perusing the record, an objection occurred to me which was not noticed at the bar. The damages laid in the declaration are only \$500. The damages assessed in one of these suits are upwards of 900, and in the other 1,900. And I was at first inclined to think, that the same reason which restrains a plaintiff from recovering more damages than he demands in his declaration, in an action sounding merely in damages, would apply to these

cases. But I find that this point occurred in *Johnstons v. Meriwether* (*supra*), and again in *Payne v. Ellzey* (*supra*), and in both cases was disregarded. My doubts are consequently changed into submission. Yet, I cannot help saying that such a practice has, in my opinion, a tendency to mislead a defendant, who may think it not worth while to defend a suit, where the damages are laid at 10% only, but would, probably, be roused on receiving notice, that he might be subject to the payment of 2,000%."

h. Debt on Bond—Jury Need Not Assess Damages.—In debt on a bond the jury need not find plaintiff's damages, but may bring in a general verdict in his favor. *Taylor & Co. v. McClean*, 3 Call 567.

i. Declaration—Allegation—Particular Injury.—A declaration, in an action for personal injuries, need not state the particular injury, for instance a broken leg; a general allegation that plaintiff was thereby "greatly injured, bruised, wounded and crippled" is enough. It is different though where the plaintiff seeks to recover special damages, consequent on the particular injury. *Yeager v. City of Bluefield*, 40 W. Va. 484, 21 S. E. Rep. 752.

Where the plaintiff, in his complaint, claims from the defendant damages for the destruction of 500 rails and about one mile of board fence, some wood upon his land, and a lot of growing timber, which, he alleges, was caused by the negligence of the defendant in permitting fire to emit from its locomotive and spread over his land, he will not be permitted to prove general damages done to his farm, but he will be confined to the specific items of damage alleged in his complaint. *Stewart v. Baltimore & O. R. Co.*, 10 S. E. Rep. 26, 33 W. Va. 88.

Not Necessary to State Every Matter That May Enhance the Damages.—In a declaration in an action for damages resulting from the death of a person by the wrongful act of another, it is not necessary to state every matter which may enhance the damages. *N. & W. Ry. Co. v. Stevens' Adm'r*, 97 Va. 631, 24 S. E. Rep. 525; *B. & O. R. Co. v. Wightman's Adm'r*, 29 Gratt 441.

Loss of Time—Married Women.—Under chapter 103 of the Va. Code of 1887, a married woman cannot recover damages for loss of time, because of injuries she has wrongfully sustained, unless it be averred and proved that she is a sole trader. *Richmond Ry., etc., Co. v. Bowles*, 92 Va. 788, 24 S. E. Rep. 888; *A. & D. R. Co. v. Ironmonger*, 95 Va. 625, 29 S. E. Rep. 819.

Medical Expenses Incurred—Married Women.—Neither may a married woman, under the same act, recover damages, for any expenses incurred by her in effecting her cure, unless she avers and proves that such money came out of her separate estate. *Richmond Ry., etc., Co. v. Bowles*, 92 Va. 788, 24 S. E. Rep. 888; *A. & D. R. Co. v. Ironmonger*, 95 Va. 625, 29 S. E. Rep. 819.

j. Special Damages—Must Aver in Declaration.—In an action of trespass on the case by employee against employer for a wrongful discharge, declaration makes no averment of malice or of special damage beyond loss of employment and wages, evidence of special damage to character by reason of the discharge is irrelevant and inadmissible. *Lee v. Hill*, 84 Va. 919, 6 S. E. Rep. 473.

k. Judgment by Default—Writ of Inquiry.—According to the common law, as recognized and settled in this state there can be no final judgment by default, in an action sounding in damages, in the absence of a writ of inquiry, either in the circuit court or before a justice, when the value in controversy or damages exceeds \$20.00, and the right of either party, if he demands it, to have such writ executed by a

jury is guaranteed by our constitution. *Hickman v. B. & O. R. Co.*, 30 W. Va. 296, 4 S. E. Rep. 654. See also, *Commercial Union Assur. Co. v. Everhart's Adm'r*, 88 Va. 952, 14 S. E. Rep. 886.

l. Jurisdiction—Justices of the Peace.—In determining the question of jurisdiction in an action for a wrong before a justice, the amount claimed in the summons, and not the damage as shown by the testimony, must control. *Stewart v. B. & O. R. Co.*, 33 W. Va. 88, 10 S. E. Rep. 26.

m. Motion to Recover Money—Damages for Breach of Contract.—Damages for an injury resulting from a breach of contract, recoverable only in an action "sounding in damages," can in no sense be considered money due upon contract, and hence a motion under sec. 3211 of the Code, cannot be maintained to recover damages for a breach of contract. *Wilson v. Dawson*, 96 Va. 687, 32 S. E. Rep. 461.

n. Joint Tort Feasors—Assessment of Damages.—In a joint action of trespass against several who plead jointly, if the jury find them guilty jointly, they should assess the damages jointly against all. If in such case the jury by mistake assess several damages, the plaintiff may cure the defect by entering a *nolle prosequi* as to some, and taking judgment against one. In such a case it is not correct for the court to instruct the jury, that they may sever in the damages, and assessed respectively what in their opinion each party found guilty ought to pay. In such a case the jury should assess against all who are found guilty, the amount which they think the most guilty should pay. In such a case therefore an instruction to the jury that they may sever the damages, is not an error of which a defendant can complain in an appellate court; though the plaintiff may. *Crawford v. Morris*, 5 Gratt. 90; *Ammonett v. Harris, et al.*, 1 H. & M. 488.

o. Damages in Appellate Court.

Damages on Costs.—Where an appellate court reverses a judgment as to costs, the successful party is not entitled to damages on the costs. *Hudson v. Johnson*, 1 Wash. 10.

Executor Prosecuting Appeal.—Appellant dies, and the appeal is revived by his executor. Judgment is affirmed. Damages and costs ought not to be awarded against the proper estate of the executor, in case of deficiency of that of the testator. *Hudson v. Ross & Co.*, 1 Wash. 74, disapproving *Bates v. Gordon*, 3 Call 555.

In Caveat.—Damages are not to be given upon affirmation of the judgment in cases of caveat. *Preston v. Harvey*, 3 Call 495.

Retarding Execution of Decree.—If the defendant appeals from a decree of the high court of chancery, pronounced on a forthcoming bond, the court of appeals may allow ten per cent. damages for his retarding the execution of the decree. *Skipwith v. Clinch*, 3 Call 86. See *McClung v. Beirne*, 10 Leigh 394.

"Matter in Controversy"—Damages Allowed by Law.—The damages allowed by law, upon affirmation of a county court judgment by a superior court of law, are not to be reckoned as part of the "matter in controversy," for the purpose of giving the court of appeals jurisdiction. If therefore the judgment be for less than one hundred dollars, but would amount to more, by adding the damages, upon affirmation, an appeal does not lie to the court of appeals. *Melson v. Melson's Adm'r*, 2 Munf. 542.

Injunction Bond—Surety.—The security in a bond for the prosecution of an injunction is not liable for the costs and damages, which may accrue on an appeal to an appellate court. *Woodson v. Johns*, 8 Munf. 230.

479 *Wallace's Adm'r & als. v. Treakle & als.

March Term, 1876, Richmond.

1. **Suits to Avoid Fraudulent Conveyances—When Creditor's Lien Begins.***—Creditors at large who file a bill to set aside a deed of their debtor conveying land as fraudulent, and succeed, have a lien on the land for their debts from the filing of their bill.

2. **Same—Priority of Creditors.**—The deed of H for land is set aside as fraudulent at the suit of some of his creditors, and there is a decree after the death of H for the sale of the land, and for account of the debts of H, and their priorities. The report shows that there was one judgment against H before the deed was made. Some of the plaintiffs in the bill were creditors by judgment, one a creditor at large; a number came in by petition before the decree; and a number came in before the commissioner, and by petition after the decree. In distributing the fund, it is to be applied, 1st. To pay the judgment recovered before the deed was made. 2d. To the judgments recovered before the bill was filed. 3d. To the creditors at large who joined in the bill. 4th. To the creditors by petition before the death of Henderson, in the order in which their petitions were filed. 5th. To all the other creditors *pro rata*.

3. **Sale of Lands under Decree—Setting Aside.**—Though in this case there was a decree for the sale of the land, and a sale before an account of the debts was taken, the sale of the land will not be set aside upon the objection of some of the creditors who came in after the decree, made years after the sale, when it is obvious the land would not sell for as much as it had sold for before, and which was more than some of these creditors had expressed their willingness to take for it.

By deed bearing date the 20th of April 1866, William Henderson, Sr., of Lancaster county, conveyed to his son, William Henderson, Jr., five hundred acres of land and one-half of his stock of horses, cattle, sheep, &c. In consideration of which,

480 William Henderson, *Jr., executed to him ten bonds of \$300 each, payable with interest in one, two, &c., to ten years, and conveyed the property purchased in trust to secure the payment of the bonds. And by a deed of the same date, William

Henderson, Sr., conveyed to his son, Charles E. Henderson, three hundred acres of land, including the dwelling house, &c., and one-half of his stock of horses, cattle, sheep, &c., for the same price, to be paid and secured in the same way.

By deed of the same date, William Henderson, Sr., conveyed to Warner Eubank three or four other tracts of land, and all the bonds of his two sons, except the first due of each, in trust to pay all his debts in which he was principal debtor, placing them all on the same footing. All these deeds were admitted to record on the 23d of April 1866.

On the 18th of September 1866, John S. Treakle, who sued for himself and four others, filed his bill in the circuit court of Lancaster county, in which he alleged that they were creditors of William Henderson, Sr.; himself and three of the other parties, by judgments recovered on the 25th of August 1866, and the fourth by bond. He charged that the deeds to William Henderson, Jr., and Charles E. Henderson, were fraudulent, intended to hinder and delay the creditors of the grantor; and he prayed that they might be set aside, and the property conveyed in them might be sold and applied to the payment of the plaintiffs' debts.

On the 7th of November 1866 the death of William Henderson, Sr., was suggested, and the suit was revived against his administrator.

In November 1867, William Henderson, Jr., and Charles E. Henderson, filed their answer denying the fraud, insisting the price they were to pay was the full

481 *value of the property. A number of depositions were taken by the defendants, which went to sustain the deeds; but the cause coming on to be heard on the 18th of April 1868, the court being of opinion that the deeds from William Henderson, Sr., to his sons, having been executed on the same day with the deed of trust to Eubank for the benefit of his creditors, the said deeds constituted one and the same transaction, and that the deeds to the sons were fraudulent, it was decreed that they be set aside, and that William and Charles E. Henderson should surrender the personal property conveyed to them by said deeds to commissioners named, who were directed to sell the property, real and personal, in the bill mentioned, upon a credit of one, two and three years, except enough to pay the costs of the suit and the expenses of sale. And a commissioner was directed to take, among others, an account of all outstanding debts of William Henderson, Sr., secured by the deed to Eubank, with the priorities, if any, of the said debts growing out of liens upon the real estate conveyed to the sons.

On the 1st of October 1868 the commissioner returned his report. He reported that the outstanding debts and liabilities of William Henderson, deceased, that had been exhibited to him, and proved to his satisfaction, amounted to the aggregate sum

***Suits to Avoid Fraudulent Conveyances—When Creditor's Lien Begins.**—The principal case is cited in *Keagy v. Trout*, 85 Va. 397, 7 S. E. Rep. 329, and also in *Batchelder v. White*, 80 Va. 106. In West Virginia it is approved in the following decisions: *Guggenheimer v. Lockridge*, 39 W. Va. 458, 19 S. E. Rep. 875; *Baer v. Wilkinson*, 35 W. Va. 423, 14 S. E. Rep. 8; *Reynolds v. Gawthrop*, 37 W. Va. 4, 16 S. E. Rep. 365; *Clafin v. Foley*, 22 W. Va. 443; *Jackson v. Hull*, 21 W. Va. 613; *Clark v. Figgins*, 31 W. Va. 150, 5 S. E. Rep. 645; *Sweeney v. Grape Sugar Co.*, 30 W. Va. 456, 4 S. E. Rep. 438.

In Virginia the statute upon which the decision in the principal case hinged has been amended, so it is no longer authority in this state. See Va. Code, § 2460; Acts 1893-4, p. 614; Acts 1899-00, p. 73. These statutes are construed in *Davis v. Bonney*, 89 Va. 758, 17 S. E. Rep. 229; 1 Va. Law Reg. 294; 2 Va. Law Reg. 432; 3 Va. Law Reg. 743, 825; 5 Va. Law Reg. 425; *Barton's Ch. Pr.* (2d Ed.) p. 543-4.

of \$24,862.32, including interest to the date of the report; of which amount \$24,128.05 was secured by the deed to Eubank. That there were judgments obtained before the death of William Henderson, deceased, amounting to \$3,789.94; and a judgment of \$24.45 after his death. One of these judgments was recovered in 1861, and the others, except the last, were recovered in August 1866. There were exceptions to this report, but it is not necessary to state them.

482 *It appears that a number of petitions were filed by creditors of Henderson, to be admitted parties in the cause, but they are, with one exception, omitted from the record; the time or order of their presentation does not appear. The commissioner states, that creditors, whose debts he states, amounting to \$11,161.19, joined in the suit; but this must have been by petition, as the debts of the plaintiffs named in the bill did not amount to more than \$6,000.

At the November term 1868, R. A. Claybrook and three others, whose debts were stated in the report of the commissioner, presented their petition in the cause, in which they insist there was error in the decree of the 18th of April 1868, because there was no enquiry in order to ascertain the outstanding liabilities against the estate of Henderson, and no enquiry to show the order of priority in which the debts should be paid, before the decree directing the sale; and they pray that the said decree be reheard in behalf of the petitioners; and that a majority of Henderson's creditors may be permitted to adopt, if they prefer, the deeds made by the said Henderson in his lifetime to his sons.

The cause came on to be heard on the 10th of October 1871, and the report of the sales of the real and personal estate having been confirmed by a former decree, the court rejected so much of the petition of Claybrook and others as asked that a majority of the creditors might be allowed to adopt the deeds which had been set aside in the cause, and decreed that the sales of the real estate of Wm. Henderson, deceased, which was conveyed to his sons, to the amount of \$3,789.94, with interest from the 1st of October 1868, paid, or so much thereof as might be then in the hands of Robert A. Mayo

483 the receiver, be applied as *follows, viz: To the payment in full of the judgment recovered in 1861, and the balance remaining in the hands of the receiver ratably between the judgments recovered in August 1866. And the commissioner was directed to take a further account of the outstanding debts of the estate of Wm. Henderson, and also an account of the entire amount of assets to be distributed in the cause, and apportion the same among all the debts secured by the deed of trust.

The commissioner reported additional debts to the amount of \$1,184.98 in which Henderson was surety. And he says there are difficulties in the way of a distribution of the funds arising from the conflicting

claims of the creditors. 1st. The plaintiffs in the suit who are not judgment creditors, claiming that they are entitled to the funds both real and personal, arising from setting aside the deeds to Wm. and Charles E. Henderson as fraudulent, after satisfying the judgments. 2nd. The creditors secured by the deed of trust to Eubank claiming that they are entitled to all the estate of Henderson after satisfying the judgments. 3d. The creditors not provided for in the deed of trust to Eubank claiming that they are entitled to a pro rata distribution of the funds arising from setting aside the deeds to Wm. and Charles E. Henderson after satisfying the judgments.

The cause came on again to be heard on the 11th of April 1872, when the court decreed that the plaintiffs in the suit who made themselves parties thereto either by joining in the original bill or by petition filed prior to the decree of April 18th, 1868, setting aside as fraudulent the deeds made to William and Charles E. Henderson, were entitled to the whole proceeds arising from the sales of the property conveyed by said deeds, including any rents and profits

484 with which *William and Charles E. Henderson might be properly chargeable after the rendition of that decree. Those having judgment liens on the real estate in the lifetime of William Henderson to be paid according to their priorities out of the proceeds of the real estate; and all others who were parties to said suit prior to the rendition of said decree to be paid pro rata out of the balance of said fund; it being apparent to the court, from the record in the cause, that there was not a sufficiency to pay the whole amount of said claims in full. And the court further decreed that all the creditors included in the deed of trust to Eubank were entitled to share in the proceeds of the sale of the trust property, according to the provisions of said deed: the creditors entitled to the fund arising from the sales of the property included in the deeds set aside as fraudulent, who were also beneficiaries under the deed of trust, were entitled to their proportion of the trust fund or any balance which might be due them after exhausting the fund arising as aforesaid from the sale of the property included in the deeds declared to be fraudulent.

And the purchasers of the land having failed to pay the purchase money, they were directed to show cause at the next term of the court why the land should not be again sold. From this decree Wallace's administrator, Claybrook and others, whose debts had been reported by the commissioner, but who had not made themselves parties in the cause until after the decree of April 18th, 1868, applied to this court for an appeal; which was allowed.

Robert & R. M. Mayo, for the appellants.

W. W. Walker, for the appellees.

485 *Christian J. delivered the opinion of the court.

It is conceded that the deeds executed by William Henderson to his sons are fraudulent and void. At all events there is no controversy here in respect to so much of the decree of the circuit court as declares them vacated. The real matter of contention is in reference to the distribution of the fund arising from the sale of the real estate conveyed by said deeds. The circuit court was of opinion, that the creditors who had obtained judgments in the lifetime of Henderson, the debtor, were entitled to be first paid, according to their respective priorities; and that the other creditors who were parties to the suit before the decree of sale were entitled to be paid pro rata out of the balance of the fund. The appellants are creditors, but, with one exception, they are not judgment creditors; nor were they parties to the suit before the rendition of the decree. These debts were, however, proved before the commissioner subsequently to the date of the decree, and at the following term of the court they became parties more formally by petition.

They do not controvert the preference accorded the creditors by judgment; but they claim that any surplus remaining after the satisfaction of their claims shall be applied pro rata to the payment of all the creditors, without regard to the time of their becoming parties to the suit. This is the main ground of controversy raised in the appeal here.

Our statute provides that a creditor, before obtaining a judgment or decree for his claim, may institute any suit to avoid a gift, conveyance, transfer, or any charge upon the estate of his debtor which he might institute after obtaining such judgment or decree, and he may in such suit have all the relief in respect to such estate which he would be entitled to after obtaining a judgment or decree for the claim which he may be entitled to recover. Code 1860, ch. 179, sec. 2.

Previous to this enactment it was the settled rule of the courts, that a creditor at large could not resort to a court of equity, to impeach any conveyance made by his debtor, on the ground of fraud. If real estate was the subject of the conveyance, a judgment was regarded as sufficient. If goods and chattels or any equitable interest therein, although incapable of being levied on, were embraced in the conveyance, the creditor was required to take out execution and have it levied or returned, so as to show that his remedy at law had failed. *Chamberlayne v. Temple*, 2 Rand. 384; *Kelso v. Blackburn*, 3 Leigh 300; *Rhodes v. Cousins*, 6 Rand. 189; *Tate v. Liggett & Mathews*, 2 Leigh 84.

Such was the state of the law before the Code of 1849. The enactment before referred to was for the first time incorporated in that code. It was adopted in consequence of the decisions above referred to, and was intended to afford a remedy in the cases designated in these decisions. For the first time the statute is before this court for its true construction. I think there can be no doubt that it was the intention of the legis-

lature to declare that a party creditor who filed his bill to avoid a fraudulent conveyance, acquired a lien upon the property of the debtor conveyed in such void conveyance, if he obtained a decree setting it aside, and in that event the lien attaches from the day the bill is filed.

The very terms of the act, as well as the necessity of its passage, growing out of the decisions above referred to, conclusively shows this to be the true construction.

It provides, that "a creditor, before obtaining a judgment or decree for his claim, may institute any suit to avoid a gift, conveyance, assignment or transfer of or charge upon the estate of his debtor, which he might institute after obtaining such judgment or decree; and he may in such suit have all the relief in respect to said estate, which he would be entitled to after obtaining a judgment or decree for the claim which he may be entitled to recover."

It is plain that by the very terms of this statute the creditor, assailing successfully a fraudulent conveyance, is placed in the same position, and is entitled to the same relief, as if he had already obtained a judgment or decree against his debtor. What is that position, and what is that relief? Plainly a lien upon the property of the debtor, just as if he had, at the filing of his bill, already obtained a judgment or decree. The statute places the creditor, who assails a fraudulent conveyance, if he succeeds in vacating it, in the position of one already having obtained a judgment or decree, and his lien subsists from the time of filing his bill.

It is clear that creditors filing a bill to set aside a fraudulent conveyance acquire a specific lien, and are entitled to priority over other creditors at large.

I am therefore of opinion that the true rule of distribution of the fund in the hands of the circuit court of Lancaster, was to pay first the judgment creditors of Henderson their judgments obtained in his lifetime, according to their priorities; and second the creditors, who, in his lifetime, filed their bill to set aside the deeds to his sons, and those who came into said suit by petition before his death, regarding their liens as subsisting from the date of the filing of said bill or petitions respectively, and the balance, if any, to be distributed pro rata among his other creditors.

*I am further of opinion that the said circuit court did not err in refusing to order a re-sale of the land sold by its commissioners upon the ground assigned in the petition of appeal, that it was sold before any account was taken of the debts and liabilities of William Henderson. The theory upon which courts of equity require generally that land shall not be sold until such accounts are taken is, that the creditors are interested in bidding for the land and making it bring its full value, and may not be sacrificed; but in this case it abundantly appears that the land brought its full value, indeed a much larger price than it was sold for by Henderson, and for which two of

the petitioners for appeal in this case were willing it should be sold. After the lapse of ten years, and when the rights of purchasers have intervened, and when the appellants acquiesced in said sale for four years, it would be to the last degree inequitable to set aside said sale, when a resale would inevitably result in a sacrifice of the property, consequent upon the general depreciation of real estate, especially in that portion of the state where this land is situate.

I am therefore of opinion that there is no error in the decree of the circuit court in refusing to set aside the sale made by its commissioner.

But the said circuit court erred in declaring that the creditors who were parties to the suit assailing the deed of Henderson prior to the rendition of the decree of 18th April 1868, should be paid pro rata, out of the balance of the fund, after satisfying the judgment creditors. Instead of directing a payment pro rata, the circuit court should have held that the creditors who filed the bill had acquired a lien from the date of its being filed, and those who came into said suit by petition, had acquired a
489 lien from the date of the filing *of the same, and treating them as judgment creditors, they should have been paid according to their priorities; and the balance, if any, distributed pro rata among the creditors at large.

For this error the decree of the circuit court must be reversed; and the cause remanded to said circuit court for further proceedings to be had therein according to the principles herein declared.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the circuit court erred in holding that the creditors who were parties to the suit impeaching the fraudulent deeds of Wm. Henderson, Sr., before the decree of sale, were entitled to be paid pro rata out of the balance of the fund remaining in the hands of the court after paying the judgment creditors: This court being of opinion that the true rule of distribution of the funds in the hands of the court, was to pay, first, the judgment creditors of said Henderson, Sr., the amounts of their judgments obtained in his lifetime, according to their respective priorities. And secondly, the creditors who in his lifetime filed their bill to set aside the said fraudulent deeds, and those who came into said suit by petition before his death, regarding the liens of such creditors as subsisting from the date of filing said bill or petitions respectively; and the balance, if any, to be distributed pro rata among the other general creditors. Therefore it is decreed and ordered that so much of the decrees of the said circuit court as are inconsistent with the foregoing decree, be reversed and annulled, and that in all other respects they be affirmed; and that the appellant Slacum, out of the estate
490 of his intestate, *in his hands to be administered, and the other appellants

out of their own estate pay to the appellees their costs by them about their defence in his behalf expended; and that the cause be remanded to the said circuit court, for further proceedings to be had therein to a final decree in accordance with the principles herein declared. Which is ordered to be certified to the said circuit court of Lancaster county.

Staples J. did not concur in so much of the opinion as treats the filing of the bill as giving a lien.

Decree reversed in favor of appellees.

491 *White, by &c., v. Gouldin's Ex'ors & als.

March Term, 1876, Richmond.

Wife's Equity.—G died in 1863 in the county of C. By his will, after a number of specific devises and legacies, he directs the residue of his estate, which includes lands, to be divided into four parts, which he gives to one of his sons and three daughters, one of whom is L the wife of W; and directs his executors to sell the property. W, who then lived in C, removed, and lived in Tennessee in 1869 with his wife and seven children; and he was insolvent. In 1869 W came to C, and he and some of the other children entered into a bond with the executors to submit the matters of difference between them to arbitration, the award to be made a rule of court. W signed this bond for himself and his wife L, without authority from her. The arbitrators awarded to each of the residuary legatees \$8,000, to be paid by the executors, the part of L to be paid to W; and that W and the other legatees should give bonds of indemnity. This award was entered as an order of the Circuit court of C, directing the executors to pay the \$8,000 to W. Before the money was paid, creditors of W, whose debts were contracted before the death of G, instituted proceedings to subject this sum of \$8,000, awarded to W, to pay their claims; and L then filed her bill against them, the executors and W, to have it settled on her. **HOLD:** She is entitled to have the whole, or a part, as may be deemed reasonable on enquiry, settled to her separate use.

John Gouldin, of the county of Caroline, died in February 1863. He left a will, which was admitted to probate in the county court of Caroline; and his sons, Thomas W. and James F. Gouldin, qualified as his executors. The provisions of the will are sufficiently set out in the opinion of Anderson, J. After a number of specific devises and bequests to his children, he says: "I
492 desire that all the balance of my *estate, not already disposed of, be equally divided into four parts. After the sale of the land, as hereafter directed, one part to go to the heirs of my son Silas B. Gouldin, one part to my daughter Martha J. Broadus,

***Wife's Equity.**—On this once important, but now almost obsolete subject, see the principal case cited in *Williams v. Sloan*, 75 Va. 149, and in *Walden v. Walden*, 83 Gratt. 88, and *note*. Also, see *Ware v. Ware*, 28 Gratt. 670, and *note*; *Smith v. Bradford*, 76 Va. 758.

one to Lavinia C. White, and one part to Bettie J. Conway." By a subsequent clause he directs and empowers his executors to sell the estate embraced in this residuary clause of his will, as soon after the payment of his debts as they may think best for the benefit of the legatees interested.

Testator's daughter Lavinia was married to William S. White. He lived in Caroline county until 1863, when he removed with his family to the state of Georgia, where they remained until some time in the year 1871, and then removed to the state of Tennessee, where they still live. The family consists of Mr. and Mrs. White and seven children. He is at present insolvent.

In 1869 William S. White appears to have come to Virginia; and in August 1869 the following submission and award and proceedings thereon were entered and made, viz:

Whereas differences of opinion and opposing claims have arisen between Thomas W. Gouldin and James F. Gouldin in their capacity as executors of the last will and testament of John Gouldin deceased, and as beneficiaries under the same, and as heirs and distributees of said decedent, on the one side, and William S. White and Lavinia C. his wife, Lysander B. Conway and Bettie J. his wife, and certain children of Silas B. Gouldin, viz.: John G., Wilton S., and William M. Gouldin, respecting their respective interests as devisees, legatees, heirs and distributees of said John Gouldin deceased; which differences and disputes *relate to the proper legal construction of the will of said testator, to the proper rights, interests and claims of all said parties thereunder, and to the actings and doings of the said executors in their administration of the estate of said testator.

Now, for the final ending of all such questions and disputes, and the decision of the same, it is consented, concluded and agreed, by and between all the said parties, that all the said questions and disputes, and all matters of controversy, and of conflicting rights and interests between said parties in the premises shall be, and they are hereby, referred and submitted to the final award and determination of John L. Marye, Jr., of Fredericksburg, and Judge Richard H. Coleman of Fredericksburg arbitrators, indifferently chosen by the said parties, to hear, decide, and finally determine the same; and in case of disagreement arising between said arbitrators, touching any such matter so submitted to them, they shall select and call in a third arbitrator to act as umpire between them, and decide and determine any such matter of disagreement. So that the award, decision and judgment so made by said arbitrators and said umpire (if one be called in), be rendered in writing on or before the 20th day of October 1869, and duly authenticated copies thereof be delivered to each of said parties; and it is hereby mutually agreed by and between the said parties that this submission shall be made a rule of the circuit court of Caroline

county. And it is further understood and agreed by, and between said parties, that in making this arbitration the said arbitrators are not to be held rigidly bound by the rules and principles governing courts of law and equity, as settled by the courts of this country, whenever in their judgment the rigid application of such rules would work gross injustice to *any of said parties; but shall in such case decide and determine according to their individual views and judgment of the very right and justice of the case.

And in order that the award and decision so made by said arbitrators may be effectual and satisfactory between the said parties, it is hereby agreed by the latter that the said arbitrators shall prescribe, declare and determine in what mode, and out of what property which came from the estate of said decedent, and now under control of any of said parties, all the rights and claims of all said parties, as ascertained and determined by said award, shall be satisfied.

In witness whereof, the said parties acting for themselves, and binding themselves as to the assent and submission hereunto of their respective wives, who have interest to be affected hereby, have hereunto set their hands and seals this 11th day of August 1869.

T. W. Gouldin, [Seal.]
J. F. Gouldin, [Seal.]

Wm. S. White, [Seal.]
For self and Lavinia C. White.

L. B. Conway, [Seal.]
For self and Bettie J. Conway.

Wilton S. Gouldin, [Seal.]
William M. Gouldin, [Seal.]
John G. Gouldin, [Seal.]

We hereby express our approval of the above award. Witness our hands and seals.

T. W. Gouldin, [Seal.]
J. Frank Gouldin, [Seal.]
Wm. S. White, [Seal.]
L. B. Conway, [Seal.]

495 *In Caroline Circuit Court, Sept. 22d, 1869. Ex parte John Gouldin's heirs, devisees, legatees, distributees and executors.

It appearing to the court that Wm. S. White, and Lavinia C. his wife, Lysander B. Conway and Betty J. his wife, Wilton S. Gouldin, William M. Gouldin and John G. Gouldin, and Thomas W. Gouldin, and J. F. Gouldin, did on the 11th day of August 1869 agree to submit to the arbitration of John L. Marye and Richard H. Coleman all matters of controversy and difference between said parties, which differences and disputes relate to the proper legal construction of the will of John Gouldin deceased, to the proper rights, interest and claim of all said parties thereunder, and to the actings and doings of the said Thomas W. Gouldin and J. F. Gouldin, as executors of John Gouldin deceased, in their administration of his estate; and that said parties did also agree that said arbitrators should prescribe, declare and determine in what

mode and out of what property which came from the estate of said decedent, and now under the control of any of said parties, all the rights and claims of all of said parties, as ascertained and determined, shall be satisfied.

It is ordered that a rule be made that the said parties submit to the award which shall be made in pursuance of said agreement.

And an award made under said agreement having been returned by said arbitrators, it is ordered that said award be entered up as a decree of this court, so far as said award relates to said William S. White and Lavinia C. his wife, Lysander B. Conway and Bettie J. his wife, Thomas W. 496 Gouldin, and J. F. Gouldin; *the said William S. White and Lavinia C. his wife, Lysander B. Conway and Bettie J. his wife, Thomas W. Gouldin and J. F. Gouldin, having appeared in court through their counsel, and having waived any summons to show cause against said award: and in accordance with the terms and provisions of said award,

The court doth adjudge, order and decree, that Thomas W. Gouldin and James F. Gouldin do pay Lysander B. Conway, in full of all interest, claim and demands of himself and his wife Bettie J. Conway in the estate of John Gouldin deceased, the sum of eight thousand dollars, with six per cent. interest thereon from this date until paid.

Second. That they pay a like sum, with like interest, unto William S. White in full of all the interest, claim and demand of himself and his wife Lavinia C. White in said estate; but that the said William S. White and wife shall allow as a credit to the said Thomas W. and James F. Gouldin, in the payment of the said \$8,000, the amount of a certain debt owing by the said Wm. S. White and said John Gouldin, dec'd. jointly unto John Kay.

Third. That the said Thomas W. and James F. Gouldin pay the like sum of eight thousand dollars, and like interest, unto the heirs and distributees of Silas B. Gouldin, dec'd, equally to be apportioned between them, in full of their interest in said estate of John Gouldin, dec'd; subject, however, to a credit to be allowed to said T. W. and J. F. Gouldin, in paying said sum, of the amount of a certain debt due by the estate of said John Gouldin to the estate of Wiley R. Mason, dec'd.

Fourth. That in satisfaction of the sum of twenty-five hundred dollars of the 497 moneys to be paid to Wm. *S. White and L. B. Conway, the said Thos. W. and James F. Gouldin, as executors, do transfer unto said White and Conway the twenty-five shares of the capital stock of the Fredericksburg Aqueduct Company belonging to their testator, the said White and Conway, each giving his receipt for twelve hundred and fifty dollars on account thereof to said T. W. and J. F. Gouldin.

Fifth. That the said Wm. S. White, L. B. Conway, and the adult heirs and distrib-

utees of Silas B. Gouldin, shall, before they receive any of the moneys awarded them hereby, execute and deliver unto the said T. W. and J. F. Gouldin bonds with security satisfactory to the latter, conditioned as follows, viz.: The said L. B. Conway shall execute a bond conditioned for the payment and satisfaction of one-fifth part of any amount of debt which may hereafter be discovered as due by the estate of said John Gouldin, and which may be enforced against the same, and the existence of which is not now known to said executors, provided that such after discovered indebtedness shall swell the indebtedness of said estate beyond the sum of thirty-three thousand and five hundred dollars when computed as of the present date (this award being based upon the estimate that the entire indebtedness of said estate of J. Gouldin, computed as of this date, amounts to the sum of thirty-three thousand and five hundred dollars), and that the said William S. White shall execute a bond with like security and like conditions, and that the adult heirs and distributees of Silas B. Gouldin shall execute a bond with like security and like conditions.

Sixth. That the said Thomas W. and James F. Gouldin shall execute their joint bonds to the said parties for the money so awarded herein to be paid by them 498 *to said parties, which bonds shall stipulate for the payment of said moneys, with interest thereon as aforesaid, in three equal annual instalments, at one, two and three years respectively from this date. But written obligations shall be executed by the said T. W. and J. F. Gouldin, binding them that in case a sale of either of the acts of land which they derive from the estate of John Gouldin, called "Hays Mount" and "Lynden," shall be made on terms, and at a time, so that the proceeds of such sale shall be realized earlier than the maturity of said three annual instalments stipulated in said bonds, then that two-thirds of such instalments of purchase money realized from such sale of said farms shall be applied to the payment of the instalments called for in said bonds in anticipation of the maturing of said instalments.

Seventh. Proper and sufficient deeds of trust shall be executed by the said Thomas W. Gouldin and James F. Gouldin, and their respective wives, conveying unto Richard H. Coleman and John L. Marye, as trustees, the said real property called "Hays Mount" and "Lynden" (embracing all the area of land as pertaining to each farm as was designated for each in the will of said John Gouldin) in trust, to secure by such provisions in said deeds as said trustees may deem discreet and efficacious and reasonable the payment of said bonds.

Eighth. The said L. B. Conway, William S. White, and the adult heirs and distributees of Silas B. Gouldin, and their wives respectively, shall execute good and sufficient deeds of release, releasing unto the said Thomas W. Gouldin and James F. Gouldin all the interests and claims of said

parties respectively, of, in, and to the estate of said John Gouldin, and releasing and discharging the latter as executors of

499 said John *Gouldin, from all liability or obligation to them over and beyond the obligation for the payment of moneys as imposed and directed by this award.

And it is ordered that said Wilton S. Gouldin, William M. Gouldin and John G. Gouldin be summoned to the next term of this court to show cause, if any they can, against this award.

In October 1869 and in September 1870 and 1871 certain creditors of William S. White in Virginia, whose debts were contracted prior to the death of John Gouldin, instituted proceedings in the county and circuit courts of Caroline, against said White and the executors of said Gouldin, to have satisfaction of their debts out of the money directed by the award to be paid by the executors to William S. White; and in these proceedings there were orders by the court that the debts should be paid by T. W. and James F. Gouldin, the executors, when the money they owed became due.

In November 1871 Mrs. Lavinia C. White, by her next friend L. B. Conway, filed her bill in the circuit court of Caroline county, setting out the foregoing facts. She says, her husband has little or no means, and it is with great difficulty that he can support her and her children, and that not comfortably. That the said \$8,000 and the interest thereon, directed to be paid by Thomas W. and James F. Gouldin to said White, arises from the land of her father, which was directed to be sold by his will and which is still in the possession of said Thomas W. and James F. Gouldin, his executors; and the fund has not been paid either to William S. White or the creditors who have sought to subject it, naming them; that said White has not reduced the said fund into his possession by

500 *unconditional decrees, judgments, assignments, or otherwise; nor has she, the plaintiff, personally united in or been bound by any such proceedings. And making Thomas W. and James F. Gouldin, as executors and in their own right, and the said creditors, naming them, parties defendants, she prays that the said Gouldins may be enjoined from paying any part of said fund to the said creditors; that it may be settled upon her for the support of herself and her children; and for general relief.

The creditors answered, insisting that Mrs. White was bound by the submission and award and the order of the court upon the award; and that the fund had been by these proceedings reduced into possession by the husband.

Several witnesses were examined, who proved the insolvent condition of White, and the number of the children.

The cause was removed to the circuit court of Spottsylvania, and came on to be heard on the 25th of November 1872; when the court held that there had been a reduction into possession by William S. White of

the estate sought to be settled on the plaintiff, by the award which was entered as a decree in the case, *ex parte* Gouldin, in Caroline circuit court on the 23d of September 1869. The injunction was therefore dissolved, and it was decreed, by the consent of William S. White, that after the payment of the debts to the creditors named, and any other debts of William S. White which might be made out of said funds, the balance of the fund should be paid to L. B. Conway, as trustee, for the sole and exclusive use and benefit of the said Lavinia C. White. From this decree Mrs. White, by her next friend, obtained an appeal to this court.

501 *E. C. Moncure and A. B. Chandler, for the appellant.

E. P. Chandler, Braxton and Wallace, for the appellees.

Anderson, J., delivered the opinion of the court.

John Gouldin, by his last will, bearing date 1st day of February 1863, and probated March 9th following, after the payment of his debts, desired that all his lands, except the land he bought of the Buckners, called the Summer-house tract, and the land he bought of Catharine Merryman's estate, be divided into three lots, which are described, and gives to his son James F. Gouldin the first choice of the three lots, and to his son Thomas W. Gouldin the second choice.

He bequeaths to his granddaughter Josephine A. Broadus, for life, with remainder to her issue, if any, and in default of issue to his children and their legal representatives, the sum of three thousand dollars in bank stock and two servants.

To his son Thomas W. Gouldin a specific legacy, including a number of servants.

To his son James F. Gouldin a similar specific legacy.

To the estate of his son Silas B. Gouldin, the interest of Silas B. Gouldin, Jr., which he bought of C. C. Jett, trustee.

To his daughters, Martha J. Broadus, Lavinia C. White and Bettie J. Conway, he makes severally specific legacies of slaves.

To his daughter Lavinia C. White he gives the money he lent her husband Wm. S. White, and his watch; to his daughter Bettie Conway one thousand dollars, to be

added to what she has already received; *and to his daughter Martha

502 J. Broadus he lends the farm on which she resides, for her use and benefit during her life, and at her death to return to his heirs or their legal representatives.

All the balance of his estate, not already disposed of, he directs shall be equally divided into four parts. After the sale of the land, one part to go to the heirs of his son Silas B. Gouldin, one part to his daughter Martha J. Broadus, one to Lavinia C. White, and one part to Bettie J. Conway.

That portion of his estate included in the foregoing residuary clause, allotted to the

heirs of his son Silas, he leaves in the hands of his executors, to be sold or not as they may think best for the children, and equally divided among them. And that portion allotted to his daughter Martha J. Broadus, as well as the farm on which she resides, he leaves also in the hands of his executors, in trust, for her use and benefit during her life, and at her death to return to his children, &c. He directs his executors to sell the portion of his estate which is included in the residuary clause, as soon after the payment of his debts as they may think best for the benefit of the legatees interested. And he appoints his sons Thomas W. Gouldin and James F. Gouldin his executors, and requires of them no security.

William S. White removed, with his wife Lavinia and their seven children, to the state of Georgia, in 1863, where they remained until 1871, when they removed to the state of Tennessee, where they now reside. This is a suit by Mrs. Lavinia C. White, by bill in chancery, for a settlement on her and her children of the foregoing legacy. The bill alleges that her husband, William S. White, has little or no means, and

can with great difficulty support her
503 and her children, *and that not comfortably. The evidence shows very clearly that he is insolvent. The issue is between her and creditors of her husband, who seek to subject her legacy to the payment of his debts. When these debts were contracted the property involved in this controversy was neither hers nor her husband's. It was the property of John Gouldin, who subsequently bequeathed it to his daughter.

The wife had rights in this legacy independently of, and adversely to her husband. The theory of this branch of equity jurisprudence, is very clearly stated by Mr. Story (2 Stor. Eq. § 1405). "By marriage (he says) the husband clearly acquires an absolute property in all the personal estate of his wife capable of immediate and tangible possession. But if it is such as cannot be reduced into possession except by an action at law, or by a suit in equity, he has only a qualified interest therein, such as will enable him to make it an absolute interest by reducing it into possession. If it is a chose in action, properly so-called, that is, a right which may be asserted by an action at law, he will be entitled to it if he has actually reduced it into possession in his lifetime. (Mr. Story says a judgment is not sufficient; upon which we give no opinion.) But if it is a right which must be asserted in a court of equity, as where it is vested in trustees who have the legal property, he has still less interest. He cannot reach it without application to a court of equity, in which he cannot sue without joining her with him; although perhaps a court of law might permit him to do so, or at least to use her name without her consent. If the aid of a court of equity is asked by him in such case it will make him provide for her, unless she consents to give such equitable property to him." Baldwin, J.,

in Yerby & wife v. Lynch & al. 3
504 Gratt. 439, 476, said, "It *will be found that whenever the husband has not the unlimited disposition by assignment of choses in action of the wife, they are such as are not assignable at common law, as debts due her on bonds or otherwise, money in funds, legacies, trust funds, and other property recoverable by action or suit." The property in this case is a legacy, which is only recoverable by suit in equity; and in a suit for such purpose by the husband he must join the wife as plaintiff. And if the husband had brought suit in this case to procure said legacy, or any portion of his wife's fortune, a settlement would have been decreed to the wife upon her request. In such case it is of no consequence, whether the fortune accrues before or during a marriage, the equity of the wife will attach to it. (Stor. Eq. § 1408.) And the legacy having been made to her during the marriage, and after the debts sought to be enforced against it were contracted, she has a higher equity against the claims of her husband's creditors, because the debts could not have been contracted on the faith of the property now claimed by her. All who claim under the husband must take his interest subject to the same equity.

The wife was then, in this case, invested with a property by the will of her father, of which she could not be divested by her husband or his creditors by any legal proceeding except by suit in equity, to which she was a party. The wife may not only assert her right to a settlement in a suit brought by the husband or his assignee to extinguish her right, by way of defence; but she may bring a separate and independent suit in her own name by her trustee, against the husband and his assignee, to prevent her property being subjected to the marital rights of her husband, and to have it, or a part of it, settled upon her

505 and her children. It was *at one time supposed that the wife could only assert her equity in a suit by the husband or his assignee to acquire her property absolutely, only upon the principle that he who asks equity must do equity. But it seems to be settled now, that the wife's equity constitutes a valuable consideration to support a post-nuptial settlement by her husband; and it is now firmly established that she may recover her property in a suit brought by her or her trustee for the purpose of asserting her claim to a settlement, and that a court of equity will decree to her the whole of it if only a reasonable settlement. Poindexter & wife v. Jeffries & als., 15 Gratt. 363; Stor. Eq., § 1377 a; Davis' widow v. Davis' creditors, 25 Gratt. 587.

But it is contended by the appellees, that the right of the husband to the wife's legacy in this case has become absolute, and the wife's equity extinguished by the submission and award of arbitrators, and the entering up said award ex parte as the decree of the court.

It does not appear that the appellant was a party to that submission. The deed of

submission is signed and sealed by William S. White, and under his signature is written, "For self and Lavinia C. White." There is nothing to show that her signature is there either by her act or by her authority, or with her assent. Indeed it does not purport to have been signed by her. It only purports to have been signed and sealed by William S. White for himself and Lavinia C. White. She puts in issue the fact of execution by her bill, by the averment that she has not personally united in or been bound by any of those proceedings; and there is nothing in the record to show that she participated in them in any manner. At the time of these proceedings, from their inception to their ending, she was not present, but resided in a distant state.

506 *and in all probability had no knowledge of what was going on. Her husband disclaims any authority from her to assent to the submission, or to confirm or sanction the award, and there is no proof of her knowledge or assent.

Is it competent for the husband, in the absence of his wife, and without her consent or knowledge, to enter into an agreement with the executors of her father and the legatees, to submit to arbitration her legacy, which he could only recover by suit, by suing jointly with her in equity, and in which suit he could not recover without making a settlement on her, and to agree that the award should be made the decree of court under a rule, thereby depriving the wife of her right to a settlement? It would be a fraud upon the rights of the wife. If she were notified of the proceeding, she might invoke the interposition of a court of equity to restrain the arbitrators from proceeding to award the payment of her legacy to her husband, or her husband from receiving it, without making a reasonable settlement on her and her children. It does not appear that she was ever served with notice of the award or of the rule of court. The whole proceeding was *ex parte* as to her, and should not be allowed to deprive her of her right to a settlement. The award itself is but a chose in action, and doubtless was not intended by the arbitrators to settle and adjust any questions involving the marital rights of the husband or wife; nor was the litigation of any such matters contemplated or designed by the parties in their deed of submission; nor was there in fact any such question canvassed or passed upon by the arbitrators in making up their award. The only purpose was to ascertain the extent of the executors' liabilities, and the amount due to each legatee; and

507 the direction that "the executors should pay to William S. White the legacy due to his wife was given evidently without reference to any question as to the right of the wife to a settlement, and without intending to pass upon such right. The award has not been executed; the *ex parte* decree has not been performed; the subject matter remains in statu quo. What is there to preclude the wife from now filing her bill, and asking that the *ex parte* decree may be

reformed, and that the amount awarded her should not be paid to her husband or his creditors, but that it be settled on her and her children; as she has done in this case?

But does the award and the *ex parte* decree of the court, if valid, vest the plaintiff's legacy absolutely in her husband, and debar her right to proceed in equity for a settlement?

"No act or intention of the husband which stops short of an actual reduction into possession, or of an entire extinguishment of the original right of action in the wife, in some of the modes indicated, can operate as to destroy her right." Allen, J., in *Yerby & wife v. Lynch & al.* 3 Gratt. 439, 495. In this case there has been no actual reduction of the wife's legacy by the husband into possession. The residuum consisted of lands, which the executors were required to sell as soon after payment of testator's debts as they may think best for the legatees interested. The bill alleges that said lands are still held by the executors unsold, and the legacies which are to be raised by the sale thereof have not been paid; that the legacy to the plaintiff has not been paid to her husband or to his creditors, and that she is not precluded by reason of said award and *ex parte* decree, to which she was not a party, from obtaining a decree against the executors in this suit.

She is willing to accept the amount 508 *in satisfaction of her legacy as ascertained by the said arbitrators; but asks that the same may be settled upon her for the support of herself and children, free from the control or appropriation of her husband, or any of his creditors. Admitting said award and *ex parte* decree to be binding as between her husband and the other parties to the same, it cannot be binding as between her and any of the parties thereto, she not having been a party to either. And the decree that the executors should execute their bonds to William S. White for the amount of his wife's legacy so ascertained, and execute a deed of trust upon certain lands as security for the same, upon receiving refunding bonds with security satisfactory to them, from the said William S. White, and deeds of release from the said William S. White and Lavinia C., his wife, of all the interests and claims of said parties in and to the estate of John Gouldin, deceased; and moreover, releasing said Thomas W. and James F. Gouldin of all liability and obligation to them, over and beyond their obligation for the payment of moneys, as imposed and directed by said award, having never been performed; and the payment to W. S. White by the executors being conditioned upon the performance of said several acts by the said Wm. S. White, which he has not chosen to perform, and upon the execution of a joint deed of release by the said Wm. S. White and Lavinia C. White, which it was at least optional with her to perform or not, it seems to the court that said conditional award and decree not having been performed by the husband, and not obligatory upon the executors until per-

formed by William S. White and Lavinia C., his wife, and being incapable of a coerced performance by the wife, they cannot be regarded as even constructively a reduction by the husband of the wife's 509 legacy into his *possession. Nor can said award and decree, under the circumstances and in connection with the facts, be regarded as a surrender or waiver by the wife, or extinguishment of her equity.

Courts of equity will interpose to secure to the wife her equity to a settlement—first, when the husband seeks aid or relief in a court of equity in regard to her property; secondly, when he makes an assignment of her equitable interest; and, thirdly, where she seeks, as plaintiff, relief in equity against her husband, or his assignees, in regard to her equitable interests. It is true, she may waive a settlement, and agree that the equitable fund shall be wholly and absolutely paid over to her husband. But it must very satisfactorily appear that such was her wish. In a pending proceeding her consent must be given before a settlement under the decree is completed, and her consent must be given in open court or under a commission. Such is the respect which the courts of equity have for the wife's equity. And in some cases a court of equity will not allow the wife to dispense with a settlement out of her property, as where she had been a ward of the court of chancery and married without its authority. 2 Story Eq. §§ 1404 and 1418.

As to the amount which should be settled upon the wife—whether a part or the whole of her legacy, and, if only a part, what proportion—depends upon what would be a reasonable settlement. The court is not prepared to say that the whole of the wife's legacy in this case ought not to be settled on her and her children. If it is not more than would afford them a reasonable support, being property given to her by her father, and upon the faith of which the debts in question could not have been contracted, and evidently not intended to go to her 510 husband, for even the debt due *the testator by the husband he gives to her, it would not be an unreasonable settlement. But there ought to be an account, to ascertain what would be a reasonable allowance. The court is therefore of opinion, to reverse the decree with costs, and to remand the cause, to be proceeded with in conformity with the principles herein declared.

Decree reversed.

511 *Walker v. Beauchler.

March Term, 1876. Richmond.

Sale of Land under Deed of Trust.—B, a German by birth, was the owner of a tract of twenty-four acres of land on which he lived, in the county of Alexandria, near Georgetown. In June 1850, to secure a debt of \$300, which he owed to P of Georgetown, payable in two years, he conveyed the land to

J, the son-in-law of P, in trust to secure the payment of the debt, and if the debt was not paid, he was, on the request of P, to advertise the land in a paper published in A, and sell at public auction. In 1861 the union forces having taken possession of that part of the county, B removed with his family to Fairfax court-house, and remained there until the close of the war. In October 1864, J having advertised the sale of the land in a paper in A, sold it at public auction in Georgetown, when Mrs. B, the wife of B, and niece of P, bought it at a reduced price. W was present at this sale. Mrs. B and her husband afterwards sold it to W and S at the same price, and afterwards W bought out S, and made permanent improvements upon it. In 1870 B filed his bill against W, &c., to set aside the sale and conveyances. **Held:**

1. **Same—Debtor and Creditor—Alien Enemies.**—B being within the confederate lines, and P being in the union lines during the war, B could not legally pay, or P receive his debt, and therefore the deed of trust could not be enforced, and the sale was invalid.
2. **Same—Purchaser Not Bona Fide—Rights.**—W having been present at the sale, and knowing the circumstances, can stand in no better condition than the purchaser at the sale, and his title therefore is invalid.
3. **Same—Rights of Original Owner—Of Purchaser.**—B is entitled to have his land, he paying to W the amount of the debt which he owed to P.
4. **War Interest.**—B's debt is not to bear interest during the war.
5. **Laches of Owner—Improvements by Purchaser.**—B having delayed for four years after the war had closed to assert his right to the property, and 512 permitted W to put valuable *and permanent improvements upon it, believing that he had an undisputed title to it, W is to be charged for the rents and profits of the land, exclusive of his improvements, whilst he held it, and to be allowed a reasonable compensation for the permanent improvements he has made upon it, though this shall be in excess of the rents and profits.

In June 1854, John Beauchler, a German by birth, purchased of Luke Osborn a small tract of twenty-four acres of land, lying in the county of Alexandria, within some three or four miles of Georgetown, at the

***Debtor and Creditor, Alien Enemies.**—Where a debtor and creditor occupy the status of alien enemies towards each other, it is unlawful for the one to make, or the other to receive, payment of the debt. It follows therefore, that the right of the creditor to enforce the obligation is suspended, and any proceeding to do so is nugatory and void. See *Haymond v. Camden*, 22 W. Va. 191, 197, where the principal case is approved. *Tracey v. Shumate*, 22 W. Va. 512, also citing the principal case. See also, *Billgerry v. Branch*, 19 Gratt. 393. In *Morris v. Va., etc., Co.*, 90 Va. 381, 18 S. E. Rep. 843, the principal case is discussed, and in *Shurtz v. Johnson*, 28 Gratt. 667, it is also cited but distinguished. The principal case is again cited in *Coltrane v. Worrell*, 80 Gratt. 447.

†**Laches of Owner—Improvement by Purchaser.**—See *note to Wood v. Krebs*, 33 Gratt. 665. Further, see *Hall v. Hall*, 80 W. Va. 786, 5 S. E. Rep. 263; *Dawson v. Grow*, 29 W. Va. 337, 1 S. E. Rep. 567; *Hall v. Lowther*, 22 W. Va. 579.

price of \$850. Though the building upon the land was very small, Beauchler seems to have lived in it until 1861, when the late war having broken out, and the union forces having taken possession of that part of the county, he removed with his family to Fairfax court-house.

Whilst Beauchler was living on the land, viz: on the 6th of June 1859, he conveyed it to Frederick W. Jones of Georgetown, in trust to secure a debt of \$300, which he owed to Joseph N. Fearson of Georgetown. This debt was evidenced by a promissory note, payable in two years from its date, which was the date of the deed, with interest payable semi-annually; and the deed provided, that upon any default of payment in the interest or principal of said note, Jones, upon the written request of Fearson, should proceed to sell the land, or so much of it as might be necessary, at public auction, upon such terms as he should deem most for the interest of both parties, first giving twenty days notice of the time, place and terms of sale, in some newspaper published in the city of Alexandria.

In October 1864, on the request of Fearson, Jones, having advertised the sale in an Alexandria paper, proceeded to sell the land at public auction in the city of Georgetown,

when it was purchased by Mrs. Juliana *Barrett, the wife of Erastus B. Barrett, for the sum of \$425, and Jones conveyed the land to her. In February 1865 Mrs. Barrett and her husband conveyed the land to Robert Walker and Franklin Scott at the same price; and in January 1869 Scott, in consideration of \$400, conveyed his undivided moiety to Walker.

In October 1870 Beauchler filed his bill in the county court of Alexandria county against Walker, Jones, and the unknown personal representative of Fearson, to set aside the sale by Jones, and the deeds which had been executed by Jones and the subsequent holders. He set out the facts above stated; stated that he had gone in 1861 within the confederate lines; that when the notice of sale was given, and the sale made, he was living in the state of Virginia, and was, because of the existence of war and military regulations, unable to visit the place from which he had fled, or where the pretended sale occurred, and that he had no notice of the sale. He insisted that Jones was not authorized to sell the land in Georgetown, outside of the state of Virginia, and the sale was a nullity; that Jones was the son-in-law of Fearson, and that Mrs. Barrett was his niece, and had been reared by him as one of his own family, and that Walker at the time of his purchase of the land was aware of the plaintiff's right, and of the irregularities in the sale.

Walker answered the bill. He said he was present at the sale; that it was well attended, and brought a full price; that it was fair in every particular, so far as he knew or believed. That he is a bona fide purchaser for value without notice; and he relies upon the laches of the plaintiff in delaying so long to bring his suit, with the

knowledge that he was making large improvements upon the property.

A number of witnesses were examined as to the *value of the land, its condition when sold, and the improvements put upon it by Walker. The commissioner, who was directed to report upon the question, put the value at the time of the sale at \$600; to which both parties excepted. Some of the witnesses thought it sold for a full price, and others for more than it was worth; and some thought that Walker's improvements cost more than land and improvements would sell for.

The cause came on to be heard on the 4th of December 1871, when the court set aside the sale of the land made by Jones in October 1864, and declared his and the subsequent deeds null, so far as respected the conveyance of any title to said land as against Beauchler; and a commissioner was directed to report the amount of the debt due from Beauchler to Fearson, omitting interest during the war, and an account of rents and profits, and the improvements made upon the land since October 1864, which was to be set off against the rents. From this decree Walker obtained an appeal to the circuit court of the county of Alexandria; but the decree was affirmed by that court by its decree of the 28th of May 1872. And Beauchler waiving all demand for rents beyond the value of the improvements, the court made a decree in favor of Walker, as substituted to the rights of Fearson against Beauchler, for the sum of \$300, with interest from June 6th, 1860, until June 6th, 1861; and from April 10th, 1865, till paid; and if not paid within ninety days from the date of the decree, then commissioners named were to proceed to sell the land, &c. And thereupon Walker applied to a judge of this court for an appeal; which was allowed.

F. L. Smith, Jr., for the appellant.

Smoot, for the appellee.

515 *Staples, J., delivered the opinion of the court:

Whatever may be the diversity of opinion in respect to the validity of acts done under the authority of the confederate government, there is one proposition, certainly, as to which the courts are now generally agreed: that is, that the late war between the two sections was a civil war in the most literal and comprehensive sense of the term, and was attended by all the incidents and consequences of a war between independent nations. Having no common superior to judge between them, the two sections stood precisely in the same predicament as two nations who engage in a contest and have recourse to arms. Numerous cases in the state courts might be cited in support of these propositions; but it is unnecessary. A reference to some of the decisions made by the supreme court of the United States will be conceded by all as sufficient for that purpose. In *Brown v. Hiatts*, 15 Wall. U. S. R. 177, Mr. Justice Field said: It is unne-

essary to go at length over the grounds upon which this court has repeatedly held that the statutes of limitation of the several states did not run against the right of action of parties during the continuance of the civil war. It is sufficient to state, that the war was accompanied by the general incidents of war between independent nations; that the inhabitants of the Confederate States, on the one hand, and of the loyal states, on the other, became thereby reciprocally enemies to each other, and were liable to be so treated, without reference to their individual dispositions or opinions; that during its continuance all commercial intercourse and correspondence between them were interdicted by principles of public law, as well as by express enactments of congress; that all contracts previously made *between them were suspended; and that the courts of each belligerent were closed to the citizens of the other. See opinion of Judge Joynes in *Billgerry v. Branch & Sons*, 19 Gratt. 393, 417, and cases cited.

The prohibition here alluded to by Mr. Justice Field, it has been held in numerous cases, affected debtors and creditors on either side equally with those who did not bear that relation; so that the transmission or payment of money for any purpose was utterly forbidden. It was unlawful for the debtor to pay, it was unlawful for the creditor to receive. It was unlawful for them to have any intercourse, communication, or correspondence, whatever, upon any subject or for any purpose. The operation of the contract during the war was as completely suspended as though it had never had any existence. In the language of the supreme court of New York in the famous case of *Griswold v. Waddington*, 16 John. R. 438, the idea that any remission of money may be lawfully made to an enemy is repugnant to the very rights of war, which require the subjects of one country to seize the effects of the subjects of the other. The law that forbids intercourse and trade must equally forbid remittances and payment.

No one familiar with the history of the struggle between the two sections, and with the decisions of the courts since its close, will hesitate to apply these rules in all their stringency, to the respective belligerents after the date of the president's proclamation of the 2nd August 1861.

Applying these principles to the case in hand, it follows, that the appellee, residing within the confederate lines of occupation, could not lawfully pay the appellant residing within the federal lines. He was positively interdicted from making such payment by the *laws of his country and the laws of nations. How then could the trust deed be enforced. A sale under that deed was founded upon the supposed default of the debtor. But there can be no default, when the debtor is prohibited from paying and the creditor from receiving. In this connection I cannot do better than to give an extract from the opinion of an enlightened federal judge. In the Kan-

awha Coal Company v. Ohio Coal Company, 7 Blatch. Cir. C. R. 391, 408, Judge Blatchford uses this language: The enforcement (of the debt) was indeed not by a judgment that the debtor personally pay the debt to the creditor, but was by a sale of land which the debtor had specifically put in trust to pay the debt. Nevertheless the foundation of the proceeding was that the debt existed and the debtor had not discharged it. The duties and rights of the creditor were correlative. The right which the creditor undertook to exercise by enforcing a sale of the land, was to compel the discharge of the debt in invitum by that means, so far as the proceeds of sale would go. This right could not exist in favor of the creditor unless there existed at the same time a corresponding duty and capacity on the part of the debtor to pay the debt to the creditor. The right of action that is suspended must include the right to resort to any species of proceedings, judicial or otherwise, to enforce the contract.

These positions of the learned judge are supported by a number of cases cited in his opinion, and by a force of reasoning which appears to be unanswerable.

The supreme court of the United States has, however, decided differently. In the case of "*University v. Finch*," 18 Wall. U. S. R. 106, that court held that a sale was valid made by a trustee during the war under a trust deed executed before; the creditor being a *resident of Missouri, and the debtor a resident of Virginia. Mr. Justice Miller, in delivering the opinion of the court, maintained, that even the enforced absence of the debtor afforded no sufficient reason for arresting his agent and the agent of the creditor in performing a duty which both of them imposed upon him before the war began. His power over the subject was perfect; its exercise required no intercourse, commercial or otherwise.

The learned justice loses sight of the principle that the deed of trust is a mere security for the debt, and that the authority of the trustee to sell results only from the default of the debtor. No one will maintain that the creditor could enforce a sale of his debtor's property while the latter is prohibited by injunction or process of garnishment from making the payment. The prohibition arising from a state of war is much more stringent: for in the latter case the debtor is not only forbidden by positive law, but by the highest obligations of duty and patriotism from holding any communication with his creditor. The injustice of selling the property of the debtor to satisfy a debt which he is prohibited by law from paying, is too palpable to admit of justification. The debtor's right to redeem his estate is commensurate with that of the creditor to make the sale. If the one is suspended, justice and reason require that the other shall not be exercised.

The learned judge felt the force of these difficulties in *University v. Finch*. He answered them, or attempted to do so, by de-

declaring that the effect of the proposition was to give immunity to rebels against the government not accorded to the soldier who is fighting for that government; its tendency is to make the very debts which the citizens of one section may owe

519 *to another an inducement to revolution and insurrection; and it rewards the man who lifts his hand against his government by protection to his property which it would not otherwise possess, if he can raise his efforts to the dignity of a civil war. It is very obvious that the learned judge is disposed to make a wide distinction between the case of a "rebel debtor in the insurrectionary states" and "a loyal debtor in the loyal states." If the position of the parties in *University v. Finch* had been reversed, and the estate of a loyal debtor had been sold, the argument of the learned judge must of necessity have been very different. No authority is cited for this supposed distinction between the rights and privileges and exemptions, during the war, of those adhering to the federal government and those siding with the confederate government. The writers on the laws of nations utterly repudiate any such distinction. Those writers universally declare, that in a civil war the parties, having no common superior to judge between them, stand precisely as two independent nations who engage in a contest and have recourse to arms. Who shall judge between them; who shall pronounce on which side the right or the wrong lies? On earth they have no common superior. Vattel's Law of Nations.

But as I have already said, the supreme court of the United States itself has again and again decided that the late conflict was a war, in the legal sense, with all the incidents and consequences of an international war; and that in order to determine how the contracts, rights and obligations of citizens were affected by that war, recourse must be had to the general principles applicable to a state of war between nations. According to these principles the very same privileges, disabilities and exemptions

520 attached to the debtor residing *in the South during the war as to the debtor resident in the northern section. It was equally unlawful for the former as the latter to make any transmission of money to his enemy creditor, or to hold any communication whatever with him. And when the southern debtor seeks to avail himself of this universally acknowledged principle, he is told that his proposition gives immunity to rebels not accorded to the loyal soldier; and that its tendency is to make the very debts which the citizens of one section may owe to another an inducement to revolution and insurrection.

Whatever may be the motives of a people in going to war, even if they be so paltry as the non-payment of a few years interest upon their debts, these motives are not the subject of inquiry with the courts in adjudicating the contracts of citizens as affected by that war. The political department, the treaty-making power, may deal with the

causes of the war, with a view to indemnity and security, but the courts have no concern with them. It is sufficient for them that the contest was waged—that it assumed the magnitude and proportions of a civil war, and was so treated by the legislative and executive departments. It cannot but excite astonishment that when the validity of the blockade was to be maintained, or a right to capture private property was asserted, doctrines were announced the effect of which was to invest the Confederate States with the powers and rights of belligerent sovereignties; but when the rights of loyal citizens of the North are involved in controversies with citizens of the South, the people of the Confederate States are denounced as traitors, escaping the just punishment of their crimes only through the clemency of a magnanimous government. *Spotts* 521 *v. United States*, 20 Wall. U. *S. R. 459; *Mrs. Alexander's Cotton*. Speaking for myself only, upon this and questions of a kindred character, I feel under no obligation to follow the decisions of any tribunal, unless they accord with my own convictions of the rights and obligations growing out of the struggle through which the country has passed.

It has been argued, however, that the principles here involved have no application whatever to the case of a debtor who voluntarily left his home during the war, for the purpose of residing within the confederate lines; thereby, by his own act, disabling himself from performing his contract. The cases of *Dean v. Nelson*, 10 Wall. U. S. R. 158, and *Ludlow v. Ramsey*, 11 Wall. U. S. R. 581, are relied on in support of this proposition. Those cases certainly establish the distinction between the case of a debtor who voluntarily left his residence in the North, for the purpose of engaging in hostilities against the federal government, and a debtor who was expelled by military force and forbidden to return. In the one case, it was held, the party is bound by judicial proceedings against him in his absence; and in the other it was held, that he was in no wise bound.

Now there may be cases in which a debtor, voluntarily abandoning his home and going into the opposing lines, cannot claim the benefit of the rule as applied to actual residents. The present is, however, not one of them, as will be hereafter seen. But, I submit, the mere fact of such voluntary abandonment is not of itself sufficient to deprive the debtor of the benefit of the rule. In the first place, it is very difficult now to determine what constituted a voluntary abandonment of home in the case of a citizen who fled from one section to the other. Thousands of persons, being in the northern states, and suspected of southern 522 sympathies, *were expelled from their homes, not by military force, but by that which was far more terrible and alarming, the fire and passion of mighty mobs, aroused to the highest exasperation by the attack upon Sumpter, and, as they conceived, by an unjustifiable rebellion. These

persons were liable at any moment to popular violence. They were perpetually subject to a system of espionage, annoying and degrading in the extreme; and they were in constant apprehension and danger of arrest and confinement in dungeons, beyond the reach of the courts of law. To some extent this condition of things existed in some of the southern states with reference to persons of northern proclivities. Nineteenths of those who abandoned their homes at the commencement of the struggle did so under the most powerful motives and inducements that could animate the human heart. There were many who fled in sudden alarm when the storm broke in its fury, without any fixed intention except to escape the dangers that surrounded them, and who had no conception of the magnitude and duration of the struggle, and who were never able to return in safety.

Again, as the war progressed, the federal armies extended their conquests from state to state, acquiring firm possession as they advanced; in many instances the terrified inhabitants fleeing before them, and taking refuge still further within the confederate lines. Henceforth such territory would be enemy territory, and the creditor and debtor be regarded as enemies.

Every one can see the injustice of applying to persons thus situated, and thus acting, the rule laid down by the supreme court of the United States in the cases cited. It cannot be justly said of these men that they voluntarily removed from the one section to the other. *But if it can be so said; if the abandonment of residence and home was voluntary, does it follow a different rule is to be applied to them? The doctrine I understand to be well settled, that upon the breaking out of a civil war every man is permitted (in the language of Mr. Justice McKean) to choose his party. It was so held in *Respublica v. Chapman*, 1 Dall. R. 53-58; in *Jackson v. White*, 20 John. R. 313. In *Inglis v. Trustees of the Sailors' Snug Harbour*, 3 Peters. R. 99, it was decided that the right of election must necessarily exist in all revolutions like ours, and is so well established by adjudged cases, it was unnecessary to enter into any examination of the authorities. The only difficulty that could arise was to determine the time when the election should have been made.

This right of election was freely exercised during the revolutionary war, and was universally conceded. The doctrine of the English courts was, that American antenati, by remaining in this country after the treaty of peace of 1783, lost their character of British subjects. On the other hand, the American courts adopted the declaration of independence as the period for determining the status of the citizen as a subject; and it was held that a person born here, but who left the country before the declaration of independence and never returned, thereby lost the character of an American citizen. It will be perceived that neither the English nor American courts confined

the right of election to a period anterior to the commencement of the war.

In the late struggle it is well known that as late as the battle of Bull Run, vast numbers changed their residences from one section to the other, as a sense of duty, inclination or necessity suggested. And none exercised this privilege more freely than officers of the *government, officers of the army and navy; and their right to do so was not questioned at Washington. Indeed it was considered safer for the federal government and for individuals themselves, that they should take this course. Henceforth these persons, officers, and private citizens, became by the laws of war, enemies of the government of the United States, and of all who adhered to it. I can see no just reason why all these men thus treated as enemies, should not be entitled to the same exemptions, and stand precisely in the same predicament with those who happened to be resident here at the commencement of the struggle.

If, in determining the status, rights, and liabilities of the citizen we are to look exclusively to the beginning of the war, we encounter numerous and perplexing questions. As is well known, and as has been judicially determined, the war did not begin, nor did it close, at the same time in all the states. In the case of "*The Protector*," 12 Wall. U. S. R. 700, the supreme court of the United States held that the proclamation of the 27th April 1861, declaring a blockade, must be taken as ascertaining the commencement of the war in Virginia. But in a more recent case, *Matthews v. McStea*, 20 Wall. U. S. R. 646, the same court has decided that the blockade proclamations did not contemplate a cessation of all intercourse and business relations between citizens of the different sections. The only interference intended was such as might arise from the blockade itself; and the whole purpose as announced, was inconsistent with the idea that the people of the south were at that date to be regarded as public enemies.

The proclamation of the 27th August 1861, it would seem, is now regarded as the one establishing absolute non-intercourse, and the cessation of all business relations.

*Are we to look to the 27th of April 1861 as the commencement of the war, as the period after which there could be no voluntary change of domicile, in the sense of the rule laid down by the supreme court? or must we take the 27th August 1861 as the period of non-intercourse? or the ratification of the ordinance of secession by the people of Virginia? or must we take the date of the battle of Manassas as the period and the event, which more effectually terminated friendly intercourse and communication.

Instead of attempting to lay down a rule, dependent upon inquiries of this sort, it is better to adhere to those fixed principles which define the rights and liabilities of parties as affected by the existence of war, without perplexing investigations into the causes of the war, or the manner in which

the relation of enemies was acquired. As the creditor is forbid to receive, and the debtor to pay by a supreme power, each is therefore relieved from all the penalties, forfeitures and damages incident to the non-enforcement and the non-performance of the contract, and that, too, without regard to the particular circumstances under which they were placed in the attitude of enemies each to the other. If we hold it is the duty of the citizen to obey the laws of the government under which he lives, and to have no communication with its enemies, obedience to that law ought not to impose upon him the loss or sacrifice of his property. This rule accords with the dictates of an enlightened public policy, and with humanity and justice. In support of these views, there is abundant authority found in the opinion of Judge Blatchford, already cited, and in an able and interesting article published in the 14th vol. of Am. Law Reg., page 129.

It will be understood, of course, that these rules *have no application to a party who abandoned his section with a view to the non-performance of his contracts. Nor do I mean to affirm that it will apply to every case in which a debtor, even without such intention, changed his residence after the commencement of the war. Whatever may be the exceptions to the rule, the present case is not one of them.

The appellee is a German by birth, and is now perhaps seventy-five years of age. It is not very clear as to the precise date of his abandoning his home in Alexandria county. It was certainly not later than the 1st of June 1861, and was, of course, long before the non-intercourse acts and the proclamation based thereon. What was his precise motive in thus coming within the confederate lines does not appear. His residence was in the midst of the federal troops, and it is easy to understand his apprehension of the annoyances and dangers to which he was hourly exposed. According to his own statement, he afterwards made an attempt, on several occasions, to return to his home, but was unable to do so. It is probable he might have done so by taking an oath of allegiance; whether he could have remained there in safety is another question. However that may be, whether he could or could not have returned, it may be reasonably supposed he had no apprehension of a sale under the trust deed at the time it was made, as there was then in force a statute passed by the Alexandria legislature prohibiting sales of property under trust deeds for debt. This court has never decided that such legislation in time of actual war is unconstitutional; nor is it necessary now to pass upon that question. The existence of such a law, in connection with the other facts, was well calculated to cast a cloud over the title, and to lead to a sacrifice of the property. The sale

was made not in *Alexandria, nor even in the state, but in the District of Columbia. It is very true the deed does not prescribe the place of sale, and much was

therefore left to the discretion of the trustee. In the exercise of that discretion, it would seem clear that the sale ought certainly to have been at least in the county where the property was situated, more particularly as at that time access to Georgetown was rendered more difficult by the presence of the military and by the requirement of permits for persons resident in the county of Alexandria. As might have been expected, at a sale made under such circumstances, the property commanded a price considerably below its real value. The purchase was made by a married woman, the niece of the creditor, and a member of his family; the trustee being also a son-in-law. All the facts and circumstances tend strongly to show that the sale was a family arrangement, made exclusively in the interest of the creditor. The appellant was no doubt cognizant of all the facts as he was present at the sale, and was then apprised of the absence and place of the appellee's then residence. He can therefore occupy no higher ground than the parties under whom he derives title.

Under all the circumstances, I think there was no error in the decree of the county court vacating the sale, and no error in the decree of the circuit court affirming the decree of the county court.

These views equally apply to the question of interest during the war. Interest is paid for the use or forbearance of money. There can of course, be no forbearance where the creditor cannot compel the payment of the principal, and where the debtor is prohibited by law from paying. During the period of such prohibition no interest can be exacted.

See *Hoare v. Allen*, 2 Dallas R. 162. The circuit court *therefore committed no error in abating interest during the war.

The only remaining enquiry is whether the appellant is entitled to compensation for such permanent improvements as he may have made on the land, before the claim of the appellee was asserted. The circuit court was of opinion that the appellant was entitled to such compensation, but not to exceed the value of the rents and profits of the land. In this respect the decree is erroneous to the prejudice of the appellant. The appellant made his purchase in January 1865, took possession of the land at once, and has remained in possession ever since. Between the date of his purchase and the year 1870, he made permanent improvements in the full conviction that his title was good. During all this time the appellee asserted no claim to the land; nor did he in any manner notify the appellant of his purpose to contest the title of the latter. Although this silence is not sufficient to affect the appellee's right of recovery, it is sufficient under the circumstances, to give the appellant a strong equitable claim to compensation for the full value of his improvements. On this ground the decree of the circuit court must be reversed, and the cause remanded, that an account may be taken, in which the appellant is to be

charged with a reasonable rent for the use and occupation of the land during the time he has had possession; and he is to be allowed reasonable compensation for such improvements of a permanent character as he may have made, which have given an increased value to the land.

The decree was as follows:

The court is of opinion, for reasons 529 stated in writing, and filed with the record, that the circuit court did not err in holding that the sale of the appellee, Beauchler's land, made on the 11th October 1864, was not a valid execution of the trust, and that the parties claiming under such sale acquired no valid title to the said land. Nor did the said court err in holding that the appellee, Beauchler, is entitled to an abatement of the interest upon the debt secured by the said deed during the existence of the war. The court is further of opinion that the appellant is entitled to compensation for such permanent improvements as he may have made upon the land before notice of the appellee, Beauchler's claim, although it may be in excess of the rents and profits for which the appellant is liable. Therefore it is decreed and ordered, that so much of the decree of the said circuit court as is in conflict with this decree be reversed and annulled, and the residue thereof affirmed, and that the appellant and appellees pay the costs by them incurred respectively in the prosecution and defence of this appeal aforesaid here. And it is further decreed and ordered that the same be remanded to the circuit court, with instructions that an account be taken, on which the appellant is to be charged with the rental value of the land, exclusive of his permanent improvements during the time he had possession; and credited with the value of such permanent improvements as he may have made before notice of the appellee, Beauchler's claim, and a decree rendered for or against him, as the case may be, for any balance which may appear to be due. Which is ordered to be certified to the said circuit court of Alexandria county.

Decree reversed.

530

*Winston v. Giles.

March Term, 1876. Richmond.

1. *Bills of Exception—Put in after Judgment Entered—By Leave of Court.**—In an action at law, which is submitted to the judgment of the court without a jury, the court renders a judgment, to which one

**Bills of Exception—Put in after Judgment Entered—By Leave of Court.*—It is an *unbinding* rule, that a bill of exceptions cannot be made part of the record after the rendition of a final judgment, and the term ended. See *Page v. Clopton*, 30 Gratt. 415, and *note*; *Danville Bank v. Waddill*, 31 Gratt. 469, and *note*; *Peery v. Peery*, 26 Gratt. 320, and *note*. The principal case is further cited in *Hudgins v. Simon*, 94 Va. 602, 27 S. E. Rep. 606; *Powell v. Tarry*, 77 Va. 260; *Owens v. Owens*, 14 W. Va. 98; *Welty v. Campbell*, 37 W. Va. 301, 17 S. E. Rep. 314.

party excepts, and it being near the end of the term, the court gives the counsel time, until the first day of the next term, to prepare the bill of exception: but judgment is entered. The court cannot give such leave, and the bill of exception cannot be made a part of the record.

2. *Same—Same—Same.*—Even if the court had authority to give the time until a day certain in the next term to prepare the bill of exception, if the bill of exception is not tendered to the court on that day, it cannot afterwards be received.

3. *Same—Correct Course.*—In cases when it may be important to give time until the next term to prepare the bill of exception, the case should be kept open, and the judgment should not be entered until the next term.

The case is stated by Judge Moncure in his opinion.

Meredith & Blackwell, for the appellant.

Page & Maury, for the appellee.

Moncure, P., delivered the opinion of the court:

This is a writ of error to a judgment of the circuit court of the city of Richmond, rendered in an action of ejectment, brought in said court by Pleasant Winston against Thomas T. Giles, for the recovery of certain real estate lying in and near the said 531 city. Issue was *joined on the plea of not guilty; and the parties waiving their right to have a jury, and agreeing that the whole matter of law and fact should be heard and determined, and judgment given by the court; accordingly, on the 23rd day of December 1871, all the evidence adduced on both sides, and the argument of counsel being heard, the court was of opinion that the case was for the defendant, and gave judgment for him.

Immediately under the copy of the judgment in the transcript of the record before us, is this:

"Memorandum. The plaintiff this day excepted to an opinion of the court given against him upon the trial of this cause, and leave is given him until the first day of the next term to file his bill of exceptions."

Then follows, in the transcript, a copy of an order made by the same court on the 9th day of April 1872, in which order it is stated, that the plaintiff, on that day, tendered to the court a bill of exceptions to an opinion rendered against him on the 23rd day of December 1871; that the defendant objected to the signing of said bill, and the court refused to sign the same; to which refusal of the court the plaintiff excepted, and tendered to the court his bill of exceptions to such refusal; which latter bill was received, signed and sealed, and ordered to be made a part of the record. The latter bill is then set out in the transcript, and in it is embodied the former bill, which is a bill of exceptions to the judgment of the court in the case, and sets out all the evidence offered on the trial. After the insertion of that bill, there follows a statement in these words, in the bill which was signed:

"And the defendant, by his counsel, thereupon objected to the signing of said bill by the court, on the ground that the record was closed, and that the court

532 *had no power to reopen the same; which objection of the defendant, being maturely considered, was sustained, and the court refused to sign the said bill," &c., as above stated. "And the court certifies that the judgment to which the plaintiff excepts was rendered on Saturday, December 23rd, 1871; that the court finally adjourned for that term on December 27th, 1871, and did not sit upon December 25th 1871; that the present term of this court began on the 5th day of February, 1871, and that the bill of exceptions, now tendered for signature was handed to defendant's counsel some two weeks before this date.

"And the court further certifies, that the judgment rendered by the court in the said cause in the 23d day of December 1871 was the opinion of the court, to which, as it appears by the record, the plaintiff immediately excepted, and obtained leave until the first day of this term to file a bill of exceptions; but on that day no bill was tendered; and the court being satisfied that the evidence set forth in the said bill is an accurate and full statement of all the evidence submitted to the court on the trial, further certifies that its refusal at this time to sign the said bill is for the single reason alleged by the defendant in objecting thereto, viz: that the record is closed and cannot be reopened, altered, amended, or supplemented without consent of both parties.

"And it is further certified that the said cause has not been upon the docket of the court at this term."

There are two assignments of error in this case: First, that the circuit court erred in refusing to sign the bill of exceptions first tendered to it by the plaintiff, and considering that bill of exceptions as properly a part of the record. Second, 533 that the said court erred *in giving judgment for the defendant instead of the plaintiff.

We will proceed to consider the first of these assignments of error, on the decision of the question arising upon which the necessity for at all considering the second will depend.

Then, did the court err in refusing to sign the said bill of exceptions?

The counsel on both sides have argued this question with much learning and ability, and have cited a great many cases on the subject, both from the English and American reports, in which cases there appears to be some, if not much conflict. But we deem it unnecessary to follow the counsel in the review of these cases, which would occupy much time and space, and be perhaps unprofitable. They depend generally, if not entirely, upon local statutes, decisions and practice, which do not prevail in this state; and we must look for our law on the subject to our own statutes, decisions and practice. Looking to them

alone for information, the question recurs, did the court err in refusing to sign the said bill of exceptions?

In this question are involved two others, viz: 1st. Can a bill of exceptions to an opinion of the court given on the trial of a cause, be signed by the court after the end of the term during which final judgment is rendered in the cause; at least, unless the parties to the cause consent to such signature? And, 2dly, if that can be done at all, and a day is named by the court in a succeeding term for tendering and signing such a bill, which, however, is not accordingly tendered, and of course is not signed on that day, and no notice is then taken of the matter, must the court sign a bill tendered on a later day of the term, even

534 though *such bill correctly state the facts of the case and the opinion of the court to which the exception applies?

In the absence of any special statute, or any authoritative decision or settled and established practice on the subject, such as exists in some other states, a bill of exceptions to an opinion given by a court on the trial of a cause ought to be tendered at least before the end of the term during which the final judgment in the cause is rendered. A bill of exceptions, when duly tendered and signed, becomes a part of the record in the cause, and cannot therefore be properly or regularly added to the record of a case after that cause is ended by final judgment therein, and after the power of the court over it is ended by the close of the term of the court during which the judgment is rendered. The rule at common law is, that during the term wherein any judicial act is done, the record remains in the breast of the judges of the court and in their remembrance, and therefore the roll is alterable during that term as the judges shall direct; but when that term is past, then the record is in the roll, and admits of no alteration, averment, or proof to the contrary. 1 Rob. old Prac. 638, quoting from 3 Tho. Co. Lit. 323.

Formally and regularly, a bill of exceptions purports to be tendered and signed when, or immediately after, the opinion excepted to is given; and certainly, if convenient, the facts would then be set out more accurately and with less difficulty than at any other time. It is admitted in all the cases, everywhere, that at least the exception must be taken at the time, so as to give notice of it to the adverse party; and some of the cases require that the substance of the exception should be stated in

535 writing at the time. And all of *them seem to admit, that on exception being properly taken at the time, a formal bill of exceptions may be drawn up and tendered by the exceptant at such time afterwards, during the same term, as may be prescribed or allowed by the court. Convenience seems to require this measure of indulgence, but does not seem to require more; and to give more would create dangers and difficulties, which are obvious, and ought to be avoided if possible without encountering greater

evils. Generally, a bill of exceptions may conveniently be prepared and tendered when the opinion excepted to is delivered, or during the trial, and almost always it may be done during the same term of the court. And in the very rare cases in which that cannot be done, the case could be kept open and continued until the next term; or by consent of the court, and all the parties entered of record, a day in the next term might be named by an order of the court for tendering and signing the bill of exceptions, to be done only on that day, unless the time for doing so should be then further enlarged by a like consent, and so on. We think that a practice of that kind would answer every purpose of necessity or convenience.

And now let us see whether there be any law or decision or settled practice of this state which requires or authorizes us to go farther than is above indicated in favor of the right of tendering bills of exception.

We have no special statute in this state, as there is in several other states of the union, expressly giving a right to tender a bill of exceptions at a succeeding term to that during which the judgment is rendered. The only statute we have on the subject is the Code, ch. 173, § 8, p. 1119, which stands in the place of 1 R. C. of 1819, ch. 133, 536 p. 523. That act was taken from *the statute of Westm. 2, 13 Ed. 1, c. 31, and is almost in the same identical words. It continued on our statute books in the same quaint language, which by successive changes in our judicial system had become very awkward, and to some extent unintelligible, down to the period of our revision in 1849, when it was materially modified and curtailed by the revisors, and the law as it now stands in our code was recommended by them and adopted by the legislature. There is nothing in the law as it stood in the Code of 1819, which seems to afford any warrant for the idea, that it authorized a bill of exceptions to be tendered to the court after the end of the term at which the judgment complained of was rendered. It is said that the law prescribed no period for tendering the bill, which might therefore be tendered at any convenient time. But the very nature of the case implied that the bill should be tendered at the same time, or at least during the same term, at which the judgment was rendered. The bill was to be a part of the record, which would be unalterable and unamendable by the same court, except for a clerical error, after the end of the term. It was therefore unnecessary expressly to name what was so plainly implied. We think that the early and leading case of *Wright v. Sharp*, 1 Salk. R. 288, decided by Lord Chief Justice Holt, shows that this was the then construction of the statute. But if there could be any doubt about the construction of that statute, there ought we think, to be none in the construction of the law as it now stands in the code. The words of it are: "In the trial of a case at law in which an appeal, writ of error or

supersedeas lies to a higher court, a party may except to any opinion of the court and tender a bill of exceptions, which (if the truth of the case be fairly stated therein) the judge or justices, or the 537 *greater part of those present, shall sign; and it shall be a part of the record of the case." In the trial of a case a party may except and tender his bill of exceptions. Not after the trial, and at another and different term, after the case had been ended. The trial may be considered as lasting during the term at which it occurred, for the purpose of completing the record by signing bills of exception in the case, but not during a succeeding term.

We have no decision of this court which authorizes us to go to the extent now claimed. It is somewhat singular that numerous as are the cases which have been cited from the reports of other states, there is but one in the reports of this state on the subject to which we were referred in the argument, and that is the case of *Washington & New Orleans Telegraph Co. v. Holson & Son*, 15 Gratt. 122. That case, we think, strongly maintains, if it does not conclusively establish, the views we have already presented on the subject. In that case it was held, as stated by the reporter, that "it must appear from the record that a point decided by the court has been saved before the jury retires; though the exception may be prepared and may be signed by the judge either during the trial or after it is ended, during the same term. If this appear from the whole record, it is sufficient, though it is not expressly stated in the bill of exceptions, but if it does not so appear from the record, the appellate court cannot review the judgment of the court below on the point." The portion of the cases extending from page 134 to 143 is pertinent and material to the question we are now considering. Judge Daniel, in delivering his opinion in that case, in which all the other judges concurred, at least so far as is material to this case, makes the following remarks in regard to our practice

538 *which seem to be pertinent to our present inquiry: "According to our practice, it is not necessary that a bill of exceptions should be tendered immediately on the transpiring or happening of the action of the court to which a party excepts. It is true, that when the character of the exceptions is such that little delay is occasioned by the preparation of the bill of exceptions, it is sometimes immediately prepared and disposed of; and, in such a case, a memorandum of the transactions is usually made in the minutes of the proceedings of the day. But as in a great number, perhaps a majority, of cases, serious delay and inconvenience would result from stopping the progress of the trial to prepare bills of exceptions to the rulings of the court, a practice, sanctioned by long usage, has prevailed, for the counsel desiring to except to any opinion of the court given against them on the trial, simply to state to the court that they intend to save the point

and ask the court to note the exception, and afterwards, during the term, to prepare the bill of exceptions and tender it to the court for its signature"—page 137. "Little aid in determining the question under consideration is derived from a reference to the decisions of other states; as each state has moulded for itself, either by statute or the decisions of its courts, a practice in the matter of bills of exceptions varying in a greater or less degree from the practice observed in any other state," &c.—page 141.

There is a subsequent decision of this court on the subject which was not referred to in the argument, no doubt because being a very recent decision it therefore escaped the observation of counsel. We mean the case of *Martz's ex'or v. Martz's heirs*, 25 Gratt. 361. But that case is only confirmatory of what was decided in the case cited from 15 Gratt., *supra*.

539 *We think there has been no such general practice in this state as is contended for in this case, to authorize bills of exceptions to be tendered and signed after the term during which the cause to which the exceptions apply was decided, and certainly there is no sanction to be found for such a practice in any law or decision of the state. On the contrary, the only law and decision we have upon the subject, seem to be adverse to the legality of such a practice.

We are, therefore, of opinion that the circuit court erred in giving to the plaintiff until the first day of the next term after that at which the judgment was rendered, to file his bill of exceptions.

It might well be questioned, whether the exception taken at the time of the trial was sufficiently specific to inform the defendant of the precise nature of the exception intended to be taken, whether it was to the whole judgment, or some particular point embraced in it. But it is unnecessary to decide that question.

But if we were wrong in deciding that the circuit court erred in giving the plaintiff until the first day of the next term after the judgment was rendered, to file his bill of exceptions, we are clearly of opinion that the said court did not err in refusing to sign the bill of exceptions which was not tendered until long after the first day of the next term, to wit: the 5th day of February 1872; that is, not until the 9th day of April 1872. Many of the cases cited in the argument show that even where a statute expressly authorizes a bill of exceptions to be tendered on a certain day of a succeeding term to be named by the court, such bill cannot be tendered after that day; at least, unless for good cause shown, the time is enlarged on that day, and the parties are duly informed of such enlargement. If

540 such a course could be pursued *without express statutory authority, of course there would be at least as much necessity for complying strictly with the terms of the permission in that case as in a case in which such statutory authority existed.

As the decision which we have made excludes the bill of exceptions from the record, it is decisive of the whole case. We are, therefore, of opinion that there is no error in the judgment of the circuit court, and that it must be affirmed.

Judgment affirmed.

541 *Fred & al. v. Dixon & als.*

March Term, 1876, Richmond.

1. Interest—War Interest.—A person residing in Virginia contracted debts here, and on the breaking out of the late war he went north, and there remained until his death in 1865. His creditors who remained in Virginia are not entitled to interest upon their debts during the war.

2. Same—Same.—In such case, the fact that the debtor had conveyed land in Virginia in trust to pay all his debts, and 2d, to the separate use of his wife, does not entitle his creditors to interest on their debts during the war.

This was a suit in equity in the circuit court of Fauquier county, brought in 1859 by creditors of Henry T. Dixon against said Dixon, and Annie E. his wife and their children, to subject the real estate of Dixon to the payment of his debts. There was a deed of trust on this land, given to secure specially two debts given for the purchase money of the land, and then for all his other creditors; and any balance was given to Mrs. Dixon, for her separate use for her life, with power of appointment; and, if no appointment, to the children of the marriage. One of the debts specified was held by Frank L. Fred, and the other by Larkin Crenshaw.

Proceedings in the case were stopped during the war, and Dixon died in 1865. The case was then revived, an account of the debts of Dixon was taken, and the land was sold; and there was no disputed question in this court except as to the interest upon the debts during the war. The facts bearing on this *question are stated by

542 Judge Christian in his opinion. The court below disallowed the interest, and Fred and Crenshaw applied to a judge of this court for an appeal; which was allowed.

Jno. S. Mosby and Wm. J. Robertson, for the appellant.

Brooke & Scott, for the appellees.

Christian, J., delivered the opinion of the court:

The only question we have to determine in this case is, whether the decree of the circuit court of Fauquier abating the interest during the war upon the debts due to the appellants was erroneous?

This question arises upon the report of a commissioner made in the cause, and which is as follows:

"It appeared to the satisfaction of your

*For monographic note on Interest, see end of com.

Commissioner, that the said Henry T. Dixon, from early in 1861 to the end of the late war, lived outside of the confederate lines; and that from August 1861, to July 1865, he held a commission as additional paymaster in the United States volunteers (said commission having been produced before your Commissioner), and during this entire time he (Dixon) was subject to the authority and laws of the United States government.

"The creditors (the appellants et als.) herein mentioned were residents of the state of Virginia, then a state in 'the Confederate States Government of America.' Under this statement of facts your commissioner has not allowed interest upon the different debts due by said Dixon to the creditors herein, who were during the recent war living in the said confederate government."

543 *The general principle that where debtor and creditor are separated during war, one residing on one side of belligerent line, and the other on the other side, the interest during the period of the war must be abated, does not seem to be seriously controverted by the counsel for the appellants. But if it had been, the general rule has already been declared by this court in *Cole v. Bright*, decided at the present term. It is true, in that case, the creditor left his debtor in Williamsburg then, and during the war, in the occupancy of the federal army, and came into the confederate lines. But the principle declared in that case was, that when debtor and creditor were separated by the belligerent lines the interest must be abated. I refer to that case and the following authorities to establish the doctrine, that interest during the war, where debtor and creditor are separated by belligerent lines, must be abated. *Hoare v. Allen*, 2 Dall. R. 102; *Mr. Jefferson's letter in note McCall v. Turner*, 1 Call 115; *Brewer v. Hastie & Co.*, 3 Call 22; *Conn & als. v. Penn & als.*, 1 Peters R. 523-26; *Hanger v. Abbott*, 6 Wall. U. S. R. 532; 1 Gall. R. 295; *Griswold v. Waddington*, 16 John. R. 438.

It is insisted, however, by the learned counsel for the appellants, that this case is taken out of the operation of the general rule above declared, because the debtor in this case was domiciled in Virginia up to the spring of 1861, and voluntarily left the state of Virginia and went to Washington, where he remained during the war; and that having thus voluntarily left his former domicile, he cannot claim the benefit of an abatement of interest due his creditor.

In my opinion this act of the debtor, though voluntary, cannot affect the status of the parties, or the legal rights and liabilities growing out of the laws of

544 war. *He had the right upon the approach, or after the commencement of the civil war, to choose for himself which side he would take, which cause he would espouse. In our late unhappy civil war many men at the north were constrained by family ties, by early education, by local attachments, by political proclivities, by

earnest conviction of right and duty, to leave the north and unite their fortunes and their destinies with the south in that cause which they believed was the cause of the right of self-government and of the maintenance of civil liberty. And so in the south there were men who, from the same motives, chose to espouse the cause of the north and to uphold the integrity of the union. In all civil wars men must choose for themselves which side they may take. But I will pursue this line of discussion no further, contenting myself with a reference to the admirable opinion of my brother Staples, delivered to-day in the case of *Walker v. Beauchler*, for the true doctrines upon this subject.

The question here is not how the parties became separated—whether voluntary or not—but the whole question is, were they separated? The question is not how the residence became changed, but where was the actual residence of the debtor and creditor during the war: were they during the war on different sides of the belligerent lines? If they were, no matter how they became thus separated, the question is closed. Dixon was in Washington from the early spring of 1861 till after the close of the war. The appellants were in the county of Fauquier. A line of bristling bayonets was between them. They were enemies; no intercourse between them was lawful; no payment could be made; no money could be transmitted. It is clear, therefore, that it is a case where the interest ought to be abated.

545 *But one of the counsel for the appellants objected to the decree of the circuit court upon another ground. He argues, with much ingenuity, that inasmuch as the debts due to the appellants are secured upon land in the county of Fauquier; that the land is in a court of equity to be regarded as debtor, and not Dixon; and that therefore there should be no abatement of interest. A brief reference to the facts of the case will be a sufficient answer to this position. Dixon, by deed bearing date December 8th, 1837, conveyed a large estate, real and personal, to a trustee,—first, to secure his creditors, among whom were the appellants: which deed provides that the said trustee is to have and to hold the above granted property, real and personal, upon the following trusts and confidences unto them the said parties of the second part: 1st. To pay a debt due Aquila Glascock of about six thousand dollars; a debt to Frank Fred of seven thousand dollars, and all other debts due and owing by the said Henry T. Dixon, amounting as it is supposed to about two thousand dollars; but, whether more or less, it is to be understood that all debts due by the said Dixon, enumerated or not enumerated, are to be paid; and to that end the said parties of the second part, trustees shall collect all debts due to the said Dixon, and from time to time sell such of the property as may be necessary for that purpose, at public or private sale, as may be best. 2d. After the payment of all the debts due

by the said Henry T. Dixon, for the sole, separate and exclusive use and benefit of the said Annie E. Dixon, wife of Henry T. Dixon, for and during her life, free from the contracts and liabilities of her said husband, or of any future husband.

It became necessary, therefore, in the court below, to enquire and ascertain what debts of the said Dixon *were still due; because Mrs. Dixon was entitled to the balance after payment of his debts. She filed her petition, claiming that her husband did not owe the interest on the debts secured which had accumulated during the war; and the circuit court sustained that claim.

Now the land was merely the security for the debts due by Dixon; and after these debts were paid it belonged to Mrs. Dixon. It was competent to show what part had been paid, or that part was not in fact due, or that no interest could be claimed for the period of four years. The debt was due by Dixon; the land was merely the security for its payment.

Upon the whole case, I am of opinion that there is no error in the decree of the circuit court, and that the same be affirmed.

Decree affirmed.

INTEREST.

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I. WHEN INTEREST IS ALLOWED.

1. *General Principles of Allowance.*—"Interest is allowed because it is natural justice that he who has the use of another's money should pay interest for it." *PENDLETON, P.*, in *Jones v. Williams*, 2 Call 102. Cited with approval in *Baker v. Morris*, 10 Leigh 284; *McVeigh v. Howard*, 87 Va. 599, 13 S. E. Rep. 3; *Stuart v. Hurt*, 88 Va. 343, 13 S. E. Rep. 488. See also, 3 Min. Inst. (2d Ed.) pt. 1, p. 383; *Bart. Law Pr.* (2d Ed.) 718.

It is allowed whether demanded *eo nomine* in the declaration or not for "the interest follows the principal as the shadow does the substance." *COALM. J.*, in *Hatcher v. Lewis*, 4 Rand. 152. See also, 3 Min. Inst. (2d Ed.) pt. 1883; *Bart. Law Pr.* (2d Ed.) 718.

"It has always been lawful in Virginia for parties to contract for the payment of interest for the use or forbearance of money within the limits prescribed by statute; and in the absence of any express agreement for the payment of interest, in obligations for the payment of a certain sum of money on demand or on a given day, interest on the principal sum from the time it becomes payable is a legal incident of the debt, and the right to it is founded on the presumed intention of the parties." *BURNS, J.*, in *Roberts v. Cocke*, 28 Gratt. 207. Quoted with approval in *Kent v. Kent*, 28 Gratt. 840; *Cecil v. Hicks*, 29 Gratt. 1, 26 Am. Rep. 391; *McVeigh v. Howard*, 87 Va. 599, 13 S. E. Rep. 31. See also, *Cecil v. Deyerle*, 28 Gratt. 775.

2. *Accounts, Unliquidated, Doubtful or Uncertain.*—Interest ought not to be allowed where the accounts are unliquidated and disputed between the parties. *Kerr v. Love*, 1 Wash. 172; *Waggoner v. Gray*, 2 Bea. & M. 608; *McConnico v. Curzen*, 2 Call 356, 1 Am. Dec. 540; *Skipwith v. Clinch*, 2 Call 253; *Stearns v. Mason*, 24 Gratt. 484. Nor where the claim, though just, is doubtful. *Auditor v. Dugger*, 3 Leigh 241.

Under the statutory enactments, interest may be recovered on estimated rents and profits. See *post* under the title "Rents." As to the allowance of interest in actions of contract or tort and in suits in equity, see Va. Code 1887, §§ 3300, 3301.

3. *Legacies and Annuities.*—Where a testator bequeaths a certain sum to each of his two infant daughters, to be paid at age or marriage; but if either die, her legacy to go to her sister; and one of them dies during infancy, the legacy thus accruing to her is due immediately and bears interest from one year after her death. *Cary v. Macon*, 4 Call 68.

Where slaves are specifically bequeathed to a child, when he or she shall attain the age of 21 years, or shall marry, and no provision is made expressly for maintenance in the meantime, their intermediate profits, if not otherwise disposed of, do not pass by a general residuary clause, but go to the legatee. In such case, the legatee is also entitled to interest on

the profits from the time of the receipt thereof by the executor, no good reason appearing for his failure to apply the principal to the use of the legatee. *Quarles v. Quarles*, 2 Munf. 321.

Interest is allowed on a legacy, where no certain time for payment has been appointed, from the end of one year from the testator's death; and to a legatee in remainder, from the end of the year in which the tenant for life died. *Shobe v. Carr*, 8 Munf. 10.

If the testator "desire that no interest shall be demanded on a legacy, but that the executor will pay it off as soon as money can be raised by selling certain property," no interest is to be demanded until a reasonable time for raising the money shall have elapsed; after which, the executor, if he improperly withhold payment, is chargeable with interest. *Patton v. Williams*, 3 Munf. 50.

A testator directed his executors to set apart enough of his property to produce an annual income of a certain sum and pay such income in certain annuities. The executors failed to set apart the property and died wholly insolvent. One of the annuitants sued the administrator *d. b. n.* for her annuity with interest thereon. *Held*, that she was not entitled to interest. *Adams v. Adams*, 10 Leigh 527.

In *Hite v. Hite*, 2 Rand. 400, the testator left 17 children. For four of them, as he states in his will, he had made ample provision. To each of his remaining children, he bequeathed a legacy of \$1,000. There being no other provision for these children, interest was allowed on these legacies from the testator's death.

In *Lyon v. Magagnos*, 7 Gratt. 377, the testatrix gave a legacy, directing that it should be paid within a year from her death. The legacy bears interest from the end of the year although there is no hand to receive it for thirteen years. See also, *Bourne v. Mechan*, 1 Gratt. 292; *Granberry v. Granberry*, 1 Wash. 246, 1 Am. Dec. 455.

For several years an infant legatee resided with and was maintained by her grandmother, who was chargeable with the payment of the legacy, the annual interest of which was less than the annual value of the maintenance. *Held*, the grandmother should not be charged with interest on the legacy during the period of such maintenance. *Arrington v. Cheatham*, 2 Rob. 492.

Interest will not be allowed on the arrears of an annuity, which was to be paid in agricultural products at a particular place, the value of which was to be ascertained by testimony; and in the absence of any proof of a demand, at the place where it was to be paid, or of any agreement to dispense with such demand, and to convert the same into money. *Phillips v. Williams*, 5 Gratt. 259.

4. Obligations in Writing.

a. *In General*.—In an action of debt on a note for a certain sum of money with interest from date, if the declaration does not claim interest, judgment upon *non sum informatus* should be given for the principal only. *Hubbard v. Blow*, 1 Wash. 70.

In an action upon a bond, the court may instruct the jury with regard to the interest. *Fine v. Cockshut*, 6 Call 16.

Before Va. Statute 1805, if the declaration did not demand interest, in an action upon a promissory note, and the defendant waived his plea, judgment could not be given for interest. *Brooke v. Gordon*, 2 Call 212.

In an action of debt on a single bill, under Va. Statute 1805, interest was allowed, although not mentioned in the bill or demanded in the declaration. *Baird v. Peter*, 4 Munf. 76; *Wallace v. Baker*, 2 Munf. 334.

In an action on a negotiable note, a demand of interest in the declaration, which is not demanded in the writ, is not erroneous. *Hatcher v. Lewis*, 4 Rand. 152.

The purchaser gave a bond for the purchase price of a piece of land, with the provision that if he did not succeed in procuring the legal title, the contract should be void. He went into possession and continued to hold, but neglected to obtain the legal title. *Held*, that he ought to pay interest. *Bailey v. James*, 11 Gratt. 468, 62 Am. Dec. 669.

Where interest on a principal sum to date was included in a note, and there was a decree for the payment of the note, it was proper to decree interest on the whole amount. *Kraker v. Shields*, 20 Gratt. 377.

In a debt or check, where the declaration demands a sum certain and interest, the judgment may be for "the principal and charge of protest with interest thereon from the date of such protest." Va. Code 1887, § 2853; *Lake v. Tyree*, 90 Va. 719, 19 S. E. Rep. 787.

b. *Penal Bonds*.—If a bond be given in the usual form with a penalty, conditioned to be discharged by the payment of the principal at a future day "with interest from the date if not punctually paid," such back interest is to be considered an additional penalty and not recoverable. *Waller v. Long*, 6 Munf. 71.

A court of equity will relieve against back interest secured by way of penalty. *Mosby v. Taylor*, Gilmer 172.

In debt on a bill penal, a judgment entered upon *nil dicit* or *non sum informatus*, ought not to be reversed on the ground that the declaration, though describing the bill correctly as to the principal, penalty and date, omits to mention that the debt is payable "with interest from a day prior to the date" and that the judgment, in conformity with the bill penal, is entered for the penalty, to be discharged by the principal, with such interest and costs. *Harper v. Smith*, 6 Munf. 399.

Interest on a bond or judgment for a penalty may be recovered at law or in equity, although the principal and interest exceed the penalty. *Tennant v. Gray*, 5 Munf. 494; *Roane v. Drummond*, 6 Rand. 182; *Baker v. Morris*, 10 Leigh 294; *Tazewell v. Saunders*, 13 Gratt. 354.

By Va. Code 1887, § 3390 "the jury, in any action founded on contract, may allow interest on the principal due, or any part thereof, and fix the period at which such interest shall commence."

5. *Purchase Money*.—Where a purchaser of land, being thoroughly informed of the defects of the vendor's title, nevertheless agreed to pay interest on the purchase money from a certain day, he shall not be relieved from paying such interest on the ground that he could not get possession of a part of the land, which he knew, at the time of entering into the agreement, was held by another person. *Mayo v. Purcell*, 3 Munf. 243.

A part owner, being ignorant of the title of the other partners, remained in possession and enjoyment of the whole land for many years, but made their title known to the other partners immediately after it was discovered by himself. Upon a bill filed by them for partition, it was considered equitable, that he should account for their proportion of the rents received by him, deducting his disbursements

for securing the title; that all leases he had made of the land should be acquiesced in by the plaintiffs; and that for the part he had sold he should pay the price received, with interest from the time of sale; the time when he received it not appearing to be different from that of sale. *Carter v. Carter*, 5 Munf. 108.

In a contract for the sale of land, if no day be specified for delivering the deed and possession of the land, but the money be payable after delivery of the deed; it must be understood that the deed is to be delivered and possession given without delay. If, therefore, in consequence of a misunderstanding between the parties in relation to the terms of sale, this be not done, the vendor is bound to account for and pay the profits of the land received by him after the contract; and the vendee to pay interest on the money from the time it would have been payable if the deed had been immediately delivered. *Hundley v. Lyons*, 5 Munf. 342, 7 Am. Dec. 685.

Where the vendee has been in possession and the purchase money has remained unpaid, he shall pay interest thereon, although the vendor be in default, unless he has not only kept the purchase money idle, but had given the vendee notice that he has so kept it. *Brockenbrough v. Blythe*, 3 Leigh 619; *Selden v. James*, 6 Rand. 465; *Oliver v. Hallam*, 1 Gratt. 296; *Bailey v. James*, 11 Gratt. 408, 62 Am. Dec. 650.

Where the vendee so elects, he is entitled to have an account of the rents, issues and profits of the land, and to have them set off against the purchase money; or, if he elects to waive an account, he shall not pay interest on the purchase money. *White v. Dobson*, 17 Gratt. 202.

When it is uncertain what amount, if any, is due on the bonds for the purchase money, interest will not be allowed except from the date of the decree. *Stearns v. Mason*, 24 Gratt. 484.

In a contract for the sale of real property, conditioned upon a termination of a pending suit respecting the title in favor of the vendor, the purchase price bears interest only from the final decree of the appellate court reversing the judgment of the lower court adverse to the vendor. *Central Land Co. v. Johnston*, 96 Va. 223, 28 S. E. Rep. 175.

6. Rents.

a. In General.—A court of equity may, in its discretion allow interest on arrears of rent. Interest was allowed where the tenant had endeavored to defeat the rents altogether and thereby delayed payment. *Graham v. Woodson*, 2 Call 249. But not where the lessor might have distrained. *Skipwith v. Clinch*, 2 Call 258.

Interest cannot be recovered as of course in actions for the recovery of rent, but may be given, under circumstances to be judged of by the jury. *Mickie v. Lawrence*, 5 Rand. 571; *Dow v. Adam*, 5 Munf. 21. But where the proprietor delayed for many years to prosecute her claim for ground rents, she will not be allowed interest thereon. *Mulliday v. Machir*, 4 Gratt. 1.

A trustee, accountable for rents received by him, is chargeable with interest thereon. *Mundy v. Vawter*, 3 Gratt. 518. See also, *Cross v. Cross*, 4 Gratt. 257.

Interest is not recoverable by way of damages in an action for rent in arrear. *Cooke v. Wise*, 3 Hen. & M. 463. Nor, prior to the statutory enactments, was interest allowed on estimated rents and profits. *Roper v. Wren*, 6 Leigh 38; *Payne v. Graves*, 5 Leigh 561.

Judgment ought not to be rendered on a three months' replevy bond, for interest from a day

anterior to the date of the bond, but it may be rendered for interest from that date, on the rents and costs of the distress added together. And if the bond be taken, including interest from a day anterior to its date, such erroneous interest may be deducted, and judgment entered for the right sum. *Williams v. Howard*, 3 Munf. 277.

b. Under the Statutes.—By statute "in any action for rent, or for such use or occupation, interest shall be allowed as on other contracts." Acts 1826-7, p. 31, ch. 27, § 8; Va. Code 1873, ch. 134, § 7; Va. Code 1887, § 222. Tenants, therefore, holding property which is the subject of controversy in a pending suit, are bound to pay interest upon the rents, though it is not ascertained who is the party entitled to receive them. *Commonwealth v. Ricks*, 1 Gratt. 414.

The landlord is entitled to interest on rent in arrear from the time it becomes due. *Brooks v. Wilcox*, 11 Gratt. 411.

Where one tenant in common occupied the whole property and was liable to his co-tenants for a reasonable rent, he was also liable for interest on such rent. *Early v. Friend*, 16 Gratt. 21.

Interest was allowed on estimated damages in *Bolling v. Lerner*, 26 Gratt. 65. As to interest on estimated rents and profits, see also, *Vance v. Evans*, 11 W. Va. 342.

It is supposed that the statute allows interest on rent in arrear where the parties are settling the transactions privately between themselves, although there be no action. See 4 Min. Inst. (3d Ed.) pt. 1, p. 127.

7. Funds Held in Trust.

a. By Administrator.—An administrator paying away the assets of the estate to distributees, without notice of the debts or liabilities of his intestate, must account to creditors for the amount so paid away with interest. *Cookus v. Peyton*, 1 Gratt. 481.

An administrator residing during the Civil War in Winchester, was not liable for interest on funds of the estate in his hands during that period. *Brent v. Clevinger*, 78 Va. 12.

Where the administrator, during the Civil War, held money payable to distributees living within the United States lines, he should not be charged with interest thereon during that period. *Dromgoole v. Smith*, 78 Va. 665.

The mere neglect, on the part of an administrator, to invest small sums of unexpended moneys, will not render him chargeable with compound interest. *Lovett v. Thomas*, 81 Va. 245.

As to administrator's liability for interest, see also, *Adams v. Adams*, 10 Leigh 527; *Peale v. Hickie*, 9 Gratt. 437.

b. By Attorney.—Prior to statutory enactment Va. Code 1887, § 2076, allowing interest in such case, where an attorney at law was employed to collect debts, and some of them were lost to his client through his negligence, he was chargeable for the principal of the debts so lost, but not with interest thereon. *Rootes v. Stone*, 2 Leigh 650. This case seems to be in conflict with *Chapman v. Shepherd*, 24 Gratt. 35.

c. By Collector.—If a collector, living in the neighborhood of his principal does not pay over his collections in a reasonable time, he is chargeable with interest thereon. *Hawkins v. Minor*, 5 Call 118.

d. By Committee of Lunatic.—As a general rule, the committee of a lunatic is only to be charged with simple interest upon the balances found against him, on a settlement of his account. *Crigler v. Alexander*, 33 Gratt. 674.

a. By Court.—Where the funds have remained in the hands of the court during the litigation, interest is not allowable except from the date of the judgment. *Daniel v. Wharton*, 90 Va. 584, 19 S. E. Rep. 170.

f. By Employer.—Where the compensation of an employee remains in the hands of the employer, it bears interest from the date it was due. *Goldsmith v. Latz*, 96 Va. 680, 32 S. E. Rep. 483.

g. By Executor.—There is no general rule as to an executor's liability to pay interest on money in his hands. Each case must depend upon its own particular circumstances. In this case he was charged with it from the end of each year for the balance then resting in his hands; but such interest is not to be carried to the balance of the succeeding years. *Granberry v. Granberry*, 1 Wash. 246. See also, *Burwell v. Anderson*, 3 Leigh 348.

Where the failure to bring an executor to a settlement appears to have proceeded from neglect of the residuary legatees, without any wilful default on his part, interest ought not to be charged on the balance due from him to the estate, except from the date of the decree. *Fitzgerald v. Jones*, 1 Munf. 150.

An executor or administrator, hiring slaves belonging to the estate of his testator or intestate, ought not to be charged with interest on such hire from the day it became due; but a reasonable time, to collect and apply the money, should be allowed before the commencement of interest. *Dillard v. Tomlinson*, 1 Munf. 183.

Whether interest ought to be charged in an administration account, is a question, the decision of which may depend upon extraneous testimony. *White v. Johnson*, 2 Munf. 285.

An executor, except as to debts lost by his negligence or improper conduct, is chargeable with interest only, on his actual receipts. *Cavendish v. Fleming*, 3 Munf. 198.

Moneys directed to be invested by executors in government securities should be accounted for as if invested, after a reasonable time for that purpose; but the executor ought not to be charged with interest during such reasonable time. *Carter v. Cutting*, 5 Munf. 223.

Where a legacy is left in trust and the trustee refuses to act, the executor is not bound to pay the legacy until a new trustee is appointed by the court, and is not chargeable with interest before the decree. *Johnson v. Mitchell*, 1 Rand. 209.

Prior to statute allowing interest in such case, Va. Code 1887, § 2676, executors who fall by their negligence to collect a debt due to their testator by bond under a penalty, the debtor being good for the money at the death of the testator and continuing good for it for 14 years, when he falls, are chargeable with the principal and interest thereon up to the time of failure of the debtor; but they are not chargeable with interest since that time. *Chapman v. Shepherd*, 24 Gratt. 377.

h. By Fiduciaries.—Interest is required to be paid by fiduciaries on funds kept and used by them. And if such funds are kept they are presumed to have been used, and to have been worth or to have made interest. *Sharpe v. Rockwood*, 78 Va. 24; *Templeman v. Fauntleroy*, 3 Rand. 494.

i. By Guardian.—A guardian is not to be charged with interest upon the money received by him from the day it is received, but he is to be allowed six months in which to invest it. *Armstrong v. Walkup*, 12 Gratt. 608.

The provision of sec. 2606 of Code 1887 allowing the guardian thirty days, during which time no interest

shall be charged against him to invest funds of his ward does not apply where he fails to make any investment thereof, and he is charged with interest from the date of receipt. *Snively v. Harkrader*, 29 Gratt. 113.

If, upon the first settlement of his accounts by the guardian, a balance remain in his hands on which he is to account for interest, such interest must, in his second annual account, be credited to the ward, like other profits of the estate; and if the interest and other profits credited in this second account exceed the disbursements, the surplus, whether it arise from the interest aforesaid or from other profits, will constitute a balance against the guardian, on which, if it remain in his hands, he must account for interest, which interest must, in the third annual account, be credited to the ward; and so on, *toties quoties*. But, from the time the guardianship terminates, the account is to be settled on the ordinary principals of debtor and creditor as to interest, compound interest being generally excluded on both sides. *Garrett v. Carr*, 1 Rob. 196; *Childers v. Deane*, 4 Rand. 406; *Cunningham v. Cunningham*, 4 Gratt. 43; *Handly v. Snodgrass*, 9 Leigh 484; *Armstrong v. Walkup*, 12 Gratt. 608; *Evans v. Pearce*, 15 Gratt. 513; *Martin v. Fielder*, 32 Va. 455; Va. Code 1887, § 2606; 1 Min. Inst. (4th Ed.) pp. 486, 487.

j. By Receiver.—A receiver will not, as a matter of course, be chargeable with interest upon a sum which he is ordered to pay, unless special circumstances to warrant it are shown. *Crawford v. Fickey*, 41 W. Va. 544, 23 S. E. Rep. 662, 3 Am. & Eng. Corp. Cas., N. S., 417, and *note*, p. 421.

k. By Trustee.—Where a trustee retains money in his hands for an unreasonable length of time, he is chargeable with interest thereon. *Lomax v. Pendleton*, 3 Call 538.

A trustee is chargeable with the interest on trust money in his hands, unless he can show it was necessarily kept in hands for the purposes of the trust. *Miller v. Beverleys*, 4 Hen. & M. 415. See also, *Beverleys v. Miller*, 6 Munf. 99, where, under the particular circumstances of the case, no interest was charged against the trustee. A trustee, accountable for rents received by him, is chargeable with interest thereon. *Mundy v. Vawter*, 3 Gratt. 518.

8. Money Paid by Mistake.—Where, in the absence of fraud, money has been paid and received under a mutual mistake of fact, interest will be allowed only from the time the mistake was discovered and demand made. *Craufurd v. Smith*, 93 Va. 623, 23 S. E. Rep. 235. See also, *Hull v. Watts*, 96 Va. 10, 27 S. E. Rep. 829.

9. Verdicts, Judgments and Decrees.

a. On Contracts.

(i) **At Law.**—Where judgment was recovered for the principal debt, with damages in lieu of interest, and costs, and the debtor executed a mortgage to secure the payment, interest was allowed on the aggregate of principal, damages and costs, from the date of the mortgage till payment. *Laidley v. Merrifield*, 7 Leigh 346.

In an action of debt on a decree for an amount of interest thereby found due, interest on the amount of the decree may be recovered in the shape of damages for its detention. *Stuart v. Hurt*, 88 Va. 343, 13 S. E. Rep. 438.

Under W. Va. Code, ch. 181, § 16, providing that where a judgment is rendered for the payment of money, "it shall be for the aggregate of principal and interest due at the date of the verdict if there be one, otherwise at the date of the judgment or

decree, with interest thereon," it was held that, where this had been done, it was error in a subsequent decree to reaggregate the debt by calculating interest to the date of the subsequent decree, and then to add this interest to the sum of the first decree and give interest on the second aggregate from the date of the last decree. *Tiernan v. Minghini*, 28 W. Va. 314. For the construction of this provision, see also, *Douglass v. McCoy*, 24 W. Va. 722.

By Va. Code, sec. 3390, it is provided that "the jury, in any action founded on contract, may allow interest on the principal due, or any part thereof, and fix the period at which such interest shall commence. And in any action whether on contract or for tort, the jury may allow interest on the sum found by the verdict, or any part thereof, and fix the period at which such interest shall commence. If a verdict be rendered which does not allow interest, the sum thereby found shall bear interest from its date, and judgment shall be entered accordingly."

(a) *In Equity*.—Prior to Va. Stat. 1804, chancery courts could not grant interest, subsequent to the date of the decree, on debts not bearing interest in terms. *Dillard v. Tomlinson*, 1 Munf. 183; *Deanes v. Scriba*, 2 Call 415. Nor, prior to said statute, could the court of appeals, in affirming a decree appealed from, allow interest on the amount of the decree pending the appeal. *Scott v. Trents*, 4 Hen. & M. 356. Since the 1st of May, 1804, when interest is allowed in equity, it should not stop when the balance of account is struck, nor at the date of the decree, but should run to the payment of such balance. *Snickers v. Dorsey*, 2 Munf. 506. See Va. Code 1887, sec. 3391.

b. *In Action of Tort*.—Prior to statutory enactment (Va. Code 1887, § 3390), interest could not be allowed upon a verdict in an action of tort. *Brugh v. Shanks*, 5 Leigh 598. See also, *Hepburn v. Dundas*, 13 Gratt. 219.

It was held proper to charge interest from the date of the verdict, upon a judgment in an action of tort depending when a provision, similar to the one above referred to, went into operation. *Lewis v. Arnold*, 13 Gratt. 454.

Under Va. Code 1887, § 3390, which provides that if a verdict does not allow interest, the sum thereby found shall bear interest from the date of the verdict, the judgment on a verdict for damages in an action of tort must allow interest from the date of the verdict, when interest is not given by the verdict. *Fry v. Leslie*, 87 Va. 269, 12 S. E. Rep. 671.

Under W. Va. Code, § 18, ch. 131, a judgment, in an action of tort, bears interest from the date thereof, and not from the date of the verdict. But judgments on contracts, as provided by § 14 of the same chapter of the code, bear interest from the date of the verdict. *Talbott v. Ry. Co.*, 42 W. Va. 560, 26 S. E. Rep. 311. See also, *Fowler v. R. Co.*, 18 W. Va. 579.

II. COMPUTATION OF INTEREST.

1. *Partial Payments*.—With regard to computing the interest where partial payments have been made, the court, in *Lightfoot v. Price*, 4 Hen. & M. 481, says: "That so much of any payment as is equal to, or exceeds the interest, is to be applied to the discharge thereof, and the residue towards discharging the principal, unless the debtor, at the time of the payment or before, directed otherwise; that is to say, from the sum of principal and interest, computing the latter to the time of payment, the

payment is to be deducted, and the balance forms a new capital; on that, interest is to be computed from that time, but with this caution, that the new capital be not more than the former, so that if the payment be less than the interest due at the time, the surplus of interest must not augment the remaining capital; because that would give interest upon interest, which would be unlawful." See also, *Boes v. Pleasants*, 1 Wythe 10; *Hurst v. Hite*, 20 W. Va. 138; *Mercer v. Beale*, 4 Leigh 189.

It is error in a commissioner to allow interest on part payments of a judgment: the proper rule is to bring the interest on the principal sum up to date of each payment, and deduct it from the amount of that payment, thus making the partial payments first applicable to the interest. *De Ende v. Wilkinson*, 2 Patt. & H. 663.

2. *Application of Payments*.—See the title "Application of Payments," 2 Am. & Eng. Enc. Law (2d Ed.) 467. Where it is agreed between a debtor and his creditor that the principal shall be first paid, the payments will be applied accordingly. *Pindall v. Bank of Marietta*, 10 Leigh 481.

III. TIME DURING WHICH INTEREST ACCRUES.

1. *As Damages for Breach of Contract*.—Where interest is allowed in an action for breach of contract it should be computed from the date of such breach. *Enders v. Board of Public Works*, 1 Gratt. 264; *Buchanan v. Leeright*, 1 Hen. & M. 211.

2. *On Obligations in Writing*.—Where no time is fixed for the payment of the principal of a bond, it becomes due immediately and interest will be allowed from the date of its execution. *Kent v. Kent*, 28 Gratt. 840; *McVeigh v. Howard*, 87 Va. 589, 13 S. E. Rep. 31.

Upon a sale of a house and lot, upon credits extending through several years, where separate bonds are taken for the interest, they bear interest from the time they fall due. *Græme v. Cullen*, 28 Gratt. 266.

Coupons for interest bear interest from the time they are payable. *Gibert v. R. Co.*, 23 Gratt. 386.

A contract of sale, dated Aug. 26, 1873, says the bonds for the purchase money are "to bear interest from this date." The trust deed describes the bonds as "dated Sept. 10, 1873, with 6 per cent. interest from Aug. 26, 1873." The bonds say, "with 6 per cent. interest from date above," when there is no "date above," except the date of maturity of the bond. Held, the bonds bear interest from the date of the contract, Aug. 26, 1873, till paid. *Ware v. Starkey*, 90 Va. 191.

"The words 'on demand' have a plain, distinct, clearly defined, legal and popular signification, well known to the courts and to the people. When an obligation for money or its equivalent is executed containing this provision, the parties perfectly understand that the debt is payable presently; that it is due immediately and bears interest from its date." *STAPLES, J.*, in *Omohundro v. Omohundro* 21 Gratt. 626. Approved in *McVeigh v. Howard*, 87 Va. 589, 13 S. E. Rep. 31.

By Va. Code 1887, § 3390, "the jury, in any action founded on contract, may allow interest on the principal due, or any part thereof, and fix the period at which such interest shall commence."

3. *On Money Paid by Mistake*.—Interest is allowed on money paid by mistake from the time the mistake is discovered and demand made. *Crauford v. Smith*, 93 Va. 623, 23 S. E. Rep. 235.

4. *Interest from Institution of Suit*.—In a suit to subject the wife's separate estate for improvements

hereon made by the husband without fraudulent intent while debts existed against him, interest should be allowed only from the commencement of the suit. *Humphrey v. Spencer*, 36 W. Va. 11, 14 S. E. Rep. 410.

IV. SUSPENSION OF INTEREST.

1. **By Act of Creditor.**—Evidence, in order to extinguish the interest, may be given to the jury on the plea of payment to a bond, that the plaintiff was absent in foreign parts beyond seas, and had not any known agent or attorney within the commonwealth. *Call v. Turner*, 1 Call 123.

The vendee of land, on a credit, to whom a deed is made, and possession given, is not excused from paying interest on the purchase money, where the payment of the principal was delayed by a third party, he vendee having continued all that time in possession and having enjoyed the profits. *Selden v. James*, 1 Rand. 465.

If a tender be made of a less sum than is justly due, a refusal to receive it is no bar to the subsequent recovery of interest on the sum so tendered from the time of the tender. *Shobe v. Carr*, 8 Anst. 10.

A willingness to pay the amount admitted to be due is not the equivalent of a legal tender of the amount, though followed by bringing the money into court to make the tender good, when no such tender was ever actually made. *N. & W. R. Co. v.fills*, 91 Va. 613, 22 S. E. Rep. 556.

2. **By Act of Law.**—An act of assembly authorizing the auditor to issue a warrant in favor of a creditor of the commonwealth on any particular fund will not stop the interest accruing on the debt, unless it appears that the fund was sufficient at the time for its payment. *Commonwealth v. Newton*, 1 Hen. & L. 90.

If a defendant, however, in a judgment for costs joins the collection of the judgment on grounds which do not affect its validity, he is liable for interest on the judgment from the time the injunction was granted. *Shipman v. Fletcher*, 96 Va. 585, 29 S. E. Rep. 325; *Templeman v. Fauntleroy*, 3 Rand. 434.

Where a debtor lawfully agreed to pay interest at 10 per cent., the court will compel the payment, though the debtor's lands are placed in a receiver's hands at the creditor's instance. *Strayer v. Long*, 1 Va. 715, 3 S. E. Rep. 372.

3. **By Existence of War.**—Interest is suspended during a war where the creditor resides within the territory of one of the belligerent powers, and his debtor within that of the other. *Roberts v. Cocke*, 3 Gratt. 207; *Brewer v. Hastie*, 3 Call 22. But where creditor and debtor reside within same territory, interest is allowed. *Coltrane v. Worrell*, 30 Gratt. 434.

In *Kirby v. Goodykoontz*, 26 Gratt. 298, a trustee was held liable for a loss resulting from his investment of good money in confederate bonds, but he was not held liable for interest during the Civil War. But after judgment for principal and interest of a debt, courts are without power to abate the interest on a debt on the ground that the creditor was within the lines of the enemy. *Rowe v. Hardy*, 97 Va. 674, 34 E. Rep. 625.

V. COMPOUND INTEREST AND INTEREST ON INTEREST.

1. **In General.**—It is a general rule of law that interest will not bear interest, unless there is some express or implied agreement to that effect between the parties. *Pindall v. Bank of Marietta*, 10 Leigh 11; *Childers v. Deane*, 4 Rand. 407. Nor does the

mere agreement that interest shall be paid annually warrant the recovery of interest on interest, unless there be an agreement after an interest installment is due that interest shall be paid thereon. *Genin v. Ingersoll*, 11 W. Va. 549. Coupons for interest bear interest from the time they are payable. *Gilbert v. R. Co.*, 33 Gratt. 583. Interest upon interest on a legacy will not be allowed unless the testator plainly requires it. *Calloway v. Langhorne*, 4 Rand. 181. The executor has no power to bind the testator's estate to pay compound interest, and only the principal sum originally due, with simple interest, should be charged the estate. *Staples v. Staples*, 85 Va. 76, 7 S. E. Rep. 199. As to when a guardian may recover compound interest for ward, see Va. Code 1887, § 2607.

But an agreement to pay interest upon interest is valid, if made after the interest which is to bear interest has become due. *Stansbury v. Stansbury*, 24 W. Va. 634; *Craig v. McCulloch*, 20 W. Va. 154; *Pindall v. Bank of Marietta*, 10 Leigh 481; *Childers v. Deane*, 4 Rand. 406; *Fultz v. Davis*, 26 Gratt. 903.

2. **On Judgments and Decrees.**—But a judgment or decree may be rendered on an interest bearing claim for the principal with accrued interest; and this aggregate, in the form of a judgment or decree, bears interest from its date. *Stuart v. Hurt*, 88 Va. 343, 13 S. E. Rep. 438; *Pickens v. McCoy*, 24 W. Va. 344; *Tiernan v. Minghini*, 28 W. Va. 314.

3. **On Claims Referred to a Commissioner.**—Where a commissioner's report showed a balance due, from the defendant, consisting entirely of interest found due on an account never before settled, and stated, that that balance of interest was to bear interest from a remote day, and there was no exception to the report, and the court decreed the balance with interest accordingly, it was held that the decree was erroneous in giving interest upon the interest from a remote day since the interest should have been allowed only from the date of the final decree. *Dunbar v. Woodcock*, 10 Leigh 623.

There was a provision in a bond for the payment of money, that it should be paid three years after date, with interest at 10 per cent. per annum from date, the claim was audited by the commissioner at 10 per cent. to the time the report was completed. Held, that the amount so computed, principal and interest, should bear interest at the contract rate from the date of auditing till paid. *Barbour v. Tompkins*, 31 W. Va. 410, 7 S. E. Rep. 1.

4. **On Successive Decrees in the Same Cause.**—Where a decree was entered, in accordance with W. Va. Code, ch. 131, § 16, for the aggregate of the plaintiff's debt, with interest on such aggregate from the date of the decree, it was held error in a subsequent decree, entered several years thereafter, to reaggregate such debt by calculating interest on such first aggregate sum to the date of the latter decree and giving interest on the second aggregate from the date of the last decree. *Tiernan v. Minghini*, 28 W. Va. 314.

VI. RATE.

See monographic note on Usury appended to *Coffman v. Miller*, 26 Gratt. 698.

547 *Alex. & Wash. R. R. Co. v. Chew and Wife & als.

March Term, 1876, Richmond.

Conveyances—Covenants—Construction.—By act of congress in 1808, the Washington & Alexandria

Turnpike Co. was incorporated to construct a turnpike road from Alexandria to Washington, to be not less than thirty, nor more than one hundred feet wide. In 1809 A conveyed to the company a strip of land one hundred feet wide and three-fourths of a mile long, for the purpose of the road. And the company covenanted with A and his heirs that said space of one hundred feet should be forever kept open and unobstructed as a public highway, and for no other purpose; and should the route of said turnpike road be thereafter altered, or should it cease to be a public highway, the said property should immediately revert to A, his heirs and assigns. The company made a graveled track twenty feet wide, in the centre of the strip, and on each side a summer road. By a statute of the state the company was authorized to sell any part of their work to the A. & W. R. R. Co., and the turnpike company conveyed to the railroad company the eastern half of their entire line; and a railroad track has been laid on the summer road occupying in all about eighteen feet on the east line, and leaving the graveled road and the western summer road unobstructed. This dealing with the road does not create a forfeiture under the deed of A, of the land conveyed by him, or any part of it.

This was an action of ejectment in the circuit court of the county of Alexandria, brought in November 1872 by Roger P. Chew and Louisa his wife, and others, heirs at law of Charles Alexander, Jr., deceased, against the Alexandria and Washington railroad company, to recover a strip of land fifty feet in width by about three quarters of a mile in length, being the half of a section of land one hundred feet in width, conveyed by the said Alexander for
548 the purposes *of a highway. The cause came on to be tried in November 1872, when the facts appeared to be as follows:

By an act of the congress of the United States of April 21, 1808 (2 Statutes at Large 485), a company was incorporated for opening a turnpike road between the town of Alexandria and the city of Washington, both then in the District of Columbia, to be called the Washington and Alexandria turnpike company the road to be not less than thirty feet and not more than one hundred feet in width.

The land for the road was to be acquired either by condemnation or purchase, as might be found necessary.

The company was duly organized, and the road built in conformity with the requirements of the charter.

A section of the road was built upon the hundred feet strip before mentioned, which had been conveyed to the company by Charles Alexander, Jr., by deed of July 4th, 1809.

By this deed the grantor conveyed the land to the turnpike company, "to have and to hold * * * to them, the said president and directors, and their successors in office, as a public highway forever. In consideration of which said cession, the said president and directors, for themselves and their successors in office, hereby promise and agree to and with the said Charles Alexan-

der, his heirs and assigns, that the said space of ground, one hundred feet wide, shall be forever kept open and unobstructed as a public highway, and for no other purpose whatsoever, without the consent of the said Alexander, his heirs and assigns, in writing first had and obtained; and
549 also, that should the route of *the said turnpike road be hereafter altered, or should it ever cease to be a public highway, the property shall thereupon immediately revert to the said Alexander, party to these presents, his heirs and assigns, in like manner as if this present indenture had never been made."

By an act of the general assembly of Virginia, of March 4, 1854, the turnpike company was authorized to sell any part of their work to the Alexandria and Washington railroad company; and on the 18th of April 1854 the turnpike company conveyed to the railroad company the eastern half of their entire road from Alexandria to Washington.

On the eastern half (fifty feet in width) thus acquired, the railroad company in 1855-'6 constructed and operated, and have ever since continued to operate, a railroad between the two cities.

The railroad track was of the usual width (eight feet), and was laid along the eastern side of the strip conveyed to the railroad company, at an average distance of ten feet from the east boundary of said strip, so that the track and the space to the east of it occupied together eighteen feet.

Before the railroad was built there was a gravelled way, about twenty feet in width, running through the middle of the hundred feet strip, and on either side was a summer road.

The railroad track occupied the summer road on the east side of the gravelled way, but did not at all infringe upon the latter, and, of course, did not infringe upon the summer road to the west of it.

The railroad track destroyed the east summer road for the purposes of travel in ordinary vehicles, leaving the gravelled way and the other summer road the same as before.

550 *When the evidence had been introduced, the plaintiff and defendant asked for the following instructions:

If the jury shall believe from the evidence, that the plaintiffs are the heirs at law of Charles Alexander, Jr.; that he was the owner of the premises, fifty feet, described in the declaration; that the said Charles Alexander, Jr., did, by the deed bearing date on the 4th day of July, 1809, grant unto the defendant, the Alexandria and Washington Turnpike Company, to wit: 100 feet of ground, to be used as a public highway or a turnpike, of which 100 feet, fifty feet, the premises described in the declaration, constitute part; that by the conditions of that grant, the said Alexandria and Washington Turnpike Company bound themselves to use the said 100 feet for a public highway or turnpike, and for no other purpose; and that the said Alexandria and Washington Turnpike Company

entered under that grant, and afterwards, to wit: by a deed bearing date on the 18th day of —, 1855, did grant unto the Alexandria and Washington Railroad company, the said fifty feet for another purpose, to wit: to be used for constructing a railway; and that the defendant did construct and are now using the said fifty feet as a railway, and that the said fifty feet, for all practical purposes, has ceased to be used as a turnpike or public highway, then the plaintiffs are entitled to recover in this action.

Which instructions the court granted as prayed. The defendants prayed the court to instruct the jury, that upon the facts proved as aforesaid, the jury must find for the defendants. Which instructions the court refused.

The defendants, by their counsel, excepted to the ruling of the court by which 551 the instructions prayed *by the plaintiffs were granted, and also to the ruling of the court refusing the instructions prayed by the defendants.

There was a verdict and judgment for the plaintiffs; and on the application of the railroad company a supersedeas was allowed by this court.

Beach, for the appellant.

W. Arthur Taylor and John S. Chapman, for the appellees.

Staples, J., delivered the opinion of the court.

The alleged right of recovery in this case is founded upon a provision in the deed from Charles Alexander to the Washington and Alexandria turnpike company. That provision is as follows: "In consideration of which cession, the said president and directors for themselves, and their successors in office, hereby promise and agree that the said space of ground, one hundred feet wide, shall be forever kept open and unobstructed as a public highway, and for no other purpose whatever without the consent of the said Alexander, his heirs and assigns, in writing first had and obtained; and also should the route of the said turnpike road be hereafter altered, or should it ever cease to be a public highway, the property shall thereupon immediately revert to the said Alexander, his heirs and assigns."

It is insisted that the deed executed by the turnpike company to the Alexandria and Washington railroad company was, ipso facto, a breach of this provision, creating a forfeiture of the estate.

552 *And secondly, if this be not so, the construction of the railroad track upon the turnpike certainly had that effect, because such appropriation and use are utterly inconsistent with the use of the soil for the purposes of a highway.

Before considering these propositions, it is well to bear in mind that if a forfeiture has taken place it occurred in the year 1856, at which time the railroad was constructed.

The company was permitted to locate and build its road, and to incur all the expense incident to an enterprise of that character, without objection from any one, so far as the record before us discloses; and now after the lapse of sixteen years the representatives of the original grantor for the first time assert the existence of the supposed forfeiture. If their claim is sustained, the effect will be to cut asunder the railroad track, and to vest in the plaintiffs not only the soil, but all the works of the company, to the extent of three-fourths of a mile. But this is not all. If there has been a forfeiture, it will operate to revert in the representatives of Charles Alexander the entire estate, being the one hundred feet conveyed to the turnpike company by the deed of 1809. It is very true that this suit extends only to the fifty feet conveyed to the railroad company; but if the heirs choose to assert title hereafter to the whole, there is strong ground to believe the claim would be successful, so that the part still used as a turnpike will be lost to the public.

A result which thus injuriously affects public and private interests to so great an extent ought not to be tolerated unless required by some imperative rule of law operating upon the contract of the parties. Clearly there is nothing in the terms of

Charles Alexander's deed, already 553 cited, forbidding or restraining *an alienation by the turnpike company, so long as the terms of the grant are substantially complied with. So long as the route conveyed is used for the purposes of a highway, it is a matter of no sort of consequence to the grantor or his representatives whether the turnpike company or its alienees hold the title.

The only question we have then to consider is, whether the construction of the railroad is such a diversion of the land conveyed to the turnpike company by Alexander as constitutes a forfeiture.

The learned counsel for the appellee, in a very elaborate note, takes the ground that a railway is so essentially and radically different from an ordinary turnpike, that the two cannot be used and operated on the same space of ground, one hundred feet wide, with any safety to travelers on the turnpike. All this may be true, and yet it does not follow that the construction of the railroad track upon the turnpike necessarily supersedes, or even interrupts, the latter as a highway. No question has been productive of more controversy than this. On the one hand, it is argued that the owner of the land is not divested of the fee by laying out the soil as a highway, and that the public only acquires thereby an easement; that the location of a railroad thereon is an increased burden upon the fee, and the appropriation of the surface, for the purposes of a railway, is inconsistent with the free and unrestricted user by the public of the soil as a highway, and for this increased burden upon the fee the owner is entitled to compensation.

On the other hand, it has been argued

that the construction of a railway along a highway, or upon the streets of a city or town, is simply a mode of accomplishing one of the objects of the original dedication,

that of creating a thoroughfare for the public, and *that the railway is but a species of improved highway, the two uses being substantially identical; and therefore the legislature may authorize (as in the case before us) the construction of a railway on a public highway, and the inconvenience thereby incurred by the citizen must be borne for the sake of the public good.

Controversies of this character must generally if not universally arise in those cases in which the owner has subjected the land to an easement, and the point of contention is as to his right to compensation for the increased burden upon the fee by reason of the construction of the railway.

Whether in the present case the owner has parted with the fee, and is therefore not entitled to compensation, is a question we are not called on to decide at this time; nor is it necessary to determine whether the turnpike company is liable in damages to an action of covenant for the failure to keep open and unobstructed as a highway the entire width of one hundred feet conveyed. The question we have to deal with is one of forfeiture exclusively. It may be that the operating the railroad subjects travelers on the turnpike to inconvenience, and even to danger; but the turnpike is none the less a highway by reason of the fact. It does not necessarily cease to be a highway because the track of the railroad may be laid upon a portion of the one hundred feet, to any greater or less degree than a street of a city ceases to be a street because of the location of the railroad thereon.

We must not lose sight of the fact, that we are considering, not a question of compensation for increased burdens and inconveniences, but of forfeiture for a breach of condition subsequent; always rigidly construed. The language of the deed is,

"should the route of the said turnpike road be hereafter altered, *or should it ever cease to be a public highway, the property shall thereupon immediately revert," &c. Now it is apparent from the facts certified, that the turnpike is still used as a highway. It has never ceased to be such. The graveled way is untouched, and so is one of the summer roads. It is true that the track of the railroad, eight feet in width, is laid upon the other summer road. But there is no obligation on the company to keep up two summer roads or even a summer road. The charter only prescribes that the width of the road shall not be less than thirty nor more than one hundred feet. If there are obstructions or irregularities upon other portions of the one hundred feet, making the passage of carriages sometimes difficult, they proceed from the carelessness and inattention of the turnpike company, or those having charge of its road. The remedy for such evils is in the courts by indictment, information or other proper

proceeding. The only portion of the land actually occupied by the railroad is the bed or track eight feet wide. If it appeared that this strip cannot be used as a highway, it is manifest there is still abundant space for all the purposes of the travelling public; more than has ever been or ever will be required. If the people who use the route are subjected to some inconvenience by reason of the passage of the trains, they are in no worse condition than the inhabitants of many towns and cities and counties. Outside of the limits of the three-fourths of a mile conveyed by Alexander, all along the route between Washington city and Alexandria, travellers upon the turnpike are more or less exposed to the same inconveniences and perils.

When the grantor seeks to destroy an estate which he himself has created, it must plainly appear that the act is within the very terms of the condition and *breach. It is not sufficient to show mischiefs and even losses which might have been provided against had they been foreseen. The fact that they were not and could not have been anticipated, may be a sufficient reason for the failure to provide a remedy; but they cannot justify the courts in so enlarging the operation of the covenant as to make them a ground of forfeiture.

The learned counsel for the appellee relies much upon that provision of the deed, which declares "that the said space of ground, one hundred feet wide, shall be forever kept open and unobstructed as a highway;" and he insists that the parties meant thereby "that a turnpike road one hundred feet wide should be made, kept open and unobstructed in its entire width for all time, and that if any portion of the space should be obstructed and cease to be used as a turnpike road, the whole should revert to the grantor or his heirs. According to this construction, a road one hundred feet wide was necessary to be made, kept open and clear of all obstructions for all time, whether required or not by the public wants and necessities; and that too notwithstanding the charter left it optionary with the company to determine the width of its road, so that it was not less than thirty nor more than one hundred feet. If this be the correct view, a forfeiture occurred long before the construction of the railroad, because it is, I think, very manifest that the actual width of the road was never at any time as great as one hundred feet. Under this construction, a failure to grade and use as a road a narrow strip of ten feet would result in the forfeiture of the whole, even though the remaining ninety feet was used as a highway, and was more than sufficient for all the demands of the public. It is impossible to believe that such was the

intention *of the parties. If the provision admits of no other interpretation than an agreement to construct a turnpike of the width of one hundred feet, and so maintain it forever, although wholly unnecessary, it will be construed as a cov-

enant, the breach of which is compensated in damages and not by a forfeiture of the entire estate. This construction saves the rights of the public, and is more consistent with the real intention of the parties. They did not mean that the entire width of a hundred feet, every parcel of it, should be graded and constructed as a road and so maintained forever, whether required or not by the necessities of trade and travel. All they designed was, that the land should not be diverted to any mere private or individual ends, but that it should be held for the purposes of a public highway, and used as the public necessities might require. Any failure of proper repair, any mere obstructions upon the road tending to the inconvenience of the public, might constitute a breach of covenant sounding in damages; but nothing short of a discontinuance of the route as a highway constitutes a ground of forfeiture.

This view is in entire harmony with all the principles of law in regard to forfeitures. The rule laid down in the cases, and sustained by all the authorities is, that conditions subsequent are strictly construed, because they tend to destroy estates, and a rigorous exaction of them is a species of *summum jus*, and in many cases hardly reconcilable with conscience. In *McKelvey v. Seymour*, 5 Dutcher R. 321, a well considered case, the supreme court of New Jersey decided that "where land is conveyed to be used for a certain purpose, with a clause of forfeiture if it cease to be used for the object specified, it is no ground of forfeiture if the land is used for
558 other purposes, provided *it is also used for the purpose for which it was conveyed."

In *Jackson v. Silvernail*, 15 John. R. 278, a lessee for lives covenanted not to sell, or assign, or dispose of his estate in the premises without permission. He nevertheless executed a deed demising part of the premises for twenty years. The supreme court of New York held this did not constitute a forfeiture. Platt, J. said, "the plaintiff's claim is *stricti juris*; and to entitle him to recover on the ground of forfeiture, he must bring his case within the penalty, on the most literal and rigid interpretation of the covenant; that a lease of part of the land for a term of years was not a sale or assignment of the estate in the premises." And yet it is easy to see that such an alienation of part was, as to such part, a violation of the whole spirit of the contract, and the intention of the parties. See also *Hunt v. Beeson*, 18 Ind. R. 380; *Emerson v. Simpson*, 4 New Hamp. R. 475; *Bolling v. Mayor &c. of Petersburg*, 8 Leigh, 224. I refer particularly to the case of *Emerson v. Simpson*, where a number of cases are cited by the learned judge, in confirmation of the doctrine that the object of the courts is so to construe the covenant as to prevent, if possible, a forfeiture; and therefore the extent and meaning of conditions defeating estates are considered as questions *strictissimi juris*.

In the case in hand the same rule of construction very justly applies. The result attains the ends of justice, and I think is conformable to the real intention of the parties. Upon the facts as stated in the record, the court ought to have given the instruction asked for by the defendant, and not that asked by the plaintiff.

559 *The judgment was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the circuit court ought not to have given the instruction asked for by the plaintiffs; but instead thereof, ought to have instructed the jury as prayed for by the defendants. Wherefore, for the errors aforesaid, it is considered by the court here, that the said judgment be reversed and annulled, the verdict set aside, and a new trial awarded; and that the defendants in error pay to the plaintiffs in error their costs by them expended in the prosecution of their writ of error and supersedeas here.

And it is further considered, that the case be remanded to the circuit court for a new trial therein to be had in conformity with the views herein expressed.

Judgment reversed.

560 *Jones & Wife v. Hughes & als.

March Term, 1876, Richmond.

I. *Dower in Executory Devises*.—H by his will gave certain lands, which he describes, to his sons J and D; and, by another clause, he says if his son J should die without issue, he gives certain part of the land given to him to D; and if both of his sons should die without issue, then all of the aforesaid lands should go to his daughters, naming them. J died without children, and the lands went into the possession of D; and D afterwards died without children, leaving a widow, to whom by his will he left all his estate, and appointed her his executrix. He owned, however, only personal estate. More than a year after D's will was admitted to probate, his widow filed her bill against the executory devisees of H, to recover dower in the lands which had come to D under the will. **Held:**

1. *Same*.—The widow of D is entitled to dower in the said lands.
2. *Same*.—The act, Code of 1873, ch. 106, § 4, does not apply to the case, and her right to dower is not barred.

**Dower in Executory Devises*.—In *Nickell v. Tomlinson*, 27 W. Va. 706, the court said: "The overwhelming weight of authority both in England and in this country is in favor of the doctrine, that the widow has a right to dower, when the husband's fee simple estate is determined by an executory devise over upon his dying without issue." For this proposition the court cited, among others, the following cases: *Taliaferro v. Burwell*, 4 Call 821; *Jones v. Hughes*, 27 Gratt. 560; *Medley v. Medley*, 27 Gratt. 568.

The principal case is cited but distinguished in *Corr v. Porter*, 33 Gratt. 285. And in *Tomlinson v. Nickell*, 24 W. Va. 160, there is a strong *dictum* to the same effect as the above proposition, where the principal case is again cited. See further, 2 Min. Inst. (4th Ed.) 156.

This was a suit in equity in the circuit court of Mecklenburg county, brought in November 1871, by Ann Eliza Hughes, widow of John D. Hughes, deceased, against Thomas L. Jones and Martha E., his wife, and others, devisees of Crawford Hughes, deceased, to recover her dower in certain land devised by the said Crawford Hughes to his son John D. Hughes. The case is as follows:

Crawford Hughes died in 1843, leaving a will, by which he gave his whole estate, except some small legacies, to his wife for her life. By the 5th clause of his will he says: I bequeath, after the death of my wife, my lands to be divided between 561 my sons James *C. Hughes and John D. Hughes as follows:—and he then sets out the part which each is to have.

The sixth clause of his will is as follows: It is my will and desire, that should either or both of my sons, James C. Hughes and John D. Hughes, die without issue, then the aforesaid land should be disposed of as follows: In case that James C. Hughes should die, I wish John D. Hughes to have all the tract on which I live; and the tract I purchased of Dr. Francis R. Gregory to be sold, and the proceeds to be equally divided between my daughters Ann F. Simmons, Martha E. Hughes, Susan J. Hughes, and Louisa M. Hughes; and should both of my sons die without issue, then all the aforesaid lands to go to my daughters and their children.

James C. Hughes survived his father for some years, and died without children; and John D. Hughes was put into possession of all the land on which the testator lived. He lived until 1870, when he died, leaving a widow, the plaintiff, but without children; and leaving a will by which he gave to his widow his whole estate, real and personal, and made her executrix of his will. This will was admitted to probate on the 19th of September 1870, and Mrs. Hughes qualified as executrix. His whole estate, however, was not more than fifteen hundred or two thousand dollars, and consisted of personality.

After the death of John D. Hughes the daughters of Crawford Hughes, one of whom had married Thomas L. Jones, took possession of the land; and in November 1871, more than a year after the will of John D. Hughes had been admitted to probate, Mrs. Hughes brought this suit.

The defendants in their answer, insisted first that John D. Hughes was not 562 seized of such an estate in *the land as would entitle his widow to dower therein; and second, that she had not renounced the provision made for her in the will of her husband, and as a year had passed after the admission of his will to probate, before her suit was brought, she was under the statute precluded from her claim of dower in his estate.

The cause came on to be heard on the 26th of October 1872, when the court held that John D. Hughes, under the fifth and sixth clauses of the will of Crawford Hughes,

took an estate of inheritance in the lands mentioned therein, and that the executory devise which determined his estate by its regular and natural limitations, without disturbing his prior seizure, did not deprive his widow of dower therein; and that she under the laws of Virginia was entitled to dower in said lands. And commissioners were appointed to allot to her her dower; and an account of profits was directed to be taken. Jones and wife thereupon applied to this court for an appeal; which was allowed.

Neeson and Atkins, for the appellant.

Goode, Page & Maury, for the appellees.

Anderson, J., delivered the opinion of the court:

Two questions are raised upon the record of this cause. The first is, does the determination of an estate by the operation of an executory devise defeat the right of the widow to dower?

The leading English case on this subject is *Buckworth v. Thirkell*, 3 Bos. & Pul. 652 note, decided in 1785. In that case, Lord Mansfield held that it would not defeat the right of the husband to curtesy. And the same was held by this court a few 563 years after in *Taliaferro v. Burwell*.

4 Call 321. No reference is made by the court in its decision, or by the counsel in argument, to the above decision of Lord Mansfield, which was probably not then known here. The principle involved in the right to dower and curtesy is the same. If the determination of the estate by an executory devise will not defeat the husband's right to curtesy, it cannot defeat the wife's right to dower; which seems to be conceded on all sides.

With regard to this question, eminent jurists and able conveyances, both in England and the United States, have entertained conflicting opinions; and *Buckworth v. Thirkell* has been the subject of much discussion, of disapproval by some eminent jurists and text-writers, and of approval by others, equally eminent; among the former may be named Jacob and Kent. Some of the leading English text-writers have forbore to express an opinion on the question, among whom may be mentioned Barton and Preston. Atkinson says, when the husband's estate is defeated by executory devise, it has been settled (but it has been thought rather anomalously) that the widow shall nevertheless be entitled to dower. Other distinguished writers support *Buckworth v. Thirkell*; among whom I will name Jarman, Roper and Bissett. Mr. Jarman states the law thus: that an immediate estate in fee, defeasible on the taking effect of an executory limitation, has all the incidents of an actual estate in fee simple in possession, such as curtesy, dower, &c.; the devisee having the inheritance in fee, subject only to a possibility. 1 Jarman on Wills 792; 1 Roper, Husb. & Wife 38-41, 377, Bissett's Est. for Life, 82-87. See also 2 Crabb Real Prop. 167.

The case of *Goodenough v. Goodenough* is referred to by Mr. Preston, as sup-

564 porting the claim of dower in *estates determined by conditional limitation or executory devise, 3 Prest. Abstr. 372. The case of *Moody & wife v. King*, 2 Bing. R. 447, 9 Eng. C. L. 475, decided in 1825, since *Buckworth v. Thirkell* had been reviewed and discussed by eminent writers, supports the judgment of Lord Mansfield. And, in a recent case, the vice chancellor applied the doctrine of *Moody v. King* to an equitable determinable estate, and held that the widow of the tenant in fee simple in that case was entitled to dower as against the executory devisee. Upon appeal to the lord chancellor the decree was affirmed. *Smith v. Spencer*, 6 De Gex, McNa. & Gord. 631. The current of American decisions seems to be in the same direction. In *Evans v. Evans*, a testator had devised lands to two sons, G. and O., their heirs and assigns; but if either should die without having lawful issue living at his death, his estate was to vest in his surviving brothers and sisters—a case very analogous to ours. One of these sons died without issue, outliving the other son, and the question was made, whether his widow was entitled to dower. Chief Justice Gibson discussed the subject at length, and it was held that the widow was entitled to dower. The same doctrine has been held in Kentucky and South Carolina, and in the early decision in Virginia, supra; and no American case, contra, has fallen under our notice, except the case of *Weller v. Weller*, 28 Barb. R. 588, which was not a decision of a court of the last resort.

Mr. Scribner, from whose valuable treatise on dower, cited by appellee's counsel, I have derived much assistance in this investigation, takes an important distinction. He says "there seems to be a marked distinction between a case where, by the terms of the limitation, the husband takes a fee simple estate, which, if he have issue living at his death, will descend to such
565 *issue, and which is limited over only in the event of his death without issue; and other cases of conditional limitation. Such a case is closely assimilated in principle, to the natural determination of the estate for want of heirs generally; and there would seem to be no good reason why the husband's estate should not be prolonged, so as to give the right of dower in the one case as well as in the other, particularly as it is allowed to estates tail under similar circumstances; and also to conditional fees at common law." It is not necessary that the estate of which the husband died seized shall be transmissible to his heir, in order to entitle the widow to dower. It is only necessary that if she has issue by him, according to Littleton (who is high authority upon such questions), that such issue may possibly inherit the estate of which he died seized. (Littleton, § 53.)

"In all the reported cases in which dower or curtesy has been allowed upon estates of this character (it is remarked by Mr. Scribner), the estate was such, that the issue of the wife, had there been any, would have

been entitled to take by descent. In the cases in which it was denied, the issue could not have taken by descent." Upon the whole, the court is of opinion that John D. Hughes, the husband, having died seized of an estate in fee, determinable by an executory devise over upon his dying without issue, his widow was entitled to dower in said estate.

The second and only remaining question raised by the record we will now consider: "Is the failure of the widow to renounce the will of her husband a bar to her claim of dower, she being a devisee under the will?" This is claimed under the following clause of chapter 106, § 4, of Code of 1873: "If any estate, real or personal, intended to be in lieu of dower, shall be con-
566 veyed *or devised for the jointure of the wife, such conveyance shall bar her dower of the real estate, or the residue thereof; and every such provision, by deed or will, shall be taken to be intended in lieu of dower, unless the contrary intention plainly appear in such deed or will."

The will of John D. Hughes contains the following clause: "Article 1st. I give and bequeath to my beloved wife my whole estate, both real and personal, for her especial use and behoof." And he appoints her his executrix, without security.

Bequeathing his whole estate to her, real and personal, if he had any real estate which could pass by the devise, her dower right would be merged in the fee. But if she chose only to claim her dower, that is a life estate in the one-third thereof, and disclaim the remainder, which she would have unquestionably a right to do, it would be an absurdity to hold that the heir could plead in bar of her recovery the devise to her of the whole real estate in fee. But if the real estate, in which, as we hold, she is entitled to dower, did not pass to her by the devise, it is because it was not devisable by the husband, and if so, not descendible from him, and his heir has no interest in it, and cannot defeat her recovery by pleading in bar the devise made to her by the will. The appellants must claim it either as heirs of the testator, John D. Hughes, or as the executory devisees. But we have seen that, as executory devisees, they are not entitled to hold it against the widow's right of dower. Having no right to it as executory devisees, they cannot claim it in that right under the foregoing clause of the statute. If the devise to the widow would be a bar to her recovery, her inability to recover, by reason of having received other

property in lieu of it from her husband, would not vest *the dower estate
567 in the executory devisee. It would be virtually a purchase of the dower by the husband, and would be an accession to his estate, and could not go to the executory devisee, but would be descendible to his heir. And for the same reason the section of the statute under consideration could only enure to the benefit of the heir or distributee, or personal representative of the testator. If the wife's dower is barred

under this section, what she loses her husband's estate gains. If she is defeated in the recovery of her dower, it is because she has received from her husband's estate other property in lieu of it, and thus her husband's estate acquires her dower. It becomes a part of his estate, in consideration of the jointure which he has devised to her in lieu of dower.

In this view of the subject, which we think is just, it is manifest that the section of the statute under consideration has no application to this case. If the wife had received the devise in lieu of dower, her husband's estate would be virtually the purchaser of her dower. The appellants, as the executory devisees, would not be entitled to it, and her husband's heirs or distributees would not be entitled to it as a part of his estate, because, by his will, he gave the whole of his estate, real and personal, to his wife; and she would be entitled to it.

The court is therefore of opinion that there is no error in the decree of the circuit court, and that the same be affirmed with costs.

Decree affirmed.

568 *Medley & als. v. Medley.

March Term, 1876, Richmond.

Dower in Executory Devises.—M devised his lands to his son G; and if G should die without having had lawful issue of his body, the said lands were to be divided among testator's four daughters. G died, leaving a widow; but without having had lawful issue of his body. G's widow is entitled to dower in the lands so devised to him.

This is a suit in equity in the circuit court of Halifax county, brought in March 1872, by Lucy V. Medley, the widow of Granville C. Medley, deceased, against the executor and devisees of Isaac Medley, to recover her dower in a tract of land devised by said Isaac Medley to his son Granville C. Medley. The only question in the cause arises upon the construction of the said devise, which is set out in the opinion of Judge Christian.

The circuit court decreed in favor of the plaintiff; and the defendants applied to this court for an appeal; which was allowed.

Jones & Bouldin, for the appellants.

Riley, Ould & Carrington, for the appellee.

Christian, J., delivered the opinion of the court.

The only question we have to determine is, whether Lucy V. Medley, the widow of Granville Medley, was *entitled to dower in the estate of her husband, which he took under the will of his father, Isaac Medley.

***Dower in Executory Devises.**—See note to Jones v. Hughes, ante, 560; also citation of the principal case in Medley v. Medley, 81 Va. 287.

The provision of the will under which the question arises is as follows:

"I devise to my son, Granville C. Medley, my lands lying between Miry creek, Hewey creek and the road leading from the Union meeting house to my mill, bounded as follows," &c., &c. "I also give to my son, Granville, all the lands that I have devised to my wife during her life or widowhood, the possession whereof the said Granville is to be entitled to at the determination of the estate so devised to my wife by her death or marriage, whichever shall first happen." "If my son, Granville, shall die without having had lawful issue of his body, the lands so devised to him are to be divided among those as hereinafter provided." And in the eleventh clause of his will, the said Isaac Medley devised as follows:

"All other lands belonging to me, not mentioned in this will, together with all my estate of every kind not otherwise disposed of, I direct to be sold, the proceeds of said sale and whatever may be due me, I appropriate to the payment of my debts; and whatever surplus may remain, I give, to be equally divided among my four daughters above named. The Roanoke stock, above named, at the death of my wife, is to be considered as embraced in this clause, likewise the lands devised to my son, Granville, should he die without having had issue as aforesaid."

Granville C. Medley died "without having had lawful issue of his body," and his widow, Lucy V. Medley, filed her bill in the circuit court of Halifax, praying that the will of Isaac Medley be construed by *the court, and that she be endowed of all the real estate taken by the said Granville C. Medley, under the will of his father, the said Isaac Medley, deceased.

On the trial of this suit, the learned judge of the circuit court of Halifax was of opinion that the said Lucy V. Medley was entitled to dower in the real estate aforesaid, and accordingly so decreed on the 9th day of September, 1872.

Was Mrs. Lucy V. Medley entitled to dower in the real estate so devised, is the only question we have to determine.

The court is of opinion, that according to the principles settled in the case of Jones & wife v. Hughes, decided at this term, and upon authority of the cases there cited, Mrs. Medley was entitled to dower in the estate of her husband, Granville Medley, devised to him by his father under the provisions of the will above referred to.

The court is therefore of opinion, that there is no error in the decree of the circuit court of Halifax, and that the same must be affirmed.

Decree affirmed.

571 *Tate v. Vance.*

June Term, 1876, Wytheville.

Injunctions—Awards by Arbitrator—Hearing and Deciding in the Absence of One Party.—T files a bill to

*For monographic note on Answers, see end of case.

enjoin V from cutting the timber on a piece of land which T claims to be his, and of which he claims to be in possession, and which was adjudged to be his by the award of an arbitrator, to whom the question of title was submitted by T and V. V answers, denying T's title or possession, and insisting the award was invalid, because the arbitrator was induced by T to receive evidence and decide the case in V's absence; and this is sustained by the arbitrator. **HOLD:**

1. **Same—Same—Same—Invalidity—Injunction Dissolved.**—The award is invalid; and T showing no other evidence of title, the injunction must be dissolved.

2. **Same—Same—Same—Same—Same—Answer in Lieu of Cross-Bill.***—V, not claiming any relief in the case, but a dissolution of the injunction and dismissal of the bill, may rely upon the invalidity of the award by his answer; and it is unnecessary to file a cross-bill for the purpose of avoiding it.

This was a bill in equity, filed by M. B. Tate in the circuit court of Smyth county, to enjoin and restrain Samuel Vance from cutting the timber on land which he claimed belonged to him. Plaintiff alleged that he purchased the land in 1872 from the McCreadys, who had been in peaceable possession of it for fifty years, and they sold to him, and put him in possession; and that he still holds possession. That, soon after his purchase, Samuel Vance claimed title to a part of this land, consisting of some eight or ten acres. Though plaintiff believed he had a good title to the land, and was in possession of it, yet not desiring litigation, he and the said Vance 572 agreed to submit the *matter in dispute between them to the award of one Samuel Cole, and bound themselves to abide by his award. That under this submission the said Cole heard all the evidence submitted by them both, made a survey of their several lands, and after full hearing, decided that plaintiff was possessed of and had good title to the land in controversy: And he filed a copy of the award. He says the entire value almost of the lands consists of the timber standing upon it. That, since the making of said award, Vance had unlawfully entered upon the said land, and is engaged in cutting and destroying the timber standing upon it. That, unless restrained, said Vance will inflict irreparable

***Answer in Lieu of Cross-Bill.**—In Virginia, "though according to the strict rules of pleading, affirmative relief cannot be granted except upon a bill or cross-bill filed for that purpose, yet, where the answer contains the proper averments, the rule will be relaxed when necessary to effect prompt and complete justice between the parties to the suit." This is an extract from the opinion of the court in *Scott v. Rowland*, 82 Va. 497, as sustaining which both the principal case and *Mettert v. Hagan*, 18 Gratt. 234, were cited. See further, *Cralle v. Cralle*, 79 Va. 182; *Adkins v. Edwards*, 83 Va. 300, 2 S. E. Rep. 435; *Sayers v. Wall*, 26 Gratt. 354; *Taylor v. Beale*, 4 Gratt. 93. In *Barton's Ch. Pr.* (2d Ed.) p. 822, and notes 1 and 2, other Virginia cases are cited and the rule in West Virginia is discussed and authorities on the same collected.

injury upon the plaintiff, as he will destroy the entire value of his estate in the said land; and that he is insolvent. He therefore prays for an injunction to restrain Vance, his servants and employees, from cutting any more timber from the land, and from removing any that he had cut; from any interference with the possession of the plaintiff; and for general relief. The injunction was granted.

Vance answered the bill. He claimed that a tract of land which had been conveyed to his wife by her father, included this land, and was held under an older title than that under which the plaintiff claimed. That there being a conflict of boundary between the two tracts, he and Joseph McCready, in 1857, agreed upon a dividing line; and respondent had moved his fence on this line, and he had ever since been in possession of all the land on his side of this line, including the land in controversy. He denies that the plaintiff, and those under whom he claims, had title to or possession of the land. He says that soon after plaintiff purchased from the McCreadys, he set up a title to this land; and for the sake

573 of peace, respondent agreed to *submit the matter to the award of Samuel Cole. No day was fixed for said Cole to hear the parties; but plaintiff, in the absence of respondent, went to said Cole, and, by misrepresenting the facts of the case, prevailed on him to render an award in the case. He denies that the award is valid, because it was procured upon ex parte statements, and was made and delivered in the absence of the respondent.

The only witness examined was the arbitrator Cole. His testimony showed that evidence of the plaintiff was received, and the award made in the absence of the defendant.

The cause came on to be heard on the 21st of December 1874, when the court dissolved the injunction, and dismissed the bill with costs. And thereupon, Tate applied to a judge of this court for an appeal; which was allowed.

Gilmore, for the appellant.

J. A. Campbell, for the appellee.

Staples, J., delivered the opinion of the court:

The court is of opinion, that the award upon which complainant relied in the court below, being founded upon evidence received by the arbitrator in the absence and without the knowledge or consent of the defendant, is invalid, and furnishes no just claim to relief in a court of equity.

The court is further of opinion, that a cross-bill is not necessary to impeach said award; but the same may be done by answer. The right to an injunction is not ex debito justitiæ; but the application is addressed to the sound discretion of the 574 chancellor, upon all the *circumstances of each particular case. A party seeking the exercise of this prohibitory

power must come with clean hands and with a case sanctioned by the clearest principles of justice. The only foundation for the complainants claim to the interposition of the court is the award. If that be invalid by reason of the misconduct of the arbitrator, or the complainant, a court of equity will not interfere, but leave the party to such remedies as he has, if any, in a court of law. In such case it does not matter whether the objections to the award appear on the face of the bill, or by the answer, or by the evidence. In either case the result is a dismissal of the bill. If the defendant asks nothing beyond such dismissal, there is no good reason why he may not in his answer rely upon any matters which make it inequitable to grant the prayer of the bill. It is only when the defendant goes beyond this, and asks affirmative relief at the hands of the court, that a cross-bill is indispensable. The case of *German v. Mastrin*, 2 Paige R. 288, affords an illustration of this principle. It was there held, that the defendant might in his answer, set up an equitable title in himself against the demand of the plaintiff for partition; but if he desires affirmative relief by a decree for a conveyance of the legal title, then vested in the plaintiff, he must file a cross-bill.

In this state, the courts have, in a number of cases, given to the answer all the effects of a cross-bill; and the same course has been occasionally followed by the English courts. And according to the settled practice, a cross-bill is now dispensed with in cases where it was once uniformly required. The court will sometimes of its motion direct a cross-bill to be filed when it is of opinion it is demanded by the purposes of justice. There is no inflexible rule 575 on the subject. If the court is satisfied that the whole merits of the case have been fully developed on bill and answer, no good can be effected by a cross-bill. And there can be no valid reason for putting the parties to the expense and delay of such a proceeding. And this is precisely the aspect of the case before us. The decision turns upon the testimony of the arbitrator. There is no controversy as to the facts stated by him. Neither party can therefore possibly be prejudiced by the failure to file a cross bill, nor can either derive the slightest advantage from having it in the cause.

The award being out of the case, and all the allegations of the bill in regard to the plaintiff's title being denied by the answer and unsustained by proofs, there was no cause for the interference of a court of equity. The court is therefore of opinion, that the circuit court did not err in dismissing the plaintiff's bill.

Decree affirmed.

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I. DEFINITION.

In equity, pleading an answer is "a defense in writing, made by a defendant to the charges contained in a bill or information filed by the plaintiff, against him in a court of equity." Bouvier's Law Dict. 145. This is the definition generally accepted by the modern courts and text writers. See 1 Enc. Pl. & Pr. 865.

II. GENERAL NATURE AND OFFICE.

The general nature and office of an answer is nowhere better discussed than by Prof. Minor, in 4 Min. Inst. (3d Ed.) 1422 *et seq.*, to which reference is now made without any attempt to expatiate.

III. FRAME.

A. Composite Parts.—An answer in chancery practice consists of the following composite elements: (1) The caption; (2) The reservation of exceptions to the bill; (3) A distinct and categorical answer to

the bill; (4) A general traverse or denial of the averments of the bill; and (5) The conclusion. See Sand's Suit in Eq. 389; 4 Min. Inst. (3d Ed.) 1430; Barton's Ch. Pr. (2d Ed.) 403. For a discussion of these several divisions of an answer, see 4 Min. Inst. (3d Ed.) 1430, 1431.

B. Caption.

1. Dual Character of Respondent.—A defendant in equity is charged as *executrix* and as *devisee* of a decedent; in the caption of her answer, she professes to answer only as *executrix*; but in the body of her answer, she in fact answers as *devisee*. Held, such answer places her before the court in her character as *devisee*. Kinney v. Harvey, 2 Leigh 70.

2. Co-Executors.—An answer filed by one executor is not to be taken as that of his co-executors, although the record states that "they appeared by counsel and filed their answer," and no further steps were taken to compel a further answer from them. Chinn v. Heale, 1 Munf. 63.

3. Partners.—Where, however, the answer of one partner in the name of both is replied to generally, and no steps are taken to compel an answer from the other partner, it is deemed a sufficient answer of both. Freeland v. Royall, 2 H. & M. 575.

This case is not overruled by the above case of Chinn v. Heale, 1 Munf. 63, but they are distinguished, in that the answer in Freeland v. Royall, 2 H. & M. 575, on its very face, expressly stipulates to be the answer of both, and is acquiesced in by the plaintiff in his general replication, whereas, in Chinn v. Heale, 1 Munf. 63, the answer of the other executors was only an adoption of the answer of the real respondent.

4. By Guardian Ad Litem.—Though an answer filed by the guardian *ad litem* purports to be the answer of the infant, by his guardian *ad litem*, yet where it is signed by the latter, and the opinions, responses, and statements are those of the latter, it has the same effect as if it had been designated and filed as the answer of the guardian in his proper person. Durrett v. Davis, 24 Gratt. 302.

C. Demurrer and Reservation of Exceptions to Bill.

1. Demurrer and Answer.—The Virginia statute, Va. Code, § 3264, allowing a defendant to "plead as many several matters, whether of law or fact, as he shall think necessary," was held in Bassett v. Cunningham, 7 Leigh 407, to apply, by analogy, to proceedings in equity as well as in law, and accordingly an answer and a demurrer were allowed to be put in at the same time. See also, Jones v. Clark, 25 Gratt. 575; Dunn v. Dunn, 26 Gratt. 291; Matthews v. Jenkins, 80 Va. 463; Cook v. Dorsey, 38 W. Va. 196, 13 S. E. Rep. 468.

It is settled in this state that a demurrer in the form prescribed by statute, and alleging no grounds, inserted in the answer is sufficient. Dunn v. Dunn, 26 Gratt. 291; Matthews v. Jenkins, 80 Va. 463.

2. Reservations of Exceptions.—Though the reservation of exceptions is usually inserted in the answer, it is really superfluous in Virginia because of the rule that allegations in a bill which are not noticed are not thereby admitted. See *infra*, "Admissions—General Rule."

In West Virginia, however, this subject is regulated by statute. See *infra*, "As Evidence—Responsiveness."

D. Distinct and Categorical Answer to Bill.

1. General Rule.—"To a bill of discovery the plaintiff is entitled to a full answer to all the charges of the bill which are not covered by a demurrer, plea, or disclaimer; or unless by answer the defendant

shows that he is not bound to make the disclosures called for by the bill." Barton's Ch. Pr. (2d Ed.) 408.

a. **Exceptions.**—An answer which would result in the breach of professional confidence, cannot be compelled; the client, however, may waive the privilege since it only exists for his benefit. See *Chahoon v. Com.*, 21 Gratt. 822; *State v. Douglass*, 20 W. Va. 770; *Tate v. Tate*, 75 Va. 522.

By the well established rule of equity, a defendant is not bound to disclose or answer matters which will expose him to pains, penalties or punishment, or to a criminal prosecution; and it is not necessary it should be made to appear that the defendant will be certainly exposed to peril by making the discovery sought; but it is enough if it appear that by answering the interrogatories of the bill he will thereby be probably subjected to danger. If the objection appears upon the face of the bill, the defendant may demur. If it does not thus appear, he must claim his protection by plea or answer, the averments of which, if traversed by replication, must be proved. *Bank v. Nelson*, 1 Gratt. 106; *Polindexter v. Davis*, 6 Gratt. 481; *Dulany v. Smith*, 97 Va. 130.

A foreign corporation, being without the jurisdiction of the court, cannot be compelled to answer; however, absence of such answer is not ground for refusing to dissolve an injunction. *B. & O. R. Co. v. City of Wheeling*, 13 Gratt. 62.

Where upon the face of the bill the whole facts of the case appear from the records of other causes which have been ended, a demurrer to the bill may be passed upon without requiring the defendant to answer. *Young v. McClung*, 9 Gratt. 396.

2. **Consistent Defenses.**—An answer may set up any number of defenses which are consistent with each other, but it cannot insist upon inconsistent defenses. *Bank v. Parsons*, 42 W. Va. 139, 24 S. E. Rep. 557; *Barton's Ch. Pr.* (2d Ed.) 414.

3. **To Bills of Discovery.**—The case of *Baker v. Morris*, 10 Leigh 284, was a suit in equity, there being no remedy at law under the circumstances, to enforce payment of a bond debt twenty-eight years after the right to demand it accrued. To rebut the presumption of payment, the bill called upon the defendant to answer whether the debt had been paid or not. Held, the defendant must answer the interrogatory. See also, *Kyle v. Kyle*, 1 Gratt. 532. See *infra*, "As Evidence—In Special Instances."

4. **Impertinent Matter.**—"If an answer contain impertinent or scandalous matter, it will be referred to a commissioner to expunge such matter, at the costs of the party filing the answer." *Mason v. Mason*, 4 H. & M. 414.

5. **Reference to Extrinsic Papers.**—Where an answer contains certain averments "as would appear by the accounts and receipts annexed to the answer" such accounts and receipts should be produced, or interrogatories as to them should be awarded if required. *Clay v. Williams*, 2 Munf. 105.

E. **General Traverse or Denial of Averments in Bill.**—Though not an essential element in the frame of an answer, it is always advisable to put in a general traverse, in order to cover the possibility of failure to deny distinctly each separate charge in the bill; for the effect of such denial is to throw upon the plaintiff the burden of proving his allegations. *Bronson v. Vaughan*, 44 W. Va. 406, 29 S. E. Rep. 1022; *Barton's Ch. Pr.* (2d Ed.) 410. See especially, *infra*, "Evidence—Conclusiveness."

Where the answer denies generally all knowledge concerning facts alleged in the bill it suffices to put

those facts in issue. *Ronald v. Bank*, 90 Va. 815, 35 S. E. Rep. 780; *Randolph v. Randolph*, 6 Rand. 158.

F. Conclusion.

1. Affidavit.

a. **General Rule and Qualifications.**—As a general rule the answer must be sworn to. *Barton's Ch. Pr.* (2d Ed.) 411. The plaintiff, however, may dispense with the oath by express waiver in his bill. Va. Code, § 3281. See *infra*, "As Evidence—Waiver of Oath."

b. **Of One of Several Defendants.**—It was held in *Arnold v. Slaughter*, 36 W. Va. 569, 15 S. E. Rep. 32, that the affidavit of only one of several defendants was sufficient.

The court in the same case, quoting from the decision in *Burlew v. Quarrier*, 16 W. Va. 109, said: "When no exception or objection was taken in the court below, so far as the record shows, to an answer in chancery or to the filing thereof, became not verified by affidavit, it is too late to make the objection in the appellate court."

c. **Of Guardian Ad Litem.**—In both Virginia and West Virginia, the answer to a bill for the sale of infants' lands must be sworn to by the infant (if over 14 years of age), and also by his guardian ad litem in proper person. Va. Code, § 2618; W. Va. Code, ch. 83, § 8; *Durrett v. Davis*, 24 Gratt. 302; *Ewing v. Ferguson*, 33 Gratt. 548; *Hull v. Hull*, 26 W. Va. 1; *Hart v. Hart*, 31 W. Va. 688, 8 S. E. Rep. 582; *Hays v. Camden*, 38 W. Va. 109, 18 S. E. Rep. 461; *Lancaster v. Barton*, 92 Va. 615, 24 S. E. Rep. 251.

d. **Answer of Corporations.**—Contrary to the general rule the answer of a corporation is not required to be sworn to. The rationale of this is obvious: for since "a corporation has no soul," it is morally impossible for it to swear. It follows, therefore, that such an answer is not evidence for the defendant though it be responsive to the bill; but it puts in issue the allegations of the bill to which it responds.

If the plaintiff wishes to have a sworn answer, he must make some of the officers or members of the corporation parties. *B. & O. R. Co. v. City of Wheeling*, 13 Gratt. 62; *Teter v. W. Va. C. & P. Ry. Co.*, 35 W. Va. 433, 14 S. E. Rep. 146; *Roanoke St. Ry. Co. v. Hicks*, 96 Va. 510, 32 S. E. Rep. 296.

It was held, in *B. & O. R. Co. v. Gallahue*, 12 Gratt. 664, that the answer of a corporation must have the corporate seal affixed. See also, *B. & O. R. Co. v. City of Wheeling*, 13 Gratt. 62; *Barton's Ch. Pr.* (2d Ed.) 411; *Teter v. W. Va. C. & P. Ry. Co.*, 35 W. Va. 433, 14 S. E. Rep. 146.

e. **Certification by Unauthorized Person.**—An unsworn answer is not evidence for the defendants for any purpose. And in the case of *Sittingtons v. Brown*, 7 Leigh 274, it was decided that a paper purporting to be an answer, but which was not certified by any person authorized by law to administer oath, was altogether defective, and of no evidence in the cause.

f. **Belief of Affiant.**—By Va. Code, § 3282, and W. Va. Code, ch. 125, § 42, the affidavit is sufficient, if the affiant swear that he believes the matter sworn to be true. See *C. & O. R. Co. v. Harlow Huse*, 5 W. Va. 579; *Oil, etc., Co. v. Gale*, 6 W. Va. 542; *Hickman v. Painter*, 11 W. Va. 386.

g. **Presumption on Appeal.**—In *Durrett v. Davis*, 24 Gratt. 302, it is held that where the decree recites that the cause came on to be heard upon the answer of a guardian ad litem it will be presumed, in the appellate court, that the answer was sworn to, though there be no evidence of the fact in the record.

IV. FILING.

A. Time.—"At any time before final decree, a defendant may be allowed to file his answer, but a cause shall not be sent to the rules or continued because an answer is filed in it, unless good cause be shown therefor." Va. Code, § 3275.

A similar statute is thus construed in *Bowles v. Woodson*, 6 Gratt. 81: "A defendant in chancery, though in default for want of an answer, ought to be permitted to file any proper answer at any time before a final decree." See also *Bean v. Simmons*, 9 Gratt. 391; *Reynolds v. Bank*, 6 Gratt. 183; *Brent v. Washington*, 18 Gratt. 540.

In *Elder v. Harris*, 76 Va. 192, the court held that, "the provision of the statute, allowing a defendant to file his answer at any time before final decree, has no reference to an amended or supplemental answer." See further applications of the above quoted statute, in *Welsh v. Solenberger*, 85 Va. 441, 8 S. E. Rep. 91; *Radford v. Fowlkes*, 85 Va. 820, 8 S. E. Rep. 817; *Buford v. North R., etc., Co.*, 90 Va. 418, 18 S. E. Rep. 914; *Ogden v. Brown*, 83 Va. 670, 3 S. E. Rep. 236.

In West Virginia there is a statute similar to that in Virginia abovequoted. See W. Va. Code, ch. 125, § 53. For constructions of this statute, see *Elliot v. Hutchinson*, 8 W. Va. 452; *Tracewell v. Boggs*, 14 W. Va. 254.

1. Filing at Rules.—Answers except in cases of injunction, can only be filed at rules or in court. *Bank v. Huntington, etc., Co.*, 41 W. Va. 530, 23 S. E. Rep. 792; *Goddin v. Vaughn*, 14 Gratt. 102; *Zeil, etc., Co. v. Heatherly*, 38 W. Va. 409, 18 S. E. Rep. 611; *Randolph v. Randolph*, 6 Rand. 200.

The irregularities or defects at rules are waived by the submission of the case for hearing. *Ronald v. Bank*, 90 Va. 815, 20 S. E. Rep. 780.

2. Failure to File Answer.—By Va. Code, § 3284 and W. Va. Code, ch. 125, § 44, a defendant who appears and fails to plead answer, etc., may be given a rule to plead, and if he continue in default, at the next rule day the bill will be taken for confessed, as to him. See *Price v. Thrash*, 30 Gratt. 515 and *Hartley v. Roffe*, 12 W. Va. 401, for applications of these statutes.

In *Mitchell v. Evans*, 29 W. Va. 569, 2 S. E. Rep. 84, the syllabus by the court was as follows: "A decree overruling a demurrer by the defendant to the plaintiff's bill uses these words, 'and the defendant not asking further time to answer said bill.' Held, these words, as construed by the context, are equivalent to the words, 'and the defendant not desiring further time,' etc., and therefore operated as a waiver of a rule upon the defendant to answer the bill."

3. After Demurrer Overruled.—If a demurrer to the plaintiff's bill be overruled the defendant may be required to answer the bill forthwith, and in default thereof the bill may be taken for confessed, and the matter thereof decreed, or the plaintiff may have an attachment against him or an order for him to be brought in to answer interrogatories. This is the substance of the statutes in Virginia and West Virginia on the subject. See Va. Code, §§ 3273, 3289; W. Va. Code, ch. 125, §§ 30, 48.

For judicial construction of these statutes, see *Sutton v. Gatewood*, 6 Munf. 898; *Bank v. Nelson*, 1 Gratt. 106; *Capehart v. Hale*, 6 W. Va. 547; *Nichols v. Nichols*, 8 W. Va. 174; *Pecks v. Chambers*, 8 W. Va. 210; *McKay v. McKay*, 28 W. Va. 514; *Moore v. Smith*, 26 W. Va. 379; *Gates v. Cragg*, 11 W. Va. 300;

Mitchell v. Evans, 29 W. Va. 569, 2 S. E. Rep. 84; *Reynolds v. Bank*, 6 Gratt. 174; *Brent v. Washington*, 18 Gratt. 540.

Where the defendant's demurrer to the bill is overruled, he is at liberty to file any sufficient answer. *Bank v. Nelson*, 1 Gratt. 106; *Billingsley v. Manear*, 47 W. Va. —, 35 S. E. Rep. 847.

4. Answer to Injunction Bill.—"There seems to be some confusion of opinion among the legal profession, as to when and where an answer may be filed to a bill of injunction, and be considered and have its proper effect on a motion to dissolve. In the case of *Goddin v. Vaughn's Ex'ors et al.*, 14 Gratt. 102, JUDGE LEE in delivering the opinion of the court, at pages 129 and 130 says: 'Another objection taken for the first time in the argument here, is that the motion to dissolve was premature, or at least that the answer should not have been read on the hearing, because it had not been filed either in court or at the rules. Generally it is true that an answer can only be filed during the session of the court or at the rules, but by our statute, as I think, an exception is made in cases of injunction. The object, in giving the judge in vacation power to dissolve an injunction, was to prevent delay and this would be to some extent defeated, if a party had to wait until the rule day or a session of the court, before he could put in his answer, and have the benefit of it on a motion to dissolve. I think the larger power to entertain and decide the motion to dissolve, embraces that of receiving the answer and making it a part of the record. If there was anything in the objection, it should properly have been made, when the motion to dissolve was heard,' &c. It seems to me, that these views of JUDGE LEE are correct and well founded, and I think in addition, that the answer may not only be received, as stated by JUDGE LEE and made a part of the record, but that a replication to such answer may likewise be received, and made a part of the record by the judge at the hearing of the motion to dissolve." *Hayzlett v. McMillan*, 11 W. Va. 477.

5. Answer to Cross-Bill.—It is error to grant leave to answer a cross-bill after a final decree settling the rights of the parties has been rendered. *Scott v. Rowland*, 82 Va. 484. This case also held, that an answer cannot be treated as a cross-bill if proper relief is attainable on the bill and answer.

6. When Conditional.—After a decree for an account against a defendant who is in contempt, and a report of a commissioner, such defendant can be permitted to file his answer on condition only, that he does not delay the trial. *Fisher v. Fisher*, 4 H. & M. 484.

The answer of an absent defendant cannot be received, except upon paying down or giving security for the payment of such costs as the court shall think reasonable, unless the plaintiff will consent that the answer may be filed without such security. *Hooe v. Barber*, 4 H. & M. 440.

7. Waiver of Objections to Filing of Bill.—It is the duty of the clerk to dismiss a suit, when the process is served, and the bill is not filed in the time prescribed by the statute. But if the bill is filed before an order of dismissal is entered, and the defendant answers without insisting upon the dismissal of the suit, and consents to a hearing of the cause, he thereby waives the objection. *Buchanan v. King*, 22 Gratt. 414.

V. EXCEPTIONS TO.

A. Office and Object.—Exceptions are allegations in writing stating the particular points or matters,

with respect to which the complainant considers the answer insufficient as not responsive to the bill, or scandalous, or impertinent. The object of exceptions is to direct the attention of the court to the points excepted to, and to take its opinion thereon, before further proceedings are had, to the end that, if the answer is insufficient, a better answer may be compelled, or if scandalous or impertinent, that the scandalous or impertinent matter may be expunged. *Richardson v. Donehoo*, 16 W. Va. 685; *Bennett v. Pierce*, 45 W. Va. 854, 31 S. E. Rep. 972.

B. Essentials.—Mr. Barton, in his admirable work on Chancery Practice (2d Ed.) pp. 415, 416, says: "The exceptions should pray that the defendant put in a further and full answer to the bill, and all the points of insufficiency should be fully and minutely stated, for, after the answer to the exceptions, unless the defendant files a further answer, or except in the case of a clear mistake, the plaintiff cannot add to his exceptions, nor will he be allowed to file exceptions after a replication to the answer."

C. Mode of Excepting.—The mode in which an exception to an answer shall point out the omission excepted to, is a matter of practice discretionary with the court, and not a subject of appeal. *Craig v. Sebrell*, 9 Gratt. 181.

D. For Insufficiency. (See also *infra*, "Admissions").—Objections to an answer for insufficiency, and other proper objections to an answer are set up by exceptions, which ought to be and are generally written on the answer itself. *Barton's Ch. Pr.* (2d Ed.) 515; *Burlew v. Quarrier*, 16 W. Va. 108.

"A total failure to answer admits the whole bill to be true; *pro*, a partial failure to answer admits the part unanswered to be true. But in the case of a total failure, the party is in contempt; and yet such steps are taken, as are calculated to warn him of the effects of his contumacy. Whereas, when he answers, and no exception is taken to his answer as insufficient, he has no notice that hereafter, at the hearing, certain facts will be relied on as proved because he has not expressly noticed and negatived them in his answer." *Per CARR, J.*, in *Coleman v. Lyne*, 4 Rand. 456.

1. When Overruled.—The court, in *Richardson v. Donehoo*, 16 W. Va. 708, said: "Exceptions for insufficiency of an answer can only be sustained where some material allegation, charge or interrogatory in the bill is not fully answered. Exceptions founded on verbal criticism, slight defects and the omission of immaterial matter, will be disallowed and treated as vexatious." See also, *Kelly v. Lehigh, etc., Co.*, 98 Va. —, 36 S. E. Rep. 511.

2. Issue upon.—In *Bank v. Parsons*, 42 W. Va. 147, 24 S. E. Rep. 557, it was decided that when the exceptions to an answer are set down to be argued, the court simply decides whether the answer is sufficient or not. See also, *Clarke v. Tinsley*, 4 Rand. 250. In this latter case the chancellor instead of deciding whether the exceptions were good or bad entered a decree as upon a hearing and sent the cause to a commissioner for an account. On appeal, the proceedings subsequent to the exceptions were set aside, and the cause sent back for the exceptions to be heard. However, in *Goddin v. Vaughn*, 14 Gratt. 102, it was held that if exceptions to an answer are not well founded, it is not ground for reversing a decree, that they were not set down to be argued, but the cause was heard and decided without passing upon them.

E. Filing Exceptions.—In both Virginia and West Virginia, there are identical statutes regulating

this proceeding, which provide that "when the plaintiff files exceptions to an answer, they must be set down to be argued." Va. Code, § 3276; W. Va. Code, ch. 125, § 54. See *Craig v. Sebrell*, 9 Gratt. 181; *Blair v. Core*, 20 W. Va. 205; *Burlew v. Quarrier*, 16 W. Va. 109; *Richardson v. Donehoo*, 16 W. Va. 685. This last case contains an approved form of exceptions to answer. In *Johnston v. Wilson*, 29 Gratt. 300, it was held that when exceptions to an answer are sustained, the defendant will be allowed further time to answer.

F. Effect When Sustained.—If the exceptions to an answer are sustained and the defendant refuse to answer further within the time required by the court, the bill may be taken for confessed, and a decree entered accordingly. *Clarke v. Tinsley*, 4 Rand. 22; *Coleman v. Lyne*, 4 Rand. 456; *Barton's Ch. Pr.* (2d Ed.) 417.

Where exceptions to a part of an answer are sustained, and the defendant does not ask leave to amend his answer, the case may be heard on the bill and so much of the answer as is not excepted in. This rule was laid down in *Chapman v. R. Co.*, 51 W. Va. 307.

G. Disposal of Exceptions.—In West Virginia there may be a reference of exceptions to a commissioner in the discretion of the court. *Arnold v. Slaughter*, 36 W. Va. 593, 15 S. E. Rep. 252.

H. On Appeal.—In *Burlew v. Quarrier*, 16 W. Va. 100, syllabi 10 and 11 contain the following by the court: "When no exception or objection was taken to the court below, so far as the record shows, to an answer in chancery or to the filing thereof, because not verified by affidavit, it is too late to make the objection in the appellate court. But when there are specific allegations of material facts in a bill in equity, and the answer does not specifically admit or deny such material allegations, but among other things contains this clause, *vis*: 'They deny all the material allegations contained in the plaintiff's bill, and call for strict proof of the same,' while this denial is general and not sufficient to constitute good pleading in chancery proceedings, if excepted to properly in the court below, still in the absence of such exceptions in the court below the appellate court will generally consider said part of the answer as controverting said material allegations of the bill."

"If by inadvertence the circuit court decides a cause upon the bill and answer, when the record shows, that the answer had been replied to generally, and the case made by the bill and answer is entirely different from the case made by the bill, answer and general replication, this court will reverse the decree so entered upon the bill and answer. It will however enter no decree in the cause made by the bill, answer and general replication, as such cause has never been before the circuit court for its consideration and has never been acted upon by it. This court will simply remand the case to the circuit court to be proceeded with, as if no decree had been entered in the cause." *Armstrong v. Grafton*, 23 W. Va. 2.

VI. ISSUE UPON AN ANSWER.

A. Defendant Setting the Case for Hearing.—In Virginia, if one month, and in West Virginia if two months, elapse after the answer of a defendant is filed, without the cause being set for hearing and without exception being filed to such answer, the defendant may have the cause set for hearing by himself. Va. Code, § 3291; W. Va. Code, ch. 125, § 53. See *Dalby v. Price*, 2 Wash. 191; *Poling v. Johnson*, 2 Rob. 255.

B. Plaintiff Setting the Case for Hearing.—A plaintiff in equity may at or after the rule day at which the bill is taken for confessed as to any defendant, or at which his answer is filed, (or, in Virginia, whenever the execution of an order of publication against him is completed,) have the cause set for hearing as to such defendant, and it may be so set for hearing on the answer, or upon a general replication thereto, as the plaintiff may prefer. Va. Code, § 3291; W. Va. Code, ch. 125, § 50.

C. Replication to Answer.—Special replications have long since fallen into disuse. See 4 Min. Inst. (3d Ed.) 1445; Barton's Ch. Pr. (2d Ed.) 441. The present practice is, if the plaintiff concedes, from any matter in the answer or plea, that his bill is not properly adapted to the case, he may obtain leave from the court to amend his bill, or may file a supplemental bill. Barton's Ch. Pr. (2d Ed.) 442, and cases cited. For the practice in West Virginia see *infra*, "As Cross-Bills—Statute."

D. Omission of Replication.—It is provided by statute, that no decree shall be reversed for want of a replication to the answer, although the defendant has or has not taken depositions, if there has been a hearing upon the merits. Va. Code, § 3450. See application of this statute in Dabney v. Preston, 25 Gratt. 838; Harris v. Harris, 31 Gratt. 19; Simmons v. Simmons, 33 Gratt. 451; Cocke v. Minor, 25 Gratt. 246; Jones v. Degge, 84 Va. 685, 5 S. E. Rep. 799; Kern v. Wyatt, 89 Va. 885, 17 S. E. Rep. 549; Ward v. Funsten, 86 Va. 366, 10 S. E. Rep. 415.

The West Virginia statute upon the subject, similar to the former Virginia statute, provides, that no decree shall be reversed for want of a replication to the answer, where the defendant has taken depositions as if there had been a replication, and it appears that there was a fair hearing upon the merits. W. Va. Code, ch. 134, § 4. See Goddin v. Vaughn, 14 Gratt. 131; Jones v. Jones, 6 Leigh 174; Forqueran v. Donnelly, 7 W. Va. 114; Coal R., etc., Co. v. Webb, 3 W. Va. 438; Martin v. Rellehan, 3 W. Va. 480; Moore v. Wheeler, 10 W. Va. 41; Richardson v. Donehoo, 16 W. Va. 707; Chalfants v. Martin, 25 W. Va. 394; Cunningham v. Hedrick, 23 W. Va. 580.

The effect of a failure to reply under these enactments, would leave the answer to be taken as wholly true. 4 Min. Inst. (3d Ed.) 445; Barton's Ch. Pr. (2d Ed.) 441. The question, however, will probably never arise, since it has (at least in Virginia) become an established custom for the clerk himself to enter a replication.

VII. ADMISSIONS IN.

A. General Rule.—In *Dangerfield v. Claiborne*, 2 H. & M. 18, it was said: "The rule in future will be understood as settled; that, where the answer is not responsive to a material allegation of the bill, the plaintiff may except to it as insufficient, or may move to have that part of the bill taken for confessed; but if he does neither, he shall not, on the trial, avail himself of any implied admission by the defendant: for, where the defendant does not answer at all, the plaintiff cannot take his bill for confessed, without an order of court to that effect, and having it served upon the defendant; and this is the only evidence of his admission. Of course, if this mode of proceeding, as to the confession of the whole bill, be correct, it must be equally correct as to the confession of any part."

This proposition was apparently overruled in the later decision of *Page v. Winston*, 2 Munf. 298, and *Scott v. Gibbon*, 5 Munf. 86. A close perusal of the facts in these cases will, however, disclose certain

distinctions, by which they may be reconciled with the older adjudication. In both cases the *onus probandi* lay upon the defendant,—in *Page v. Winston* because of the fact that the allegation in the bill was negative—that something was not done, while in *Scott v. Gibbon*, certain documentary evidence proved *prima facie* that the fact alleged, and not denied, was true. The still more recent cases adhere to the proposition laid down in *Dangerfield v. Claiborne*, 2 H. & M. 18. See *Cropper v. Burtons*, 5 Leigh 426; *Coleman v. Lyne*, 4 Rand. 454; *Argenbright v. Campbell*, 3 H. & M. 165; *Miller v. Argyle*, 5 Leigh 460; *Clinch R. M. Co. v. Harrison*, 91 Va. 181, 21 S. E. Rep. 600; 1 Va. Law Reg. 45.

1. Qualifications.—Where an injunction is granted, and a material fact is alleged in the bill, and not denied in the answer, such fact must be taken as true on a motion to dissolve; and no other proof will be required on such motion, though at the hearing the plaintiff would have to bear the burden of proof. *Randolph v. Randolph*, 6 Rand. 198; *B. & O. R. Co. v. City of Wheeling*, 13 Gratt. 61; *Ludington v. Tiffany*, 6 W. Va. 11.

If the plaintiff in equity call upon the defendant, as assignee of a bond, to say whether he had notice of the consideration thereof, when he received the money due thereon; and, in his answer, he says, that he had no such notice when he took the assignment, the answer is not to be considered as admitting notice at the time of receiving the money. *Edgar v. Donnelly*, 2 Munf. 387.

If matter appear in the answer of a defendant in equity, which is nowise alleged in the bill, it cannot justify a decree for plaintiff against defendant, though it might have been ground for such decree, if it had been alleged in the bill. (Per *BROCKENBROUGH, J.*) *Elb v. Martin*, 5 Leigh 182.

B. Conclusiveness of.—The admissions in an answer to the allegations of a bill are conclusive, and cannot be denied by the defendant in his proofs. *Shirley v. Long*, 6 Rand. 764. In this case a defendant in his answer admitted that a slave claimed by him as a gift had always been in the possession of the donor. *Held*, that he cannot be allowed to give evidence that he, the donee, had the possession, for such evidence varies from the admission.

In the case of *Kerr v. Love*, 1 Wash. 172, a decree against the defendant was based entirely upon the admissions in his answer without other proof.

C. Contradictions in Answer.—Where an answer contains positive denials or statements, which are responsive to the bill, these will not be overthrown by any admissions, or contradictions which may be found in the answer. Neither will the weight of the whole answer be destroyed, by proof that the defendant is unworthy of credit, nor by direct or indirect proof that the answer is false in one or several respects: the only effect of such proof being to destroy the weight of the answer to the extent to which it is disproved by that amount of evidence which is required by the rule in chancery. See *Fant v. Miller*, 17 Gratt. 187; *Powell v. Manson*, 22 Gratt. 189; *Broughton v. Coffer*, 18 Gratt. 196; *Shannon v. McMullin*, 25 Gratt. 211. See *infra*, "As Evidence."

VIII. AS EVIDENCE.

A. General Rule.—"The general rule," says CHIEF JUSTICE MARSHALL, "that either two witnesses or one witness with probable circumstances will be required to outweigh an answer asserting a fact responsively to a bill, is admitted. The reason upon which the rule stands is this: The plaintiff calls

upon the defendant to answer an allegation he makes, and thereby admits the answer to be evidence. If it is testimony, it is equal to the testimony of any other witness; and as the plaintiff cannot prevail if the balance of proof be not in his favor, he must have circumstances in addition to his single witness, in order to turn the balance. But, he adds, 'certainly there may be evidence arising from circumstances stronger than the testimony of any single witness.' *Clark's Ex'ors v. Van Riemsdyk*, 9 Cranch 158, 160. This case, among numerous others, is cited by the editor (1 *Dan. Ch. Prac.* 843, note 7, 4 *Amer. Ed.*) in support of the proposition, that 'where a replication is put in and the parties proceed to a hearing, all the allegations of the answer which are responsive to the bill shall be taken as true, unless they are disproved by evidence of greater weight than the testimony of a single witness,' and that 'this may result from the testimony of two witnesses; or of one with corroborating circumstances; or from corroborating circumstances alone; or from documentary evidence alone.'" *Jones v. Abraham*, 75 Va. 470; *Moore v. Ullman*, 80 Va. 307.

"There is nothing better settled than that where the answer is responsive to the bill, it is to be taken as true, unless it be contradicted by two witnesses or by one witness and corroborating circumstances.

Tuck. Com. book 3, p. 502, and cases cited. The rule is thus broadly laid down by Story: 'In every case the answer of the defendant to a bill filed against him upon any matter stated in the bill and responsive to it, is evidence in his own favor. Nay, the doctrine of equity goes farther, for not only is such an answer proof in favor of defendant, as to the matters of fact of which the bill seeks a disclosure from him; but it is conclusive in his favor, unless it is overcome by the satisfactory testimony of two opposing witnesses, or of one witness corroborated by other circumstances and facts, which give to it a greater weight than the answer, or which are equivalent in weight to a second witness.' 2 *Story's Eq.*, § 1528. In the absence of such opposing testimony, the court will neither make a decree, nor send the case to be tried at law; but will simply dismiss the bill. *Id.* This is strongly illustrated by two cases recently decided by this court, in each of which a decree in favor of the plaintiff in such a case was reversed, because the court below, instead of ordering an issue, ought to have dismissed the bill. *Wise v. Lamb*, 9 Gratt. 294; *Smith v. Betty*, 11 *Id.* 732." This was the opinion of the court, in *Fant v. Miller*, 17 Gratt. 205. See also, *Beverley v. Walden*, 20 Gratt. 154; *Grigsby v. Weaver*, 5 Leigh 197; *Carter v. Carter*, 82 Va. 636; *Elder v. Harris*, 75 Va. 72; *Keagy v. Trout*, 85 Va. 395, 7 S. E. Rep. 829; *Jones v. Christian*, 86 Va. 1081, 11 S. E. Rep. 964; *Morrison v. Grubb*, 23 Gratt. 350; *Beale v. Hall*, 97 Va. 383, 34 S. E. Rep. 58.

1. **Conclusiveness.**—In *Thompson v. Clark*, 81 Va. 428, in applying to the ordinary rule as to the effect of an answer to a bill for discovery and relief, the court continued:—"By that rule the answer is treated as evidence, including its affirmative statements of fact which are pertinent to the discovery sought by the bill, and is conclusive, unless overcome by the testimony of two opposing witnesses, or of one witness corroborated by other circumstances, or by corroborating circumstances or documentary evidence alone. *Shurtz v. Johnson*, 28 Gratt. 657; *Jones v. Abraham*, 75 Va. 466; *Bell v. Moon*, 79 Va. 341; *Moore v. Ullman*, 80 Va. 307." See to the same effect, *Va. Code*, § 3281; *Corbin v. Mills*, 19 Gratt. 466; *Morrison v. Grubb*, 23 Gratt. 342;

Maupin v. Whiting, 1 Call 225; *Pryor v. Adams*, 1 Call 390; *Buck v. Copland*, 2 Call 229; *Beatty v. Smith*, 2 H. & M. 396; *Batchelder v. White*, 30 Va. 109; *Hefner v. Miller*, 2 Munf. 45; *Wise v. Lamb*, 9 Gratt. 294; *Powell v. Manson*, 22 Gratt. 177; *Statham v. Ferguson*, 25 Gratt. 39; *Shurtz v. Johnson*, 28 Gratt. 657; *Shultz v. Hansbrough*, 33 Gratt. 581; *Bullock v. Goodall*, 3 Call 49; *Love v. Braxton*, 5 Call 537; *Auditor v. Johnson*, 1 H. & M. 536; *Ward v. Cornett*, 21 Va. 679, 22 S. E. Rep. 494; *Roberts v. Kelly*, 2 P. & H. 396, 2 Va. Law Rep. 681; *Smith v. Smith*, 92 Va. 424, 24 S. E. Rep. 280; *Hoomes v. Smock*, 1 Wash. 399; *Kennedy v. Baylor*, 1 Wash. 162; *Arnold v. Welton*, 5 W. Va. 436.

In West Virginia, this subject is now regulated by statute as follows: "When a defendant in equity shall, in his answer, deny any material allegation of the bill, the effect of such denial shall only be to put the plaintiff on satisfactory proof of the truth of such allegation, and any evidence which satisfies the court or jury of the truth thereof shall be sufficient to establish the same." *Code of W. Va.*, ch. 125, § 59. This statute is construed in the following cases: *Lowry v. Buffington*, 6 W. Va. 268; *Brown v. Knapp*, 7 W. Va. 678; *Nichols v. Nichols*, 9 W. Va. 174; *Hayzlett v. McMillan*, 11 W. Va. 491; *Bronson v. Vaughan*, 44 W. Va. 406, 29 S. E. Rep. 1022; *Jarrett v. Jarrett*, 11 W. Va. 584.

2. **Exception.**—In *Purcell v. Purcell*, 4 H. & M. 511, the court, in the course of its opinion, said: "The standing rule in equity is, that an answer is not evidence in favor of the defendant, unless it be responsive to the bill; and therefore, whatever the answer asserts affirmatively, in opposition to the plaintiff's demand, must be proved by indifferent testimony." See further, *James R., etc., Co. v. Littlejohn*, 18 Gratt. 77; *Leas v. Eldson*, 9 Gratt. 27; *Vathir v. Zane*, 6 Gratt. 266; *Paynes v. Coles*, 1 Munf. 373; *Beckwith v. Butler*, 1 Wash. 225; *Lewis v. Mason*, 84 Va. 738, 10 S. E. Rep. 529; *Hatcher v. Crews*, 75 Va. 460; *Jones v. Cunningham*, 7 W. Va. 713; *Fluharty v. Beatty*, 4 W. Va. 525; *Miller v. Blose*, 30 Gratt. 24; *Statham v. Ferguson*, 25 Gratt. 39; *Bowman v. Wolford*, 80 Va. 215; *Corbin v. Mills*, 19 Gratt. 438; *Flak v. Denny*, 75 Va. 663; *Blow v. Maynard*, 2 Leigh 6; *Wilkins v. Woodfin*, 5 Munf. 183; *King v. Malone*, 31 Gratt. 169; *Porter v. Young*, 85 Va. 53, 6 S. E. Rep. 808.

3. **Qualification of Exception.**—Even though an answer contain affirmative matter, if such matter be pertinent to the charges or interrogatories in the bill, it is nevertheless evidence of such affirmation. This qualification was laid down in *Lyons v. Miller*, 6 Gratt. 439; *Fant v. Miller*, 17 Gratt. 206; *Powell v. Manson*, 22 Gratt. 177; *Thompson v. Clark*, 81 Va. 422.

B. **When Oath to Answer Waived.**—"If the complainant in a suit in equity shall, in his bill, waive an answer under oath, or shall only require an answer under oath, with regard to certain specified interrogatories, the answer of the defendant, though under oath, except such part thereof as shall be directly responsive to such interrogatories, shall not be evidence in his favor, unless the cause be heard upon bill and answer only; but may, nevertheless, be used as an affidavit with the same effect as heretofore upon a motion to grant or dissolve any injunction, or upon any other incidental motion in the cause; but this shall not prevent a defendant from testifying in his own behalf, where he would otherwise be a competent witness." *Va. Code*, § 3281.

1. **Former Rule.**—Prior to the passage of the above quoted statute (*Acts 1883-4, p. 15*), it was the settled

rule in Virginia, that, even though the complainant in his bill expressly waive the oath to the respondent's answer, yet that he could not, by thus disclaiming the benefit of a discovery, deprive the defendant of his right to answer under oath and have the advantage of such answer as evidence in his favor, so far as responsive to the bill. See *Jones v. Abraham*, 76 Va. 466; *Fant v. Miller*, 17 Gratt. 187; *Thornton v. Gordon*, 2 Rob. 719; *Barton's Ch. Pr.* (2d Ed.) 418.

But the statute seems plainly to alter this rule, and allow the plaintiff to deprive the defendant of the weight of his answer as evidence, by the express waiver of oath thereto. *Barton's Ch. Pr.* (2d Ed.) 418.

2. Express Waiver Necessary.—Construing this statute, *Lewis, P.*, delivering the opinion in *Throckmorton v. Throckmorton*, 86 Va. 770, 11 S. E. Rep. 289, said: "Our statute (Code, sec. 3281); permitting a complainant in equity to waive in the bill an answer under oath, is taken from the amendment to the forty-first rule of practice for the Federal courts of equity, and in *Conley v. Nailor*, 118 U. S. 127, it was decided, construing that amendment, that when the bill neither demands nor expressly waives an answer under oath, and the defendant answers under oath, the answer, responsive to the bill, is evidence in his behalf, conclusive if not contradicted. If a plaintiff in equity, it was said, is unwilling that the answer shall be evidence against him, he must expressly waive the oath of the defendant in his bill."

3. In Amended Bill.—Where an original bill does not waive an answer, and the latter is filed under oath, the plaintiff cannot deprive the defendant of the benefit of his sworn answer by filing an amended bill waiving such oath. *Throckmorton v. Throckmorton*, 86 Va. 769, 11 S. E. Rep. 289.

C. Responsiveness of Answer.—"Every material allegation of the bill not controverted by an answer, and every material allegation of new matter in the answer constituting a claim for affirmative relief, not controverted by a special reply in writing, shall for the purposes of the suit, be taken as true, and no proof thereof shall be required." W. Va. Code, ch. 125, § 36.

This statute is construed in the following cases cited in inverse chronological order: *Newlon v. Wade*, 43 W. Va. 283, 27 S. E. Rep. 244; *Paxton v. Paxton*, 38 W. Va. 616, 18 S. E. Rep. 765; *Kanawha v. Swann*, 37 W. Va. 176, 16 S. E. Rep. 462; *Bierne v. Ray*, 37 W. Va. 571, 16 S. E. Rep. 804; *Elliot v. Trahern*, 35 W. Va. 624, 14 S. E. Rep. 223; *Cunningham v. Hedrick*, 28 W. Va. 579.

A prior but similar statute, to the above, was applied in *Richardson v. Donehoo*, 16 W. Va. 686; *Anderson v. Nagle*, 12 W. Va. 98; *Gardner v. Landcraft*, 6 W. Va. 36; *Dickinson v. R. Co.*, 7 W. Va. 390; *Warren v. Syme*, 7 W. Va. 476; *Forqueman v. Donnelly*, 7 W. Va. 114; *Baker v. Oil Tract Co.*, 7 W. Va. 454; *Jones v. Cunningham*, 7 W. Va. 707; *Laidley v. Kline*, 8 W. Va. 218; *Middleton v. Selby*, 19 W. Va. 167; *Snyder v. Martin*, 17 W. Va. 276.

In the case of *Major v. Ficklin*, 86 Va. 738, 8 S. E. Rep. 715, where the defendant answered the plaintiff's bill under oath, and denied its allegations, *held*, "This answer is evidence, and is sufficient to overturn the allegations in the bill, and leaves the plaintiff without proof, while the defendant's case is established by his answer." See also, *Moore v. Ullman*, 80 Va. 310.

Where the allegations of a bill of injunction are denied in the answer, and no proof of them is offered,

the bill must be dismissed. *Sneed v. Smith*, 1 Patt. & H. 46; *Wise v. Lamb*, 9 Gratt. 294.

D. On Motion to Dissolve Injunctions.—"As a general rule an injunction ought not to be dissolved till all the defendants implicated in the charges made by the bill have answered, but there are well established exceptions to this rule. 1st. The plaintiff must have been diligent in taking the necessary steps to procure the answers of all the defendants. 2d. Answers are required only of those defendants upon whom rests the gravamen of the charges in the bill, and lastly no answer need be filed if the injunction on the face of the bill ought not to have been awarded." Syllabus 4, by the court in *Shonk v. Knight*, 12 W. Va. 668.

Where a bill sets forth a contract and the plaintiff's construction thereof, and the answer admits the contract and claims under it, but denies the correctness of the plaintiff's construction, this is not such a denial as *per se*, entitles the respondent to a dissolution of the pending injunction. *Hughes v. Tinsley*, 80 Va. 259.

1. General Rule.—In *Shonk v. Knight*, 12 W. Va. 668, there was a motion, on bill and answer, to dissolve an injunction. *Held*, "The answers fully, fairly, plainly, distinctly and positively deny the allegation, and therefore, according to the general rule laid down by this court in *Hayzlett v. McMillan*, 11 W. Va. 464, the court on the coming in of such answers, ought to have dissolved the injunction, if, as was the case, the allegations of the bill were unsupported by proof. It is true there are various exceptions to this general rule, as where the plaintiff would lose all the benefit which would otherwise accrue to him should he finally succeed in the cause, or where the facts disclosed by the bill and answer afford strong presumption that the plaintiff will establish his claim for relief on the parol hearing, and it appears that he would suffer great and immediate injury by a dissolution of the injunction, or when a dissolution of the injunction would in effect amount to a complete denial of the relief sought by the bill. In these and some other cases it would be proper to continue the injunction till the hearing." See further, *North v. Perrow*, 4 Rand. 1; *Thornton v. Gordon*, 2 Rob. 719; *Hogan v. Duke*, 20 Gratt. 244; *Deloney v. Hutcheson*, 2 Rand. 183; *Moore v. Steelman*, 80 Va. 340; *Thomas v. Rowe (Va.)*, 22 S. E. Rep. 157; *Motley v. Frank*, 87 Va. 432, 13 S. E. Rep. 26; *Spencer v. Jones*, 86 Va. 174, 7 S. E. Rep. 180; *Muller v. Stone*, 84 Va. 888, 6 S. E. Rep. 223; Va. Code, § 3281.

a. Exceptions to.—Where the equity of a bill of injunction is not denied, but a new equity is set up by the answer, to repel or avoid it, such answer, read as an affidavit on a motion to dissolve, is not sufficient, of itself, to support the motion. *Noyes v. Vickers*, 39 W. Va. 30, 19 S. E. Rep. 429; *Kerr v. Hill*, 27 W. Va. 607; *Atkinson v. Beckett*, 36 W. Va. 438, 15 S. E. Rep. 179; *Hughes v. Tinsley*, 80 Va. 259.

On a motion to dissolve an injunction, made without any answer by the defendant, all the allegations of the bill must be taken as true. *Peatross v. McLaughlin*, 6 Gratt. 64.

E. In Other Causes.—The answer of a defendant in equity, is competent evidence against the same defendant, in a suit at law against him, although the plaintiff at law was not a party to the suit in equity. *Hunter v. Jones*, 6 Rand. 541.

In a suit against parties claiming under C, plaintiffs rely on statements in the answer of C in another case. The parties claiming under C are not estopped by these statements; but they have only the effect of admissions or declarations, not made in the plead-

ings in the cause, and their weight is to be ascertained by the circumstances connected with them. However, C. under whom defendant claims, having stated in her answer in another case, that a certain arrangement was made by the consent of the parties interested, the defendant must be bound by this admission, unless he can clearly establish that it was made under a mistake. *Tabb v. Cabell*, 17 Gratt. 160.

In *Ellzey v. Lane*, 4 Munf. 66, it was held that a complainant in his subsequent defense was not authorized to use as evidence his answer to a prior bill of review which had been dismissed on the ground that it ought not to have been allowed, the decree not being final.

F. Against Co-Defendant.—It is a well established rule that the answer of one defendant is not evidence against his co-defendant. This rule is based on the common sense reason that the defendant against whom the answer is proposed to be used as evidence would not have the benefit of a cross-examination, which is the main safeguard of truth. *Dade v. Madison*, 5 Leigh 401; *Hoomes v. Smock*, 1 Wash. 389; *Pettit v. Jennings*, 2 Rob. 681; 3 Va. Law Reg. 51; 4 Va. Law Reg. 582.

In *Fisher v. White*, 94 Va. 242, 26 S. E. Rep. 573, it is said: "No rule is better settled than that the answer of one defendant cannot be read as evidence by the plaintiff against another defendant where there is no joint interest, privity, fraud, collusion, or combination between the co-defendants. *Dade v. Madison*, 5 Leigh 401, 1 Dan. Ch. Pr. 841 (5th Ed.); 1 Greenleaf's Ev., sec. 176." See also, *Wytheville*, etc., Co. v. *Frick Co.*, 96 Va. 141, 30 S. E. Rep. 491; *Gilmer v. Baker*, 24 W. Va. 72.

G. For Co-Defendant.—In regard to whether the answer of one defendant is available as evidence in favor of co-defendant, there seems to be some conflict among the authorities. Prof. Minor in his able treatise of equity practice (4 Min. Inst. [3d Ed.] 1488), says that an answer is not, in general, available for a co-defendant, and he mentions no exceptions to the rule. Mr. Barton, however, in his authoritative work on Chancery Practice (Barton's Ch. Pr. [2d Ed.] 435), declares that under certain circumstances the answer of one defendant does enure to the benefit of his co-defendant.

The former of these text writers relies upon the case of *Hoomes v. Smock*, 1 Wash. 389, for his conclusion, while the latter bases his argument upon the decision in *Dade v. Madison*, 5 Leigh 401; *Pettit v. Jennings*, 2 Rob. 697; *Cartigue v. Raymond*, 4 Leigh 579.

It would, perhaps, be too presumptuous to undertake to dogmatically declare either the one or the other of such eminent writers in the wrong, though Mr. Barton's view seems the more consonant with sound principle, and is sustained in *Ashby v. Bell*, 80 Va. 819, in *Terry v. Fontaine*, 83 Va. 458, 2 S. E. Rep. 748; and in *Johnston v. Zane*, 11 Gratt. 568; *Frank v. Lillienfeld*, 33 Gratt. 380.

H. Hearing on Bill and Answer.—When a suit in equity is heard upon bill and answer, the answer is taken to be true in all its allegations whether responsive to the bill or not, unless the plaintiff files a replication thereto. The reason for this rule is that such failure on the part of the plaintiff to put in issue the facts alleged in the answer would preclude the defendant from proving them. *Jones v. Mason*, 5 Rand. 577, 16 Am. Dec. 761; *Kennedy v. Baylor*, 1 Wash. 162; *Pickett v. Chilton*, 5 Munf. 467; *Findlay v. Smith*, 6 Munf. 142, 8 Am. Dec. 733; *Blanton v. Brackett*, 5 Call 232; *Copeland v. McCue*, 5 W. Va. 264;

Cleggett v. Kittle, 6 W. Va. 452; *Bierne v. Ray*, 7 W. Va. 571, 16 S. E. Rep. 804; *Snyder v. Martin*, 17 W. Va. 276; *Martin v. Bellehan*, 3 W. Va. 480; *Saunders v. James*, 35 Va. 336, 9 S. E. Rep. 147; *Ingles v. Stram*, 91 Va. 209, 21 S. E. Rep. 490; *Bryant v. Groves*, 2 W. Va. 10, 24 S. E. Rep. 605; *Cocke v. Minor*, 25 Gratt. 246; *Hartman v. Evans*, 38 W. Va. 699, 18 S. E. Rep. 809; *Jones v. Degge*, 84 Va. 685, 5 S. E. Rep. 799.

When a case in equity comes on to be heard upon the bill, the answers and exhibits, without replication to the answers, the allegations of fact and denials of the answers, must be admitted to be true. If the answer clearly and unequivocally deny these allegations in the bill, upon which alone it can be sustained, or if the answer set up sufficient new matter in avoidance of those allegations, in either case the bill should be dismissed. But the facts constituting the equity should be plainly denied or clearly avoided. There should be no fact admitted by the answer inconsistent with defendant's denial, no equivocal denial, no doubtful avoidance. In this case the denials and allegations of the answers, though there was no replication to them, were held not sufficient to defeat the plaintiff's claim. *Cocke v. Minor*, 25 Gratt. 246.

I. In Special Instances.

1. Evidence Overthrowing Answer.—In *Jones v. Abraham*, 75 Va. 466, where the answer did not profess to be on the defendant's own knowledge, it was held to be overcome by strong circumstantial evidence alone.

An answer supported by a commissioner's report, and acknowledgments by the plaintiff, will not be set aside by evidence of loose conversations between the parties, and conjectures of witnesses. *Harris v. Magee*, 3 Call 502.

If an answer is not contradicted by the requisite evidence, two witnesses or one witness and corroborating circumstances, no issue should be directed, but the bill must be dismissed. *Carter v. Carter*, 22 Va. 624; *Beverley v. Walden*, 20 Gratt. 147; *Pryor v. Adams*, 1 Call 382.

2. Without Personal Knowledge.—In *Tabb v. Cabell*, 17 Gratt. 160, it was held that though there is no replication to an answer, yet the averment of a fact of which the defendant could have had no personal knowledge, will not be held conclusive of it, and the testimony of one witness for the plaintiff will be sufficient to disprove such averment.

The answer of a defendant which does not profess to be on his own knowledge, can only be treated as a plea of denial, and not as evidence in his behalf. See *Jones v. Abraham*, 75 Va. 469; *Kincheloe v. Kincheloe*, 11 Leigh 303.

3. In a Proceeding Devisavit Vel Non.—Unless in such a proceeding, the bill specially calls for a discovery from the defendant, and unless the facts answered be within his special knowledge, his answer is not evidence in his favor even though responsive. *Kincheloe v. Kincheloe*, 11 Leigh 303; *Coalter v. Bryan*, 1 Gratt. 40; *Malone v. Hobbs*, 1 Rob. 380.

4. Identifying Land.—Where the answer and exhibits, in a suit for partition, identifying the land held by the defendant with the land claimed by the plaintiff in his bill, there is no need for proof on that point. *Davis v. Tebbis*, 81 Va. 600.

5. Contradicted on Material Points.—Where an answer is disproved in several material points, such contradiction deprives it of the weight which is allowed to answers by the rules of equity practice. *Countz v. Geiger*, 1 Call 191.

6. **Discretion of Court as to Weight.**—The court may believe part of an answer and disbelieve another part, though all of it be responsive to the bill. *Mayo v. Carrington*, 19 Gratt. 74.

7. **Answer Taken as a Whole.**—In *Morrison v. Grubb*, 23 Gratt. 342, the respondent in his answer not only denied the allegations in the bill, but made further statements. *Held*, that the whole answer must be taken together. See also, *Clinch R. M. Co. v. Harrison*, 91 Va. 130, 21 S. E. Rep. 660; *Barton's Ch. Pr.* (2d Ed.) 422. See *supra*, "Conclusiveness."

8. **To Bills of Discovery.**—"Where a cause is retained which is brought into equity on the sole ground of discovery, and of which jurisdiction is acquired on that ground alone, the plaintiff must be content to have it disposed of in accordance with the established practice of the equity forum; that is to say, in accordance with the rule which does not permit the answer in such a case to be overturned by extrinsic evidence, since to falsify the allegation of a necessity for a discovery would defeat the jurisdiction of the court whose aid the plaintiff has invoked. 2 Tucker's Comm. 508." This was the opinion in *Thompson v. Clark*, 81 Va. 427, following the important case of *Fant v. Miller*, 17 Gratt. 187, which overruled the doctrine of *Lyons v. Miller*, 6 Gratt. 427. See further, *Chapman v. Turner*, 1 Call 280; *Smith v. Smith*, 92 Va. 606, 24 S. E. Rep. 230. Where, however, the discovery sought by a technical bill of discovery, is required to be used in a trial at law, the general rule does not apply, since the plaintiff has his election to use the answer or not. *Thornton v. Gordon*, 2 Rob. 725; *Powell v. Manson*, 22 Gratt. 190; *Jones v. Cunningham*, 7 W. Va. 707.

9. **Evasive Answer.**—In *Wilkins v. Woodfin*, 5 Munf. 184, an evasive answer has held to be outweighed by the testimony of one witness and corroborating circumstances.

10. **In Regard to Commissioner's Report.**—Where bill to enjoin sale under trust deed alleges that a certain debt was embraced in the trust deed, and the answer denies the allegation, though the answer on oath is waived, and the master's report sustains the denial and is supported by the plaintiff's admissions elsewhere, the report should be confirmed. *Adkins v. Edwards*, 83 Va. 300, 2 S. E. Rep. 436.

It is settled doctrine that when an account is ordered of a fiduciary's transactions, if additional objections to settled *ex parte* accounts are discovered, the plaintiff may present the matter before the commissioner, with proper specifications in writing, and the defendant may meet it by affidavit, which has the same weight as an answer in chancery. *Davis v. Morris*, 76 Va. 34; *Corbin v. Mills*, 19 Gratt. 465; *Chapman v. Shepherd*, 24 Gratt. 377; *Shugart v. Thompson*, 10 Leigh 484.

IX. IN LIEU OF CROSS-BILL.

A. **When Allowed.**—Where the transaction between the parties are numerous and cognate, and have not all been embraced in the bill, but are set up in the answer, the latter may be treated as a cross-bill and put them in issue, and relief in respect thereto may be granted by the court, so as to avoid multiplicity of suits. *Mettert v. Hagan*, 18 Gratt. 231; *Cralle v. Cralle*, 79 Va. 182; *Kendrick v. Whitney*, 28 Gratt. 646, and note; *Kyle v. Kyle*, 1 Gratt. 526; *Gregg v. Sloan*, 76 Va. 502; *Tate v. Vance*, 27 Gratt. 571; *Spoor v. Tilson*, 97 Va. 279, 33 S. E. Rep. 609; *Wayland v. Crank*, 79 Va. 602; *Adkins v. Edwards*, 83 Va. 300, 2 S. E. Rep. 435.

B. **When Not Allowed.**—In *Scott v. Rowland*, 82 Va. 484, it was held that where proper relief is attainable on bill and answer, the answer should not be treated as a cross-bill.

C. **In West Virginia.**—"The defendant in a suit in equity may, in his answer, allege any new matter constituting a claim for affirmative relief in such suit against the plaintiff or any defendant therein, in the same manner and with like effect as if the same had been alleged in a cross-bill filed by him therein; and in such case, if the plaintiff or defendant against whom such relief is claimed, desire to controvert the relief prayed for in the answer, he shall file a special reply in writing, denying such allegations of the said answer as he does not admit to be true, and stating any facts constituting a defence thereto. But in case a defendant allege new matter in his answer upon which he relies for and prays affirmative relief, such defendant shall not file a cross-bill in the same cause except upon condition of striking from his answer, all such matter and prayer for affirmative relief as are contained in such cross-bill." W. Va. Code, ch. 125, § 35. For applications of this statute see the following cases: *Paxton v. Paxton*, 88 W. Va. 616, 18 S. E. Rep. 765; *Goff v. Price*, 42 W. Va. 384, 26 S. E. Rep. 287; *N. & W. R. Co. v. McGarry*, 42 W. Va. 395, 26 S. E. Rep. 297; *Kilbreth v. Roots*, 33 W. Va. 600, 11 S. E. Rep. 21; *Enoch v. Mining & P. Co.*, 23 W. Va. 314; *Cunningham v. Hedrick*, 23 W. Va. 579.

A similar statute, to the one above quoted, was construed in the following cases: *Armstrong v. Wilson*, 19 W. Va. 108; *Middleton v. Selby*, 19 W. Va. 168; *Alleman v. Kight*, 19 W. Va. 201; *Rust v. Rust*, 17 W. Va. 901; *W. Va. O. & O. L. Co. v. Vinal*, 14 W. Va. 688; *Hickman v. Painter*, 11 W. Va. 386; *Moore v. Wheeler*, 10 W. Va. 35; *Tompkins v. Stephens*, 10 W. Va. 156; *Vanbibber v. Beirne*, 6 W. Va. 108.

In construing the above statute the court, in *Moore v. Wheeler*, 10 W. Va. 42, said: "An answer alleging new matter constituting a claim to affirmative relief in the suit, in the purview and meaning of the section under consideration, was intended simply to be allowed in lieu of a cross-bill in the cause as to such new matter, and not to make any other change in the practice as to pleadings in courts of equity. *Vanbibber v. Beirne, et al.*, 6 W. Va. R. 108." See further, *Armstrong v. Wilson*, 19 W. Va. 114; *Middleton v. Selby*, 19 W. Va. 177.

An answer seeking affirmative relief foreign to the original bill was held bad on demurrer in *Rust v. Rust*, 17 W. Va. 904; *McMullen v. Eagan*, 21 W. Va. 247.

"Before sections 35 and 36 of chapter 125 of the Code were passed, while it was proper and in accordance with the strict rules of pleading when a bill to enforce a vendor's lien on real estate was filed, if the defendant wished to rescind the contract because the defendant was of unsound mind when it was made, or it was procured by fraud, to file a cross-bill for that purpose; yet where the record showed that the relief could as well be given upon the bill and answer and proofs taken, as if a cross-bill were filed, the filing was dispensed with, as in such case it would be a mere formality to require it." *Per Curiam*, in *Cunningham v. Hedrick*, 23 W. Va. 579.

X. ISSUE OUT OF CHANCERY.

A. **Discretion of Court in Regard to.**—While it is true that directing an issue to be tried by a jury is a matter of discretion in a court of equity, it is equally true that such discretion must be exercised

upon sound principle of reason and justice. A mistake in its exercise is a just ground of appeal; and the appellate court must judge whether such discretion has been soundly exercised in a given case. *Wise v. Lamb*, 9 Gratt. 294; *Stannard v. Graves*, 2 Call 309; *Reed v. Cline's Heirs*, 9 Gratt. 136; *Beverley v. Walden*, 20 Gratt. 147; *Robinson v. Allen*, 85 Va. 721, 8 S. E. Rep. 885.

B. When Erroneously Awarded.—It is well settled, that in no case ought an issue to be ordered to enable a party to obtain evidence to make out his case; that, when the allegations of the bill are positively denied by the answer, and the plaintiff has failed to furnish two witnesses, or one witness and strong corroborating circumstances, in support of the bill, it is error in the chancellor to order an issue; that no issue should be ordered until the plaintiff has thrown the burden of the proof on the defendant; that, until the *onus* is shifted, and the case rendered doubtful, by the conflicting evidence of the opposing parties, the defendant cannot be deprived by an order for an issue, of his right to a decision by the court on the case, as made by the pleadings and proofs. *Smith's Adm'r v. Betty*, 11 Gratt. 752; *Pryor v. Adams*, 1 Call 382; *Wise v. Lamb*, 9 Gratt. 294; *Grigsby v. Weaver*, 5 Leigh 197; *Beverley v. Walden*, 20 Gratt. 147.

And it is held in *Jones v. Christian*, 86 Va. 1017, 11 S. E. Rep. 984, that even though an answer under oath be waived, yet when the case made by the bill is not sustained by proof, an issue out of chancery should not be awarded.

C. Evidence.—The rule of evidence is the same on the trial of an issue out of chancery as on the hearing in the chancery court; and such allegations in the answer as are responsive to the bill are conclusive unless contradicted by two witnesses or one witness and corroborating circumstances. *Powell v. Manson*, 22 Gratt. 190.

In West Virginia, however, this rule does not apply, having been changed by statute, for which, see *Tompkins v. Stephens*, 10 W. Va. 168; *Barton's Ch. Pr.* (2d Ed.) 481.

D. Instructions.—On the trial of an issue, an instruction that the jury shall weigh the defendant's answer instead of merely the parts responsive to the bill, though rather broad, is not error for which the verdict will be set aside. *Snouffer v. Hansbrough*, 79 Va. 166; *Bank v. Waddill*, 27 Gratt. 451.

XI. SPECIAL DEFENSES BY ANSWER.

A. Usury.—The defense of usury may be set up by answer, and though the averments in such answer be very informal, yet if, taken in connection with the charge in the bill, they make the defense of usury in substance, the answer is good. *Kelley v. Lewis*, 4 W. Va. 456; *Smith v. Nicholas*, 8 Leigh 880; *Crenshaw v. Clark*, 5 Leigh 60.

B. Innocent Purchaser.—In *Donnell v. King*, 7 Leigh 398, it was held that a purchaser for valuable consideration without notice might set up such fact as a defence by way of answer as well as by plea.

In *Tompkins v. Mitchell*, 2 Rand. 430, the court states the rule to be, "That he who claims protection as a purchaser without notice, must deny notice by answer, though it be not charged in the bill." See also, *Downman v. Rust*, 6 Rand. 591; *Rorer Iron Co. v. Trout*, 83 Va. 420, 2 S. E. Rep. 718. In the last case it is held that such an answer must contain the following averments: (1) That they are purchasers for valuable consideration actually paid; (2) That they have received or are best entitled to receive convey-

ance; (3) That their grantor was in possession of the property at the time; (4) That these facts happened before notice of the adverse claim.

Where a bill is filed to set aside a conveyance by husband to wife, on the ground that it is voluntary, if the wife in her answer set up a contract founded on valuable consideration, she must establish such contract by legal and proper evidence. *Blow v. Maynard*, 2 Leigh 49; *W. & M. College v. Powell*, 12 Gratt. 372; *Campbell v. Bowles*, 30 Gratt. 689; *Barton's Ch. Pr.* (2d Ed.) 428; *Flynn v. Jackson*, 98 Va. 301, 5 S. E. Rep. 1.

C. Statute of Frauds.—"When an answer admits an agreement for the sale or purchase of land alleged in the bill, though it be but a parol agreement, the defendant must plead the statute of frauds and perjuries, or the answer must claim the benefit of this statute; otherwise he is taken to have admitted an agreement, which is either good under the statute, or otherwise binding on him. The effect is the same under our rules of pleading when the agreement, though parol, is positively and definitely alleged in the bill, and he fails in his answer to deny it, though he does not admit it. The admission in the answer, which produces this effect, is an admission of the fact, that the contract alleged in the bill was made; and the effect of such admission will not be changed by a denial of the justice of enforcing such contract specifically, or by allegation of other facts, which, if true, would render it improper to enforce such contract." *Per Curiam*, in *Fleming v. Holt*, 12 W. Va. 144 (*Syllabi*, 8, 9, 10).

D. In Proceedings against Gaming Transactions.—In both Virginia and West Virginia there are statutes providing that any person, who shall lose to another a certain amount within a certain time, may file a bill against the winner, who shall answer the same, and upon discovery and repayment of the money or property so won or its value, the winner shall be discharged from any forfeiture or punishment which he may have incurred for winning the same. Va. Code, §§ 2287, 2288; W. Va. Code, ch. 97, §§ 2, 3.

E. To Bill for Divorce.—A divorce suit is conducted as other suits in equity, except that the bill cannot be taken for confessed, and whether the defendant answers or not the cause is heard independently of the admissions of either party. Va. Code, § 2206; W. Va. Code, ch. 64, § 8. See *Bailey v. Bailey*, 21 Gratt. 48; *Latham v. Latham*, 80 Gratt. 307; *Throckmorton v. Throckmorton*, 86 Va. 769, 11 S. E. Rep. 289; *Cralle v. Cralle*, 79 Va. 182; *Hampton v. Hampton*, 5 Va. 148, 12 S. E. Rep. 340.

In *Harris v. Harris*, 31 Gratt. 19, it was held that the answer to a divorce bill, excluding admissions, is entitled to the same weight as evidence as in any other suit in chancery.

XII. IN SPECIAL INSTANCES.

A. Infants.—In the case of *Bank v. Patton*, 1 Rob. 535, *BALDWIN*, J., delivering the opinion of the court, said: "No rule is better settled than that an answer of an infant by guardian cannot be read against him at all for any purpose. 2 Madd. Ch. Pract. 228; *Mud* 814, 815; 1 Stark. Ev. Pt. II. p. 278." See also, *Alexander v. Davis*, 42 W. Va. 465, 26 S. E. Rep. 291.

"The thirty-sixth section of chapter one hundred and twenty-five of the Code, so far as it relates to taking material allegations of a bill or material allegations of new matter in an answer constituting a claim for affirmative relief not controverted by a reply, as true, should be applied strictly, if at all, to the answer of infants by guardians *ad litem*." *The*

construction of the statute was made in *Laidley v. Kline*, 8 W. Va. 232.

Before there can be a decree for the sale of an infant's land, there must be an answer filed by his guardian *ad litem*. *Ewing v. Ferguson*, 33 Gratt. 548; *Hays v. Camden*, 38 W. Va. 109, 18 S. E. Rep. 461. But where it appears from the record that the infant defendants appeared and answered by their guardian *ad litem*, and that there was a general replication thereto, it will be presumed in the court of appeals that the answer was regularly filed, though the answer itself is not found among the papers in the record. *Smith v. Henkel*, 81 Va. 524.

B. Married Women.—In a suit against a married woman where her husband was made a party for conformity, they each file separate answers. *Held*, that the answer of the husband cannot be used as evidence for the wife, though that filed by the latter can, so far as responsive to the bill. *Frank v. Lillienfeld*, 33 Gratt. 377.

Formerly a married woman answered by her husband or next friend. 4 Min. Inst. (3d Ed.) 1432. But by Acts 1899-1900, p. 151, she is probably allowed to answer in her own name; the statute providing as follows: "A married women may contract and be contracted with, sue and be sued, in the same manner as if she were unmarried."

C. Trustees.—Upon a bill against a trustee and *cestui que trust* in a deed, the trustee answers and puts the allegations of the bill in issue, but the bill is taken for confessed as to the *cestui que trust*. The answer of the trustee protects the *cestui que trust*, and the plaintiff must prove his case as to both. *Johnston v. Zane*, 11 Gratt. 552.

D. Assignors.—Under some circumstances, the answer of the assignor of a claim is held to be competent evidence against his volunteer assignee, in a controversy between said assignee and third persons. *Griffin v. Macaulay*, 7 Gratt. 476.

E. Co-Trustees.—On a bill filed against two trustees charging notice to one, the trustee charged with notice filed no answer to the bill, though his co-trustee did, denying the allegations of the bill. The effect of this answer was merely to present an issue and throw the burden of proof on the complainant. It could have no further weight. *Chapman v. Chapman*, 91 Va. 397, 21 S. E. Rep. 813.

F. Lunatics.—In *Calloway v. Dinsmore*, 33 Va. 300, 2 S. E. Rep. 517, it was held that the answer of the committee of a lunatic, does not relieve the court of the necessity of taking an account of liens in a creditor's suit.

G. Stockholders of a Corporation.—Where a suit is brought against a corporation, a purchaser of its stock cannot answer the plaintiff's bill, unless the corporation refuses to defend. *Park v. Petroleum Co.*, 25 W. Va. 108.

XIII. WHEN TREATED AS PETITION FOR REHEARING.

In *Staples v. Staples*, 85 Va. 76, 7 S. E. Rep. 199, the answer of a personal representative to a creditor's petition asserting a judgment, may be treated as a petition for a rehearing.

XIV. AIDING DEFECTIVE BILLS.

An answer may be used to aid a defective bill and make a case, though on its face the bill does not state such facts as would give courts of equity jurisdiction. *Salamone v. Kelley*, 80 Va. 86; *Green v. Massie*, 21 Gratt. 356; *Ambler v. Warwick*, 1 Leigh 193.

XV. AMENDMENTS OF.

A. General Rule.—The courts are very reluctant to allow amendments to be made to an answer, unless they be clearly upon immaterial points, and the entire matters rests in the sound discretion of the court. 4 Min. Inst. (3d Ed.) 1442, 1443; *Barton's Ch. Pr.* (2d Ed.) 444; *Elder v. Harris*, 76 Va. 187; *Foutty v. Poar*, 35 W. Va. 70, 12 S. E. Rep. 1096; *McKay v. McKay*, 33 W. Va. 736, 11 S. E. Rep. 213; *Liggon v. Smith*, 4 H. & M. 407; *Matthews v. Dunbar*, 3 W. Va. 138; *Radcliff v. Corrothers*, 33 W. Va. 632, 11 S. E. Rep. 223.

1. Qualifications.—Where it is evident that an answer was filed under a mistake of fact, the general rule is relaxed and the respondent allowed to amend his answer. *Liggon v. Smith*, 4 H. & M. 406; 4 Min. Inst. (3d Ed.) 1443; *Barton's Ch. Pr.* (2d Ed.) 445.

In *White v. Turner*, 2 Gratt. 502, a defendant was allowed to amend his answer for the purpose of setting up the statute of limitations in bar of the plaintiff's claim.

It is also held that an amended answer may be allowed to explain equivocal expressions in the first answer. *Tracewell v. Boggs*, 14 W. Va. 254.

In *Jackson v. Cutright*, 5 Munf. 308, it was held that even a mistake as to a matter of law was ground for the amendment of an answer.

XVI. WITHDRAWAL AND DEMURRER.

The court may, at its discretion, allow a defendant to withdraw his answer, and demur to the bill, if he has not been guilty of unreasonable delay in making the motion to do so. *Weisiger v. Richmond, etc., Co.*, 90 Va. 796, 20 S. E. Rep. 361.

576 *Selden & Wife v. Keen & als.

June Term, 1876, Wytheville.

Wills—Bequests—Construction.—I by her will gives to her niece B for her life, the interest on a debt due I, of \$500. She then says: After the death of B, I gave the said sum of money to L, in trust for C, daughter of E; and I request that it be invested in bank-stock, and applied by L for the benefit of C, as he shall think proper. **ITEM:** In case the said C shall die under the age of twenty-one years, or marries, I direct that the stock before given to L for her benefit, be vested in him in trust for E her mother, and M, my great-nieces, to be advanced to them in equal portions, as said L may think proper, free from the control of their husbands. At the death of B, C was married, and E and M were dead, leaving children. **HELD:**

1. Same—Same—Same.—The bequest to C is not on a condition in restraint of marriage, but is a conditional limitation; and the bequest over to E and M on the marriage of C is valid.

This case was argued in Richmond, and was decided at Wytheville. It is a branch of the cases reported in 13 Gratt. 615, under the style of *McCandlish v. Keen & als.* and *Same v. Coke's ex'or & als.* The only question involved in this case, relates to the construction of a clause in the will of Rebecca Innes deceased. The case is fully stated by Judge Moncure in his opinion.

ould & Carrington, for the appellants.

Brooke and Scott, for the appellees.

577 *Moncure, P., delivered the opinion of the court.

This is an appeal from a decree of the circuit court of Gloucester county, rendered on the 7th day of August 1874, in two causes then pending in said court. The only question presented by the appeal is, as to the true construction of a portion of the will of Rebecca Innes, which is in these words:

"First: I give and devise to my niece, Susan Byrd, widow and relict of Wm. Byrd, dec'd, late of Gloucester, the arrears of all interest which may be due me at the time of my death, and all the interest which, during her life, may accrue, on a debt due to me of five hundred pounds sterling, from the estate of the said William Byrd, and for which there was a decree in my favor, the 24th day of May 1800, in the high court of chancery in Richmond; and I direct that the said — shall remain on the said security during the life of the said Susan Byrd. Item. After the death of the said Susan Byrd, I give the said sum of money to Fielding Lewis of Charles City, in trust for Courtney W. Brooke, daughter of Elizabeth Brooke; and I request that it be vested in bank-stock, and applied by the said Fielding Lewis, for the benefit of the said Courtney, as he shall think proper. Item. In case the said Courtney W. Brooke shall die under the age of twenty-one years, or marries, I direct that the stock before given to my friend Fielding Lewis for her benefit, be vested in him, in trust for Elizabeth Brooke, her mother, and Mary Chiswell Nelson, my great-nieces, to be advanced to them in equal portions, as the said Fielding Lewis may think proper, and free from the control of their husbands."

Susan Byrd, the legatee for life, died on the 15th of November 1865. Courtney

578 W. Brooke had married *Robert C. Selden before the death of Susan Byrd, but when, does not appear in the record. Fielding Lewis died without having invested the fund in bank stock, according to the request of the testatrix, though the same, it seems, has always continued to be well secured. Elizabeth Brooke and Mary Chiswell Nelson both died in the lifetime of Susan Byrd; the former leaving several children, including the said Courtney W.; the latter leaving an only child, Rebecca C., who intermarried with Edward C. Marshall of Fauquier county.

In this state of things, the question arose, and was litigated in the said two causes, who was entitled, under the said will, to the said sum of five hundred pounds sterling, with interest thereon from the death of the said Susan Byrd—whether the said Robert C. Selden and Courtney W. his wife, or the personal representatives of the said Elizabeth Brooke and Mary Chiswell Nelson.

The court below decided in favor of the latter, and accordingly decreed, by the said decree of the 17th of August 1874, "that the said Rebecca C. Marshall, under and by virtue of the last will and testament of Rebecca Innes deceased, is entitled to one moiety of the sum of five hundred pounds sterling, with interest thereon from the 15th day of November 1865 until paid; and

that the remaining moiety of the said sum, with like interest thereon, belongs to and is the property of the estate of Elizabeth Brooke deceased."

From the decision and decree aforesaid the said Robert C. Selden and Courtney W. his wife, applied to a judge of this court for an appeal; which was accordingly allowed, and which is the appeal we now have to dispose of.

579 *The question, therefore, is, which of these contending claimants are entitled?

On the one hand it is claimed that the representatives of Elizabeth Brooke and Mary Chiswell Nelson are entitled, by the express terms of the will of Rebecca Innes, which gave the subject to them in the event of the marriage of Courtney W. Brooke; which actually happened. If the intention of the testatrix, thus plainly expressed in her will, can legally be carried into effect, it must prevail, and the claim of the said representatives must be sustained. But.

On the other hand, it is claimed, in behalf of the appellants, that the said intention, even if it actually existed, cannot legally be carried into effect; that the condition on which the property was to cease to be that of Courtney W. Brooke, and become that of her mother Elizabeth Brooke and her aunt Mary Chiswell Nelson, was a condition subsequent, in general restraint of marriage, and was therefore against the policy of the law and void, leaving the gift of the subject which had been previously made in the will to Courtney W. Brooke to remain absolute and in full force and effect.

And this is the controversy between these contending parties which we now have to decide.

The great question involved in the case: that is, when a condition is void, as being in restraint of matrimony, and therefore against the policy of the law, was argued by the learned counsel on both sides with great ability and learning; and many decisions on the subject, both English and American, were cited and commented on by them. Few matters have been the subject of more frequent decisions by the courts, especially in England, and few, if any, have been the subject of greater conflict of

580 decision than the one now under consideration. *We have striking evidence of the truth of this assertion in the opinion of Lord Loughborough, in *Stackpole v. Beaumont*, 3 Vesey R. 89. His lordship there goes into a review of the doctrine of conditions in restraint of marriage being void, and concludes that the rule is one of an arbitrary character, adopted from the Roman civil law; and having no just application to the English law, it had been strangely perverted and embarrassed in its application by the senseless refinements of the judges, until it had become impossible for any one to know, with any approximation towards certainty, what the law of England upon the subject is; and he thus concludes: "The authorities stand so well ranged (upon either side) that the court

would not appear to act too boldly, whatever side of the proposition they should adopt; but I have always, upon repeated consideration, thought that there was not much reason in any of the determinations, founded upon a rule applicable to the laws of the country from which it is taken, but not to this country."

In Redfield on the Law of Wills, part ii, p. 669, note 36, the author quotes these remarks of Lord Loughborough, and says of them: "We must confess it has always seemed to us that there is great truth in the exposition of this subject, and of the decisions of the courts upon the question here made by the learned chancellor; and that the strictures which have been made upon its good taste and sound discretion are without much foundation. For where there are hundreds of conflicting cases upon a point, and no general principle running through them, by which they can be arranged or classified, what better can be done than to abandon them all, and fall back upon the reason and good sense of the question, as the courts have of late attempted to do?" And *Id.* p. 677, the

581 same author *says: "This whole subject, as to what conditions in restraint of marriage, shall be regarded merely in *terrorem*, and so void; and what as valid, is certainly, both in England and this country, involved in great uncertainty and confusion." In the case of *Dickson's Trust* (1 Sim. N. S. 37), Lord Cranworth repudiates any such rule of law, as that conditions, where there is no bequest over, are to be held inoperative as mere idle threats in *terrorem*. And this experienced equity judge here gives utterance to an opinion which could scarcely fail to strike all minds that have examined the cases upon the point as eminently just. He says: "It is impossible to refer to the numerous cases on this subject without feeling that the judges in deciding them have never felt very sure of the ground upon which they were treading," &c.

But without noticing these numerous cases in detail, it will be sufficient to refer to the great case of *Scott v. Tyler*, with the notes thereto in the last American edition of the "Leading Cases in Equity," where all the material cases on the subject are cited and commented on; and also to 1 Story's Eq. J., 11th edition, §§ 274-291e, and the notes thereto. The case of *Scott v. Tyler*, is remarkable for having been very fully and ably argued by some of the most distinguished lawyers in England, and was decided by that great chancellor, Lord Thurlow. The edition of Story, to which we have referred, has the advantage of the additions of Redfield, a late editor of that valuable work. By looking alone to these two principal sources of information on this subject, we may fully learn the history and present state of the doctrine in regard to conditions in restraint of marriage. But reference may also be had for the same purpose to 1 Roper on Legacies, pp. 751-833. See also 2 Lom. on Executors &c.,

582 *marg. 79, 80; 1 Lom. Dig., top 338-342.

It is somewhat remarkable, that numerous as are the cases which have been decided on the subject in England, there seems to be only one which has yet been decided by this court, and that is the case of *Maddox &c. v. Maddox's adm'r &c.*, 11 Gratt. 84, very much relied on by the counsel for the appellants in this case. But as that case at most only affirms the doctrine, as it seems now to be generally understood in England, in regard to conditions in restraint of marriage, it will not be necessary to notice it any further, at least for the present.

It is unnecessary to state the rule on the subject and the exceptions to it, as they seem to be at present established in England and this country. It is enough to say that this case in our opinion, is governed by principles of law, which are well settled, and cannot be denied, and to state those principles, and show their application to the case.

It is well settled and very clear, that a testator can, by his will, give property to an unmarried female until her marriage, and then and in that event, to other persons. Such a bequest may, incidentally, operate as a restraint upon marriage. But such a possible, or even probable effect, will not invalidate the bequest. It is a bequest which every owner of property, in the exercise of his dominion over it, and his power of disposition of it, has a right to make; and it is a bequest which may be very reasonable and proper to be made, under the circumstances of the case. A head of a family would naturally wish to dispose of his property, or an adequate portion of it, in such a way as to supply the wants of the needy members of the family, at least so long as they might, or were likely to continue to be needy, and then to dispose of it as he might deem to be just and proper. He might, therefore,

583 secure *it to the use of a female member of the family until her marriage, and then in that event to other members of the family. He might well suppose that while the first object of his bounty would need it for her support so long as she remained unmarried and had no one to provide for her, she probably would not need it when she would have a husband to provide for her; and acting on that supposition, he might well, in the event of her marriage, give his bounty such other direction as he might think more proper and suitable to the wants and claims of other members of his family. Nothing, certainly, is more reasonable than this; and nothing is more certain than that it would be perfectly lawful for him to do this.

Now is not this precisely what, in effect, the testatrix, Sarah Innes, did in this case? She, in effect, by her will, gave the use of a debt of five hundred pounds sterling, which was due her, to Susan Byrd during her life, then to Courtney W. Brooke, daughter of Elizabeth Brooke, so long as she might remain single and unmarried,

and in case of the death of the said Courtney W. under the age of twenty-one years, or of her marriage, then to the said Elizabeth Brooke and Mary Chiswell Nelson, great-nieces of the testatrix. If the testatrix had plainly expressed her intention in these very words by her will, it could not be denied that their legal effect would have been as above stated. But can it make any difference that she has expressed precisely the same intention by different words? The intention of a testator, as derived from his will, is the polar star by which his will is to be construed. This is the well established rule of construction of wills, and it applies to cases involving the doctrine of conditions, in restraint of marriage, as has been often adjudged. 1 Roper on

584 Legacies, 751; *832, and cases cited. If the object of a condition of a bequest be to restrain marriage, the condition will be void, as being against the policy of the law, and the bequest will be absolute. If a bequest be made absolutely or for life, or for any other specified period, coupled with a condition that the interest shall cease in the event of the marriage of the donee, without saying anything more; here, by the very terms of the bequest, the condition is in general restraint of marriage, and therefore void. So also, if the testator, by the condition, imposes such clogs upon the marriage, as, in effect, to prohibit it, the condition would be against the policy of the law, and void. A condition intended to be in general restraint of marriage is void. But where the intention, by a proper construction of the will, appears to be otherwise; appears, for instance, to be to create springing and shifting uses for the benefit of different members of the testator's family, according as their needs may seem to require, then the condition, or what is called a condition, is not against the policy of the law, and void. The question then, seems in effect to be one of intention. Did the testatrix intend to impose a general restraint upon the marriage of Courtney W. Brooke? or did she intend to make such a provision as she deemed reasonable and proper for the needs of different members of her family, and such a disposition of her property among them as she deemed to be just?

We think the latter was her intention, and that therefore it must prevail. We can conceive of no motives she could have had for doing so unreasonable a thing as to consign her great-great-niece, Courtney W. Brooke, who must at the death of the testatrix have been very young, to perpetual celibacy. But we can plainly see in the will that she had an entirely different 585 *motive for doing what she did, that is, the motive of providing, reasonably, for three principal objects of her bounty, to-wit, Courtney W. Brooke, Elizabeth Brooke and Mary Chiswell Nelson. This she does by carefully creating a trust in favor of all these objects of her bounty, in these words: "Item: After the death of

the said Susan Byrd, I give the said sum of money to Fielding Lewis, of Charles City, in trust for Courtney W. Brooke, daughter of Elizabeth Brooke; and I request that it be vested in bank stock, and applied by the said Fielding Lewis for the benefit of the said Courtney as he shall think proper. Item: In case the said Courtney W. Brooke shall die under the age of twenty-one years, or marries, I direct that the stock before given to my friend Fielding Lewis for her benefit be vested in him in trust for Elizabeth Brooke, her mother, and Mary Chiswell Nelson, my great-nieces, to be advanced to them in equal portions, as the said Fielding Lewis may think proper, and free from the control of their husbands." Now is the whole of this trust equally valid; or is that part of it only valid which relates to Courtney W. Brooke, and all the rest void? and not only void, but a trust springing up in its place, not created by the express words of the will, but in direct conflict with them? It is admitted, or, at least, cannot be denied, that if this intention, thus declared by the will in favor of Elizabeth Brooke and Mary Chiswell Nelson, had been expressed in the form of a limitation, it would have been valid. But it is contended that it is expressed in the form of a condition, which being in general restraint of marriage, is therefore void. We have already said, that in the construction of wills we look at substance, rather than mere form

of words, to ascertain the intention of 586 the testator, and then give effect to it if it be legal; and that, applying that rule, there can be no doubt as to the intention of the testatrix in this case. But, in fact, what is called a condition in this case is a conditional limitation—4 Kent's Com. 127; 1 Lom. Dig. top p. 341—and so comes within the literal terms of the rule of which the existence seems to be admitted on all sides, and according to which the trust in favor of Mrs. Brooke and Mrs. Nelson would be valid. 1 Roper, supra. A limitation over in the event of the marriage of the first taker is always an important, if not a conclusive, circumstance to show that a condition in terrorem, and in restraint of marriage, is not intended. 1 Lom. Dig. top p. 341. How much more strongly is that shown in this case, in which there is not a mere limitation over, but a careful trust is created in favor of the parties to whom the limitation is made.

But it is contended that the testatrix did not intend what her words express, and that words which would have expressed a different, and her real intention, were accidentally omitted by her. The obvious answer to this view is, that even if the fact were so, yet as the words of the will have a plain meaning, and especially as they express a reasonable intention, we must construe them accordingly, and cannot, upon mere conjecture, give to them a different meaning and effect. It is impossible for us to say that she did not mean what she says. And if she did so mean, how could she have

expressed her meaning in plainer language?

Upon the whole, we are of opinion that there is no error in the decree of the circuit court, and that it ought to be affirmed.

Decree affirmed.

587 *Johnston & als. v. Gill & als.

June Term, 1876, Wytheville.

Fraudulent Conveyances—Husband to Trustee for Wife.—Husband and wife agree in consideration that the husband convey a house and lot to a trustee for her and her children. she will unite in the conveyance of his other real estate when he shall sell it; and this she does. **Held:**

1. **Same—Consideration—Dower Interest.**—To the extent of her dower interest in the husband's real estate, the husband's conveyance to the trustee is on valuable consideration, and to that extent the wife is entitled to satisfaction out of the proceeds of the sale of the house and lot, as against creditors of the husband, for debts contracted at the time of the deed.

2. **Same—Same—Same—Liability of Property for Husband's Debts.**—For debts contracted before the execution of the deed, the proceeds of the sale of the house and lot, above the value of the wife's dower interest in the husband's real estate in the conveyance of which she joined, are liable; but not to debts contracted after the conveyance by the husband to the trustee. Code of 1860, ch. 118, § 2.

3. **Parol Evidence.**—The agreement between the husband and wife may be proved by parol evidence.

I. **Limitations—"Stay Law."**—The § 7 of the act of March 3d, 1866, known as the stay law, suspended the statute of limitations as to suits to set aside fraudulent conveyances.

II. **Same—Same.**—A deed is made in January 1869, and a bill is filed in January 1871 by creditors of the grantor to set aside the deed, on the ground that it was fraudulent as to them. The several acts of the *de facto* government of Virginia passed during the war, suspending the statutes of limitation, were valid to prevent the running of these statutes; and therefore the suit by the creditors was not barred by the statute on the 3d of March 1866, when the 7th section of the stay law of March 3d, 1866, was passed.

588 *IV. Decrees and Reports of Commissioners as Evidence.—In a suit by legatees against the executor for an account of his administration, there are several reports by a commissioner, and at length a decree against the executor for a large

***Fraudulent Conveyances—From Husband to Wife—Liability of Property for Husband's Debts.**—The principal case is cited in the following: Gentry v. Allen, 2 Gratt. 258; Irvine v. Greever, 32 Gratt. 418; Boynton v. McNeal, 31 Gratt. 464. See also, 2 Min. Inst. (4th ed.) 687 *et seq.*; Barton's Ch. Pr. (2d Ed.) p. 554; Va. Code, § 2450; Witz v. Osburn, 83 Va. 227, 2 S. E. Rep. 3; Lewis v. Mason, 84 Va. 731, 10 S. E. Rep. 529; McCue v. Harris, 86 Va. 687, 10 S. E. Rep. 981; DeFarges v. Tyland, 87 Va. 404, 12 S. E. Rep. 806, 1 Min. Inst. (4th ed.) 522.

†**Limitations—"Stay Law."**—See note to Danville Bank v. Waddill, 27 Gratt. 448, where principal case is cited.

amount. In a suit by these legatees against the executor and his grantees, in a deed executed after his qualification, to set aside the deed on the ground of fraud, the decree against the executor, and the report on which it was founded, are *prima facie* evidence against said grantees of the indebtedness of the executor; but are liable to be surcharged and falsified by them.

This case was heard in Richmond, and was decided at the term of the court at Wytheville. It was a suit in equity in the chancery court of the city of Richmond, brought in January 1871, by J. W. Gill and Louisa, his wife, James S. Scott and Virginia, his wife, and James Lyons, their trustee, claiming to be creditors of Peyton Johnston by decree, against said Peyton Johnston and Ann M., his wife, and their children and trustee, to set aside a conveyance made by Peyton Johnston, by which he conveyed to Andrew Johnston, a house and lot in the city of Richmond, in trust, for the separate use of Mrs. Johnston for her life, remainder to the children. This deed bore date the 8th of January 1859, and was duly recorded on the 31st of the same month. The material facts of the case are as follows:

In July 1846, Peyton Johnston qualified in the county court of Spotsylvania, as the executor of James McIlroe, deceased. He seems to have settled his accounts before the court of probate for some years; but the two daughters of McIlroe having married James S. Scott and J. W. Gill, they instituted their suit in equity in the circuit court of Richmond against the executor, to have an account of his administration. There were several reports made in this cause; from which it appeared that in January 1859, when he conveyed the house and 589 lot aforesaid, he was *indebted to the estate, and in January 1870 a decree was made against him for \$20,791.11.

When Peyton Johnston made the deed in question he owned other real estate in the city of Richmond and a tract of land near Richmond in the county of Henrico, he was carrying on an apothecary store in the city, and his circumstances seem to have been flourishing until the great fire in Richmond in April 1865, when his store and all his books, papers and notes due him were burned. Since that time he has probably been insolvent, and he has taken the benefit of the bankrupt act.

The conveyance in trust for Mrs. Johnston and her children was not, on consideration, purely voluntary. Though there was nothing in writing to show the agreement, it was clearly proved by parol testimony, that it was expressly agreed between Peyton Johnston and Mrs. Johnston, that in consideration of the conveyance of the house and lot, upon trust for the benefit of herself and her children, she would join in the conveyance of his other real estate; and that she had carried out the agreement on her part. But it also appeared that the house and lot was much more valuable than her

contingent dower interest in his other real estate.

In their defence in this case, the defendants pleaded that the statute of limitations was a bar to this suit; and Mrs. Johnston and her children and the trustee insisted that they, not having been parties to the suit against the executor, the decree in that case was not evidence against them; and they all insisted that the decree was for a much larger amount than was justly due from the executor.

The cause came on to be heard on the 17th of October 1872, when the court held, First. That the statute of limitations was no bar to the suit. Second. That the deed of January 8th, 1859, was not wholly a voluntary conveyance; that the relinquishment of dower by the wife was a consideration deemed valuable in law; and to the extent of the value of the interest relinquished, the settlement must be supported against the claims of all creditors, whether their debts were contracted before the making of the deed or not. Third. That beyond the value of the interest relinquished by the wife, the said deed was void as to the claims of all creditors whose debts were contracted at the time the deed was made. Fourth. That the said settlement was valid, and must be supported against the claims of all creditors whose debts were contracted after the deed was made. And fifth. That inasmuch as the trustee, and Mrs. Ann M. Johnston and her children were not parties to the suit of Scott &c. v. McKildoe's ex'or, in which the decree sought to be set up in this cause was rendered, neither that decree nor the account of the commissioner upon which it was based, was conclusive against them. It was therefore referred to one of the commissioners of the court to ascertain and report: First. In what property the wife relinquished her right of dower under the agreement in the proceedings mentioned, and the value of the interest so relinquished. Second. Whether the claim of the plaintiffs, in the bill and proceeding mentioned, was for a debt contracted in whole or in part at the time when the said deed of January 1859 was made; and if only a part thereof was then contracted, how much was so contracted. And in ascertaining such amount, the said trustee and the beneficiaries under the said deed should be at liberty to surcharge and falsify the decree against the executor and the account of the commissioner upon which it is based, and to

591 *make any lawful defense against the same, which they may be advised their rights and interests in the premises may require. And the commissioner was directed to report any other matters, &c.

In November 1872 the defendants presented a petition for a rehearing in the case, upon the question of the application of the statute of limitations; but by a decree made on the 6th of February 1873, the petition for a rehearing was overruled; and the commissioner was directed to proceed to execute the decree of October 17th,

1862. And thereupon Peyton Johnston and Ann M. his wife, applied to this court for an appeal; which was allowed.

Johnson, Williams, and Boulware and Steger, for the appellant.

Lyon & Stern and Guy & Gilliam, for the appellee.

Staples, J., delivered the opinion of the court.

It is conceded that the settlement made by Peyton Johnston upon his family, to the extent of the dower interest relinquished by Mrs. Johnston, is valid, and cannot be disturbed.

It is not denied that that settlement was considerably in excess of such dower interest; and the question is, whether it is to be permitted to stand as to such excess against the claims of the then existing creditors of the grantor. The deed as to such excess being voluntary, the ground upon which it is sought to sustain it is, that Peyton Johnston was at the time in prosperous and unembarrassed circumstances; and the provision made for his family was a reasonable one according to his state and condition in life, leaving property amply sufficient 592 for the payment of all his debts, and this property would have been available for all the demands of creditors but for the great fire of 1865 in the city of Richmond.

At this day it is unnecessary to consider the question, so long and so ably discussed by former judges of this court, how far a voluntary conveyance without actual fraud is valid against the claims of existing creditors. That question, it is believed, was finally put at rest by the provision incorporated in the revision of 1849-'50; which declares that every gift, conveyance, &c., which is not upon consideration deemed valuable in law, shall be void as to creditors whose debts shall have been contracted at the time it was made. See section 2, chapter 118, page 565, Code of 1860. This provision excludes all inquiry into the motives and circumstances of the grantor; it adopts the views of Judge Stanard in *Hutchinson v. Kelly*, 1 Rob. R. 123, and of Chancellor Kent in *Reade v. Livingston*, 3 John. Ch. R. 481, 500, that if the grantor be indebted at the time of the voluntary settlement, it is presumed to be fraudulent in respect to such debts; and no circumstances will permit those debts to be affected by the settlement, or repel the legal presumption of fraud. The effect of the statute is to disable the debtor from making any voluntary settlement of his estate to stand in the way of his creditors whose debts were contracted at the time. The mischief and inconvenience so much apprehended from the adoption of this rule, even if well-founded, will be to a considerable extent avoided by the statute requiring the creditor to institute proceedings within five years from the date of the conveyance. See section 13, chapter 149, page 639, Code of 1860.

And this leads us to the consideration of the second ground of error relied upon by
 593 the appellant. It is that "the present suit was not brought until the year 1871; whereas the deed was executed in 1859. It is insisted that the act of March 3d, 1866, suspending the operation of the statutes of limitation, does not apply to suits against fraudulent donors or their purchasers; but such cases are expressly excepted from the operation of the act in question; that the creditor being free to recover judgment and sue out execution, he was not within the purview and spirit of the suspending statutes.

It is very true that the act of March 3rd, 1866, does in no manner interfere with the rights of creditors against fraudulent donors and purchasers; and it would seem, therefore, but reasonable that the creditor should be held to the exercise of the statutory diligence in instituting proceedings to vacate the deed. But a little reflection is sufficient to show it could not have been the design of the legislature in the enactment of the statutes to suspend the statute of limitations in one class of cases, and leave it in full force as to others equally meritorious. It was very justly provided by these laws that in certain excepted cases the creditor should not be delayed in the collection of his money. These exceptions are enumerated in the second clause of the first section of the act already mentioned. In these cases the creditor was permitted to bring suit and prosecute it to judgment and execution; but it was not incumbent upon him to do so. This remedy was given him as a privilege—a matter of indulgence—and not imposed as a necessity or duty, to be postponed at the peril of being barred by limitation.

The preamble to the act of March 3rd 1866, in enumerating the reasons for the enactment of the stay law, recites that in
 594 consequence of the destruction of "the currency, and of all kinds of personal property, stocks and securities, the people were left with but little beside their lands, which, for the want of efficient labor, could not be successfully cultivated in many parts of the country; and in this condition of things forced sales of property would result only in ruinous sacrifice and loss both to creditor and debtor; thus adding to the embarrassment and afflictions under which the country was suffering. Now these considerations were equally applicable to all classes of creditors; to those belonging to the excepted class, as well as to those who did not. And while the fraudulent debtor, or his alienee might not be entitled to any consideration, there was no reason for forcing the creditor to sue if he preferred to wait for the dawn of a more auspicious period. The country was in a condition extremely unfavorable to deliberate investigation; the public mind unsettled and harassed with grievous apprehensions of the future; the courts disorganized, and with the exception of a brief period, under control of the military authorities, and in many instances filled with incumbents unknown

to the people, and unacquainted with our laws and institutions. Surely the legislature under such circumstances, could hardly have intended to give the fraudulent debtor the benefit of the statutes of limitation, if the creditor delayed his action, and at the same time deny it to the honest debtor. The object was not to encourage but to discourage litigation; to preserve the remedy alike to all who were not inclined, or those unable then to embark in litigation; and therefore it was, the comprehensive language of the 7th section, was adopted. "The period during which this act shall remain in force shall be excluded from the computation of the time within which, by operation of any statute or rule of
 595 "law, it may be necessary to preserve the loss of any right or remedy." The legislature could scarcely have used terms more comprehensive. If they do not embrace the case in hand it will be by depriving the words of their plain and natural signification. The language is too positive and unambiguous to be disregarded by the courts.

The learned counsel for the appellants have, however, raised the question of the constitutionality of the various acts suspending the operation of the statutes of limitation. It is very clear that when the bar of the statute has once attached, the legislature cannot remove the bar by retrospective legislation. It is equally clear that until the bar is complete it is competent for the legislature to extend the period for the institution of actions even as applied to rights already accrued. The various suspending acts adopted during the war were passed by a de facto government, and their validity was affirmed by the legislature which assembled after the termination of the war. At the time of the passage of the act of March 3rd, 1866, the plaintiffs' right of action consequently was not barred by any statute then in force. It was therefore entirely competent for the legislature to extend the period within which the complainants might bring their suit. This doctrine has repeatedly received the sanction of this court, and is now placed beyond the reach of controversy. I think, therefore, the chancery court of Richmond was entirely correct in holding that the claim of the plaintiffs was not barred by limitation.

The remaining ground relied upon by the appellant is, that the chancery court erred in receiving as evidence in this case, the record of the suit of Scott v. McKildoe's executor to which the appellants were not parties. That suit was instituted by
 596 the plaintiffs in "this, against Peyton Johnston, the grantor, to obtain a settlement of his accounts as executor of McKildoe's estate. After a protracted and expensive litigation conducted through a long series of years, every step in the cause being strongly contested, the plaintiffs obtained a decree for a large amount against Peyton Johnston. An appeal was taken to this court, and the decree of the chancery court was reversed in part, and affirmed in

part, but still leaving due the plaintiffs a large balance recognized and affirmed by the decree of this court.

The various accounts, settlements, orders and decrees, taken in that case, show that the executor was liable to the complainants for a large amount of money at the time of the execution of the deed, in the year 1859. The record of these proceedings was admitted by the chancellor as prima facie evidence of such liability. The correctness of this decision would seem to be too clear for argument. When the creditor has established his debt by record against the debtor, such record must, in the absence of all fraud or collusion, be regarded at least as prima facie evidence of the existence and validity of the debt in every controversy in which the debt may be the subject of investigation. This rule is universally acted on in suits involving the rights and priorities of conflicting creditors to the estate of the common debtor. In such cases the judgment or decree is often not only the best, but the sole evidence of the debt. When legatees or distributees have sued the personal representative for an account of assets, when settlements have been made under the supervision of the court, its commissioners and the parties, when every claim or demand asserted on either side has been the subject of earnest investigation, it is difficult to conceive of any proof

597 more satisfactory *than that furnished by the proceedings and decree in favor of the complainants. Fortunately, we are not without express authority upon this subject. In *Hinde's lessee v. Longworth*, 11 Wheat. R. 199, a similar question was before the supreme court of the United States. Mr. Justice Thompson, in delivering the opinion of the court, said: "It was certainly competent for the defendant to show that the grantor was indebted at the time he made the conveyance; this was a necessary step towards establishing the fraud; and if these judgments conduced to prove the fact, they could not be shut out as incompetent evidence. If the evidence ought to have been excluded because Doyle (the grantee) was not a party to the judgments, the same objection would have lain against the proof of his being in debt to others in any manner whatever. That would have been equally an inquiry into matters to which the grantee in the deed was not a party. The judgments appear to have been entered some short time after the date of the deed; and it is said that a voluntary deed is void only as to antecedent and not subsequent creditors, unless made with a fraudulent intent. But copies of the accounts upon which the judgments were founded are spread upon the record; by which it appears that the cause of action arose before the date of the deed. * * * They may be looked to for the purpose of showing that Doyle (the grantor) was in debt at the date of the deed; but whether to an extent which would avoid the deed, must depend on circumstances which are not to be enquired into by this court. There

was no error, therefore, in the admission of the evidence." The case of *McLaughlin v. Bank of Potomac*, 7 How. U. S. R. 220, is to the same effect. See also *Birely's ex'ors v. Staley*, 5 Gill & John. 433; *Alston v. Munford*, 1 Brock. R. 279; 2 Rand. 398.

These decisions render any further discussion of the question wholly unnecessary. They conclusively vindicate the decision of the learned judge of the chancery court upon this branch of the case.

Upon the whole my opinion is, that the decree is correct in every respect, and should be affirmed.

Decree affirmed.

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*Porter v. Porter.

June Term, 1876. Wytheville.

Divorce—Husband's Right to Wife's Land.—E is possessed of an estate in fee in a tract of land, and marries P; and they have two children born of the marriage. Upon a bill by P, the marriage is dissolved for the adultery and desertion of E; but the decree directs nothing as to the property of the parties. Upon the dissolution of the marriage all the husband's claims to the wife's lands which depended on the marriage were extinguished, and she is entitled to the possession of the land.

This was an action of unlawful detainer in the circuit court of the county of Russell, brought in January 1874 by William D. Porter against Elizabeth E. Porter. On the trial the parties agreed the facts, dispensed with a jury, and submitted the whole matter of law and fact to the court. The agreed facts were as follows:

That Elizabeth E. Porter owned in fee simple the land in controversy, which she has never by deed conveyed away. That while she thus owned the land she intermarried with William D. Porter, who, as her husband, took and held possession thereof. That during coverture she had two children, issue of the said marriage, born alive. That the said E. E. Porter abandoned her said husband, eloped with an adulterer, and was guilty of adultery; that the said William D. Porter sued for a divorce in the circuit court of Scott county, which was the county of his residence and the county in which he had lived with the said E. E. Porter last before her elopement; that said bill charged *adultery, and also desertion for five years, on the wife's part, as grounds of a divorce; and the said court, at the November term thereof, 1873, rendered a decree in the said

*Divorce—Husband's Right to Wife's Land.—For the rule, that, upon the dissolution of the marriage relation, the husband's rights to his wife's property become extinguished, see *Cleek v. McGuffin*, 39 Va. 329, 15 S. E. Rep. 896; *Osburn v. Throckmorton*, 30 Va. 316, 18 S. E. Rep. 285; *Cralle v. Cralle*, 79 Va. 186; *Moss v. Friedenwald*, 77 Va. 62; *Harris v. Harris*, 31 Grant 38, all citing the principal case. 1 Min. Inst. (4th Ed.) 302; 2 Min. Inst. (4th Ed.) 118.

suit, in the words and figures following, to-wit:

"This cause came on to be heard on the bill and evidence in the cause; and it appearing that the order of publication has been duly posted and published, it is decreed and ordered that the plaintiff be divorced from the defendant, and the bonds of matrimony as to him between them is forever dissolved, and that the plaintiff recover of the defendant his costs; and the cause is stricken from the docket." And it is further agreed that William D. Porter, after the divorce, did not live on the land, but claimed the possession, cultivated and controlled it until the defendant, E. E. Porter, in the winter of 1873, entered peaceably into the possession of said land, but without the consent and against the will of the said W. D. Porter, and was withholding from him the possession thereof at the time the writ issued.

The court rendered a judgment for the defendant; and thereupon William D. Porter applied to this court for a writ of error and supersedeas; which was awarded.

Burns, for the appellant.

C. F. Trigg and Morrison, for the appellee.

Anderson, J., delivered the opinion of the court.

At common law a divorce a vinculo matrimonii, could only be granted for causes existing before the marriage. By the Virginia statute, the circuit courts have jurisdiction of suits for annulling or
601 affirming marriages, *or for granting divorces; and they are authorized to decree a divorce from the bond of matrimony for certain causes therein specified, some of which are such as exist prior to the marriage, and others are such as arise subsequent thereto; and upon decreeing the dissolution of marriage, or a divorce, whether from the bond of matrimony, or from bed and board, the court is authorized to make such further decree, as it shall deem expedient, concerning the estate or maintenance of the parties, or either of them, and the care, custody, and maintenance of their minor children, and may determine with which of the parents the children, or any of them, may remain, &c. Code of 1860, chap. 109, p. 529.

In this case the decree of divorce simply dissolves the bonds of matrimony and nothing more. It makes no provision concerning the estate, or the maintenance of the parties or either of them. Their respective rights of property are undisturbed, except only so far as they may be affected by the dissolution of the marriage. It is more accurate to say that the rights of property of the husband and wife are to be found, where the dissolution of the marriage leaves them, than to say that they remain, where the law of the marriage placed them.

This is true as to the wife's personal property. For it is well settled, that upon

the dissolution of the marriage by a decree of divorce which does not otherwise direct, the wife's choses in action, which had not been previously reduced to possession by the husband, or specifically assigned by him, revert immediately to her. But her choses in action, and her personal chattels, which had been reduced to possession by the husband prior to the divorce, had become

absolutely vested in him as his prop-
602 erty, and could not be divested *by the divorce. Why may it not be true also as to the wife's real estate? Mr. Bishop says, "All transfers of property which were actually executed, either in law or fact, abide; for example, the personal estate of the wife, reduced to possession by the husband, remains his after the divorce the same as before. But this divorce puts an end to all rights depending on the marriage, and not actually vested, as dower in the wife, curtesy in the husband, and his right to reduce to possession her choses in action." 2 Bishop on Mar. & Div. § 705.

If the husband retains an interest in the wife's real estate after the divorce, it must be either as tenant by the marital right or tenant by the curtesy.

Although the tenancy by the curtesy is ordinarily, to appearance, a mere prolongation of the tenancy by the marital right, enabling the husband to hold for his own life what otherwise would terminate with the life of the wife, yet the tenancy by the marital right attaches to some estates to which the tenancy by the curtesy cannot attach, though there should be issue of the marriage, as, for example, estates for life—even estates pur autre vie. And to other estates it cannot attach, in which there may be curtesy, as, for example, estates held for the separate use of the wife. In such estates, under some circumstances, there may be curtesy; but it is of their very essence not to be subject to the marital right.

It is the general doctrine, that marriage alone, without the birth of issue, casts upon the husband an estate in all the wife's real property in possession, whether of inheritance or of freehold for life, during the joint lives of husband and wife. The death of the husband, or of the wife, ends this estate. (1 Bishop on the Law of Mar.

603 Women, § 529.) It is a freehold *estate in the husband, since it must continue during their joint lives, and may by possibility last during his life, if his wife survives him. (2 Kent's Com. side p. 130.) By the intermarriage the husband acquires a freehold interest during the joint lives of himself and wife in all such freehold property of inheritance as she was seized of at the time of marriage; and a like interest vests in him in such as she may become seized of during the coverture. The seisin acquired by the husband is a joint seisin with the wife in right of the wife. This interest of the husband, which is a tenancy by the martial right, may be defeated by the act of the wife alone. For, if at common law the wife is attainted of felony, the lord

by escheat could enter and eject the husband. 4 Hawk. P. C. 78; Co. Litt. 40 a; Vin. Abr. Curtesy A. In Co. Litt. 351 a, Lord Coke says: "It appeareth here by Littleton, that if a man taketh to wife a woman seized in fee, he gaineth by the intermarriage an estate of freehold in her right, which estate is sufficient to work a remitter; and yet the estate which the husband gaineth dependeth on uncertainty and consisteth in privacy; for, if the wife be attainted of felony, the lord by escheat shall enter and put out the husband." "Also, if the husband be attainted of felony (he says,) the king gaineth no freehold, but a pernanity of the profits during the coverture; and the freehold remaineth in the wife. The claim to the rents and profits during the coverture was all the husband was entitled to in his own right, though in right of his wife he was jointly seized with her of the freehold, unless, by the birth of a child, he became tenant for life by the curtesy." 2 Bl. Com. 433.

If the foregoing principles are sound, which are well supported by high authority, it is clear that the husband's tenancy by the marital right is dependent upon and derives its support from the marriage relation, and ceases immediately upon its dissolution. It really vests no right to the realty in the husband as his own, and divests no right from the wife in the realty. The husband acquires in his own right only the pernanity of the rents and profits during the coverture. And immediately upon the dissolution of the marriage by decree of divorce, his tenancy by the marital right, which he holds in jure uxoris, ceases, and the freehold remaineth to the wife.

After the birth of issue, the husband is entitled to an estate for his own life, and in his own right, as tenant by the curtesy initiate. Co. Litt. 351 a, 30 a, 124 b; Schermerhorn v. Miller, 2 Cowen R. 439. He then becomes sole tenant to the lord, and is alone entitled to do homage for the land, and to receive homage from the tenant of it, which, until issue born, must be done by husband and wife. 2 Bl. Com. 126; Litt., § 90; Co. Litt. 67 a, 30 a. Then he may forfeit his estate for life by committing a felony, which, until issue born, he could not do, because the wife was the tenant. 2 Bl. Com. 126; Roper Hus. & Wife 47. And, after issue born, the husband's estate will not be defeated by the attainder of the wife; for the tenancy continues, he being sole tenant. 1 Hale P. C. 359; Co. Litt. 351 a, 40 a; Bro. Abr. Forf. 78. Does it follow that it will not be defeated by a divorce, which dissolves the marriage? That is the important question in this case, because there is issue of the marriage, whereby the plaintiff in error became tenant by the curtesy of his wife's lands, of which she now holds possession, and from which to eject her he brought this suit. We have seen that he could not hold it as tenant by the marital right. But having by the
805 birth *of issue become tenant by the

curtesy initiate, according to the authorities cited, he thereafter held by a different tenure. He no longer held it by a joint seisin with the wife in her right; but, by the birth of issue, he became the sole tenant, and held in his own right, as tenant by the curtesy initiate. The foregoing declaration of doctrines and citation of authorities may, for the most part, be found in Ewell's Lead. Cas., title Coverture, p. 485-6; and without affirming or disaffirming the law as declared by them, with regard to the rights acquired by the husband by the birth of issue, it may be conceded so far as it may affect the decision of this cause.

To constitute a tenancy by the curtesy, there are four requisites, the last of which is the death of the wife. The tenancy of the husband by the curtesy is initiate upon the birth of issue. It is consummate on the death of the wife. The attainder of the wife cannot prevent its consummation. Notwithstanding her attainder, at her death, the husband living, it will be consummate. Therefore the attainder of the wife cannot defeat it. But the divorce which breaks the bonds of matrimony perpetually dissolves the marital relation between them, so that the man ceases forever to be the husband and the woman to be the wife, must necessarily defeat its consummation. It can never be consummate by the death of the wife. As is said by Mr. Bishop: "Upon the birth of living issue, capable of taking her estate of inheritance by heirship, he (the husband) becomes tenant by the curtesy initiate of it; but the death of the wife is necessary to make such tenancy consummate, and there can be no death of the wife if the woman ceases to be a wife before her death." 2 Bishop on Mar. & Divorce, § 712. The attainder of the wife could not overturn the foundation upon which
806 *the tenancy rested, the marriage; or prevent its consummation by rendering the fourth requisite impossible. The divorce does both. It removes or destroys the foundation on which the tenancy rested, and without which it could not have existed at all; and it makes it impossible that it can ever be completed or consummated.

The question as to the relative merit or demerit of the parties can have no bearing upon the decision of this cause. It might have had a very important influence in the decision of questions relating to the estate and maintenance of the parties in the divorce case, if the court had undertaken in that cause, as authorized by the statute, to decree concerning them. But in a possessory action to eject the defendant from the possession of her freehold of inheritance, with which she was invested before the marriage, the case must turn upon questions involving the rights of property and possession. The plaintiff must recover upon the strength of his title or right of possession. It is only a question of property, and the plaintiff cannot avert the legal effect of a divorce upon his marital rights of property by showing that the divorce was de-

creed in his favor for the fault of his wife. Unless there was some rule of law for settling the rights of parties, according to their relative merit or demerit in the divorce suit, it is not perceived how that could have any legitimate influence upon the decision of this cause. The court is not aware of any such rule of law. Nor can it be perceived how such a rule could be framed or prescribed that would comport with justice, and be promotive of the public virtue.

The policy of the law is not to oppress the frail and erring, or to drive them to hopelessness and despair. It is rather to reclaim the weak and erring, and to invite
607 *and allure them back to the paths of virtue when they have in an evil hour departed from them. It would be impracticable, perhaps, to prescribe any general and inflexible rule that would not operate very often injuriously. It would not do to provide that the property of the party in fault, or such a proportion of it, should be taken from him or her and given to the other. Nor would it be right to prescribe an inflexible rule against the wife, to divest her of her property, and give it to her husband, when she was found to be in fault. Such legislation would not comport with a just, wise, or humane policy. The legislature, in its wisdom, has made a more judicious disposition of this subject, in vesting the divorce courts with power to make such decree concerning the estate and maintenance of the parties as the circumstances of each case may make expedient and proper. When the court fails to make such decree, as in this case, then the parties must, as to the property, stand upon their legal rights, as they may be affected by the dissolution of the marriage.

Upon the whole, the court is of opinion, that upon the dissolution of the marriage all the husband's claims to the wife's lands which depended on the marriage were extinguished, and she was entitled to be restored to them; and that there is no error in the decree of the circuit court, and that it be affirmed.

Judgment affirmed.

608 *Board of Supervisors of Washington Co. v. Dunn & als.

June Term, 1876, Wytheville.

1. Notices—To Sheriff by Supervisors.—A notice by the supervisors of a county to D, late sheriff and his sureties, that they will move the county court at its November term, to render judgment against them for the sum of \$4,840.08, the same being the amount of said D's deficiency, and default for county levies for the year 1869, that went into D's hands as sheriff as aforesaid, and which he had failed to account for, &c., is sufficiently specific and definite to warrant a judgment thereon.

2. Same—How Viewed.—The rule governing notices is, that they are presumed to be the acts of parties,

***Notices—How Viewed.**—In *Union C. L. Ins. Co. v. Polard*, 94 Va. 153, 26 S. E. Rep. 421, the court cited the

and not of lawyers. They are viewed with great indulgence by the courts, and if the terms of the notice be general, the court will construe it favorably, and will apply it according to the truth of the case, as far as the notice will admit of such application. If it be such that the defendant cannot mistake the object of the motion, it will be sufficient.

3. Same—Sheriff and Sureties—Official Bond.—Upon a notice to a sheriff and his sureties of a motion against them for his failure to account for taxes, they appear and ask for a rule upon the attorney for the commonwealth to show cause why the record of the bond of the sheriff should not be amended, corrected or vacated; and several of the sureties file affidavits, in which each states the grounds on which he relies, to show he is not bound by the bond. One says he signed on condition that other persons should sign. Another says he signed the bond, but never acknowledged or delivered it, and after signing he determined not to acknowledge it. Another says he acknowledged it in court, on condition that all the parties who signed would acknowledge it. In fact, the defendants had either acknowledged the bond before a justice; and none of these conditions appeared on the record or bond, or were made known to the court. These affidavits present no ground for the release of the parties or for the rule.

4. Same—Same—Same—Proof of Execution.—It is not necessary that the sureties of a sheriff in his official bond should acknowledge the same in court. The bond may be acknowledged by
609 *them in court, or its execution out of court may be proved by witnesses. And there is no statute or rule of law requiring such proof to be adduced at the time the bond is received by the court. With or without such proof, the parties who had actually signed would be bound by the deed.

5. Bonds—Signed, Sealed and Delivered.—A person who signs, seals, and delivers an instrument as his deed, will never be heard to question its validity, upon the ground that it was not acknowledged by him, nor proved at the time of the delivery. It is the sealing and delivery that gives efficacy to the deed; not proof of its execution. And this principle applies to all bonds, whether executed by public officers or private persons, unless there is a statute making the acknowledgment, or proof in court essential to the validity of the instrument.

principal case for the following proposition: "The rule governing notices is that they are presumed to be the act of the parties, and not of lawyers, and are viewed with great indulgence by the courts. If the notice be such that the defendant cannot mistake its object, it will be sufficient." See also, *Blanton v. Com.*, 91 Va. 11, 20 S. E. Rep. 884, citing the principal case; *Monteith v. Com.*, 15 Gratt. 172; *Drew v. Anderson*, 1 Call 51; *Graves v. Webb*, 1 Call 448; *Segouline v. Auditor*, 4 Munf. 398; *Lemoigne v. Montgomery*, 5 Call 528; *Booth v. Kinsey*, 8 Gratt. 560; *Hendricks v. Shoemaker*, 3 Gratt. 197; *White v. Sydenstricker*, 6 W. Va. 46; *Board v. Parsons*, 22 W. Va. 311, citing the principal case; *Shepherd v. Brown*, 30 W. Va. 19, 3 S. E. Rep. 190, citing the principal case; *County Ct. v. Miller*, 34 W. Va. 791, 12 S. E. Rep. 1078.

***Bonds—Signed, Sealed and Delivered—Effect.**—In *State v. Proudfoot*, 38 W. Va. 745, 18 S. E. Rep. 952, the court quoted and followed the rule on this subject laid down in the principal case.

6. *Same*—Evidence of Execution.—In an action on an official bond, if there is no record evidence, the execution of it may be established by the testimony of attesting witnesses, or if there be none, by proof of hand writing, or by discovery from the adverse party.

7. *Same*—Motions on—Pleas.*—On a notice of a motion against a sheriff and his sureties on his official bond, the pleas of "*non damnificatus*" and "*nil debet*" are not proper pleas.

8. *Same*—Parties' Names Not in Body of Instrument.—The fact that the names of two of the parties who executed and acknowledged the bond, were not in the body of it, does not invalidate it as to them.

9. *Motion against Sheriff*—Evidence of Indebtedness.†—On a motion against a sheriff and his sureties for the county levies he had failed to account for, the report of the clerk, who had been directed by an order of the county court to settle the sheriff's account, though made with the sheriff without notice to the sureties, is competent evidence against them to show the amount for which the sheriff is indebted. If they had notice, as the statute provides, the report would be conclusive upon them; without notice, it is *prima facie* evidence of the amount of the sheriff's indebtedness.

In October 1872 the board of supervisors of Washington county gave a notice to Wm. A. Dunn, late sheriff of said county, and fourteen other persons, as his sureties in his official bond as sheriff, that at the November term of the county court of Washington county, a motion would be made to said court to render judgment against them in favor of said board of supervisors for the sum of \$4,840.03, the same being the amount of said Wm. A. Dunn's deficiency and default for county levies for the year 1869 that went into said Dunn's hands as sheriff as aforesaid, and which he failed to account for, or pay over as the law requires, with legal interest on said sum from May 1st, 1870, and such damages, &c.

When the case was called the defendants moved the court to quash the said notice on account of insufficiency and illegality. But the court overruled the motion; and the defendants excepted. This is the first exception.

The defendants moved the court for a rule upon the commonwealth's attorney requir-

The principal case is also cited in *Wheeling v. Black*, 25 W. Va. 281, and in *Wright v. Smith*, 81 Va. 782.

*Pleas to Motions against Parties on Bonds.—See the following cases citing the principal case with approval: *Bunch v. Fluvanna Co.*, 86 Va. 454, 10 S. E. Rep. 532; *Hall v. Ratliff*, 93 Va. 328, 24 S. E. Rep. 1011; *Poling v. Maddox*, 41 W. Va. 784, 24 S. E. Rep. 1001. Further, see *State v. Hays*, 30 W. Va. 107, 3 S. E. Rep. 177; *Archer v. Archer*, 8 Gratt. 589.

†Motion against Sheriff—Evidence of Indebtedness.—In *Carr v. Meade*, 77 Va. 160, the principal case is cited, and also, *Munford v. Overseers*, 2 Rand. 313; *Jacobs v. Hill*, 2 Leigh 393; *Cox v. Thomas*, 9 Gratt. 323; *Crawford v. Turk*, 24 Gratt. 176. These cases sustain the rule that the record of a chancery suit is properly evidence *prima facie* against sureties, although they are not parties thereto.

ing him to show cause why the record in this court in regard to the bond of Wm. A. Dunn, late sheriff of this county, should not be corrected, amended or vacated, and asked leave to read certain affidavits in support of said motion; to the reading of which the plaintiff objected, which objection the court overruled; and then overruled the motion, and refused to grant the rule; and the defendants again excepted. The substance of these affidavits are sufficiently stated by Judge Staples in his opinion. This is the second exception.

The defendants then craved oyer of the record in reference to the execution of the bond of Wm. A. Dunn and his qualification as sheriff, and demurred to it; but the court overruled the demurrer. They then tendered the pleas of *nil debet*, payment, *non damnificatus* and conditions performed; and, on objection by the plaintiffs the court excluded the pleas of *nil debet* and *non damnificatus*; and the defendants again excepted. This is the third exception.

Robert P. Pippin, and Joseph Pippin, two of the defendants, filed their several pleas of *nul tiel record*, and insisted there was no record binding them. These pleas were objected to by the plaintiffs, but were admitted by the court; and the court proceeding to try the issue on the pleas, rendered judgment for the plaintiffs; and these defendants again excepted. This is the fourth exception.

On the calling of the cause, it was agreed by the parties to dispense with a jury, and submit the whole matter of law and fact to the court. And to maintain the issue on their part, the plaintiffs offered in evidence a report of commissioner Baugh, the clerk of the county court, before whom, by an order made at its March term 1870, the county court had directed William A. Dunn, late sheriff, &c., to settle his account with the clerk of the court, as provided by law. This report showed a balance due from said Dunn for taxes of \$4,840.03, upon which he might be entitled to a credit for the proceeds of tax tickets turned over to his successor. To this evidence the defendants objected—1st, because the report was illegal; and 2d, because the sureties were not summoned, or in any way parties to the settlement on which the report was made. But the court overruled the objection, and admitted the evidence; and the defendants again excepted. This is the fifth exception.

When the evidence was introduced, the court rendered a judgment against the defendants for \$4,840.03, with interest from the 1st of May 1870 till paid, subject to the credits of \$1,138.32, and \$1,077.60, as of that date; but refused to allow damages. From this judgment the defendants obtained a supersedeas to the circuit court; and in that court the judgment of the county court was reversed, and a judgment was rendered in favor of the defendants. And thereupon the plaintiffs applied to a judge of this court for a writ of error and supersedeas; which was awarded.

612 *J. L. White and J. A. Buchanan, for the appellants.

Baxter and York, for the appellees.

Staples, J., delivered the opinion of the court.

The board of supervisors of Washington county moved the county court of said county, at its November term 1872, for judgment against Dunn and his sureties on account of his default as sheriff, in failing to account for and pay over the county levies for the year 1869. At the December term the defendants submitted a motion to quash the notice upon which the motion of the plaintiffs was founded. The court overruled the motion to quash; and the defendants excepted. This is the defendants' first bill of exceptions.

The ground of the motion to quash does not appear by the record; but, as stated by the counsel, it is that the notice is not sufficiently specific and definite to warrant a judgment thereon. In *Monteith v. Commonwealth*, 15 Gratt. 172, it was decided by this court, that upon a motion against a sheriff and his sureties for his failure to pay taxes due the commonwealth, it is not necessary that the notice shall state on what bond of the sheriff the motion will be made. The rule governing notices is, that they are presumed to be the acts of parties, and not of lawyers. They are viewed with great indulgence by the courts; and if the terms of the notice be general, the court will construe it favorably, and apply it according to the truth of the case, as far as the notice will admit of such application. If it be such that the defendant cannot mistake the object of the motion, it will be sufficient. *Graves v. Webb*, 1 Call

613 443; *Segouine v. Auditor*, 4 *Munf. 398; *Steptoe v. Auditor*, 3 Rand. 221. In this case the notice states, that the sheriff had collected the levies for the year 1869, and that he had failed to account for and pay over the same as required by law. It states the amount for which he was delinquent, and for that amount judgment would be asked against him and his sureties. It would seem impossible for the defendants, upon reading this notice, to misunderstand the character of the claim asserted or the grounds of the proceeding. We are therefore of opinion, that the county court did not err in refusing to quash the notice.

The next ground of error arises upon the defendants' second bill of exceptions. At the January term 1874 the defendants moved the court to grant them a rule against the attorney for the commonwealth to show cause why the record of the bond of William A. Dunn, as sheriff of Washington county, should not be corrected, amended or vacated; and they asked leave to read certain affidavits in support of their motion, to the reading of which the plaintiffs objected; but the court overruled the objection, and permitted the affidavits to be read. It, however, refused to grant the rule asked for by the defendants; and to this ruling the

defendants excepted. It will be observed that the application was for a rule to amend, correct or vacate the record; which of these was intended does not appear. We are not informed in what respect or to what extent the record was designed to be altered; nor are we informed whether the action of the court was desired as to all or part only of the defendants. Perhaps the object of the defendants may be more correctly gathered from the affidavits filed by them. One of these states, that the affiant signed the

614 bond upon condition that certain other persons were also to *sign; but this condition had never been complied with. No such condition appears on the face of the bond; nor is there anything from which it would be inferred; nor is it pretended it was ever communicated to the court. Another affidavit states, that the affiant signed the bond, but he never acknowledged or delivered it; upon information he afterwards obtained in regard to the sheriff, he determined that he never would acknowledge the bond.

A third affidavit states that the affiant acknowledged the bond in open court, on condition, however, that all the parties who signed would also acknowledge it; but no such condition appears either by the bond or by the record. Another affiant relies upon the fact, that his signature was affixed by his nephew; and further, that his name is not in the body of the bond. It is very true that this defendant did not himself sign his name, but it was done by another in his presence, and by his direction and authority. This, of course, is equivalent to a signing by himself. The other defendant, whose affidavit was taken, states that the sheriff informed him he only wanted affiant's name until next succeeding court, when it would be taken off the bond; and with this understanding he signed the bond; but it is not pretended that the county court was apprized of any such arrangement.

Upon these papers the application for the rule to alter the record was based. I have taken the trouble to state the substance of them, that it may be seen how utterly groundless is the claim of the defendants to escape the obligation of the bond executed by them. Notwithstanding this pretension of a conditional execution of the instrument, all of those making affidavits appeared before a justice or justices of the peace, and acknowledged they had respectively 615 signed the bond *as sureties; and these acknowledgments were made without qualification or reservation, and with full knowledge that such acknowledgments would be used before the county court by the sheriff as evidence of their execution of the bond. The fact is, that these affidavits are nothing more than pleas of non est factum in disguise. But however considered, whether as pleas or mere affidavits, whether taken singly or in the aggregate, they present no ground either for the release of the defendants, or for a rule to amend or vacate the record.

It is very apparent the main theory of the

defence is, that an acknowledgment in court is necessary, in order to bind those who sign the sheriff's bond as sureties. This is, however, to confound the execution of the instrument with the proof. In *Calwell v. Commonwealth*, 17 Gratt. 391, it was decided by this court that the sureties may acknowledge the bond in court, or its execution out of court may be proved by witnesses. Such, indeed, is the language of the statute. There is, however, no statute nor rule of law requiring such proof to be adduced at the time the bond is received by the court. It is very true that a tribunal, charged with the duty of taking the bonds of public officers, would be grossly derelict in accepting a bond without satisfactory proof of its execution being adduced at the time of receiving the bond; but with, or without such proof, the parties who had actually signed would be bound by their deed. A person who signs, seals and delivers an instrument as his deed, will never be heard to question its validity upon the ground that it was not acknowledged by him, nor proved at the time of the delivery. It is the sealing and delivery that gives efficacy to the deed, not proof of the execution. And this principle applies to

616 all bonds, whether executed by public officers or private persons, unless, indeed, there is some statute making the acknowledgment or proof in court essential to the validity of the instrument. In an action upon an official bond, if there is no record evidence, the execution of it may be established by the testimony of attesting witnesses, or, if there be none, by proof of hand-writing, or by a discovery from the adverse party. Such proof may not be as conclusive as an acknowledgment of record, but in many cases it is equally satisfactory.

In the case before us the bond was acknowledged in open court by five of the sureties, at the May term 1869. And on motion of the sheriff, he was allowed until the June term to complete it. At the June term the bond was accordingly returned with the justices' certificates of acknowledgment, by nine other sureties, two of whom had become such since the preceding term. In this condition the bond was accepted by the court as a complete instrument.

There is no proof in the record; nor is there even an averment, save a brief statement made by Isaac B. Dunn in his affidavit, that any of these parties either signed or delivered the bond conditionally. All of them certainly acknowledge it without qualification, reservation or condition, either before the court or before justices of the peace in the country. Now, it may be true, that the mere certificate of a justice of the peace is not competent evidence of the execution of an instrument of this character. It does not follow, however, there may not have been other proof before the county court at the time, in addition to these certificates. Non constat but that the justices themselves were in court producing the certificates and testifying to the acknowledgment. *Caldwell v. Craig*, 17 Gratt. 396. Be that as it may, none of these

617 *defendants deny their signatures or their acknowledgments. Neither in the affidavits filed, nor in any other mode, so far as the record discloses, was there any question or controversy on this point. And, as will be hereafter seen, this court is bound to presume that satisfactory proof as to all the defendants was adduced upon the trial of this case in the court below.

It seems, however, there are six signatures to the bond, as to which there was no proof before the county court which recorded the bond, by acknowledgment or otherwise. There is no suggestion, however, that these signatures are not genuine, or that the bond is not valid as to the parties who made them. These obligors are not included in the plaintiffs' notice. Why they were not so included does not appear. No complaint was made upon that ground in the court below, for the reason, no doubt, that the statute authorizes a notice and motion against all or any intermediate number. There was doubtless good ground for the omission; and, as the record discloses nothing to the contrary, that which was done was rightfully done.

But it further appears, there are, or were, upon the bond the names of five other obligors. These names had, however, been erased, according to a statement of the deputy clerk, before the May term 1869, to which the bond was first returned. In recording the bond, these names were omitted by the clerk; so that they are not upon the instrument as recorded. Whether they were in fact genuine signatures, and, if so, why they were erased, does not appear. One thing is certain, the erasures had been made and were apparent at the time the five sureties unconditionally acknowledged the bond in open court. They were equally apparent when the bond was taken into the

618 *country and unconditionally acknowledged before the justices by nine of the sureties. So that all the present defendants may be regarded as having acknowledged the execution of the bond with full notice of the erasures. If they did not have such notice, it was because they deliberately closed their eyes to the fact, or because they most negligently failed to examine, or even to look at, the paper at the time of the acknowledgment. The consequences of such gross negligence must, of course, fall upon the defendants, and not upon the public.

Such was the case made by the defendants upon the application for a rule to alter the record. It may be true, as I have already said, that the certificate of a justice of the peace is not of itself competent evidence of the execution of the bond. But these certificates were exhibited by the defendants themselves; the original bond was exhibited by them; the unconditional acknowledgment was conceded in the affidavits. How then could the court grant the rule? Upon the defendants own showing, the papers upon which they relied showed conclusively they were not entitled to it, and fully vindicated the refusal of the county court to grant it.

It seems, however, that the defendants demurred to the record of the bond of the sheriff; and the learned judge of the circuit court was of opinion upon that demurrer the judgment of the county court ought to have been for the defendants. Now considering that a demurrer to evidence is a proper proceeding upon a mere notice and motion to be tried by the court, was it ever heard that a party could select a single item of his adversary's testimony and demur to that? I had supposed that a demurrer of the kind could only be taken after the whole testimony is concluded, and

19 *then the demurrer affirms the insufficiency of the whole testimony to sustain the issue. But this is not all. No one will controvert the proposition, I imagine, there can be no demurrer to evidence until the trial is had. In this case the demurrer was taken at one term of the court before the trial had commenced, and before the case was even ready for a trial, and the case was in fact tried at the next succeeding term. If the court had held that the record was of itself insufficient to charge the defendants as sureties, it would not have precluded the plaintiffs from offering again on the trial at the next term in connection with parol proof to supply the defect. It would have been competent to show by any relevant evidence, that all the defendants had signed, sealed and delivered the bond, although the record showed that we only had actually acknowledged it in open court. Was it any less the bond of the nine who acknowledged before witnesses, than of the five who appeared before the court? Was it not proper, and every way permissible, to bring proof of the execution of these nine if the record failed to show it? Can we assume it was not adduced before the judge who tried the case? The record states that the whole matters of law and of fact were referred to the court. What were these matters of fact there is nothing to show. No bill of exceptions was taken to enlighten us in regard to the proceedings before the court. Are we not bound to presume that everything was faithfully done? The principle is universal, that an appellate court in reviewing the decision of the trying court, will always resume that the verdict and judgment were founded upon sufficient evidence unless the contrary is plainly made to appear. This principle is carried so far, that where there is a bill of exceptions professing to

20 state the evidence, *this presumption will still prevail, unless it can be fairly inferred that it contained all the evidence adduced on the trial. See *Cooper v. Lepburn*, 15 Gratt. 551; *Powell on Appellate Proceedings* 126. In the case before us, if the defendants desired to raise the question of the sufficiency of the evidence to charge them as sureties, it was incumbent upon them to spread it upon the record, in order that the appellate court might act understandingly upon that question. Failing to do so, they are precluded from controverting the correctness of the judgment rendered by

the county court. According to these views there is nothing in the second bill of exceptions which would warrant an appellate court in reversing the decision of the county court.

The defendants' third bill of exceptions was taken to the refusal of the court to receive the plea of non damnificatus and the plea of nil debet. It is somewhat difficult to understand what was the object or necessity for the various pleas tendered by the defendants. The proceeding was a mere motion, founded upon a notice, upon which no formal pleadings were required. It was competent for the defendants, as well without as with the pleas offered by them, to make every defence those pleas suggested. But if this were not so, the plea of non damnificatus is good only where the condition of the bond is to indemnify and save harmless. Here the condition of the bond is "faithfully to discharge the duties of the office according to law." To an action upon such a bond, "conditions performed" is the proper plea, and that plea was offered by defendants, and received by the court. With it the defendants were entitled to the benefit of every defence they could make under the plea of non damnificatus. As to

the plea of nil debet, it was altogether 621 *improper in an action or notice upon an official bond. If, however, it were admissible, still under the plea of conditions performed, the defendants were privileged to make any defence a plea of nil debet could possibly present. There is therefore no error appearing upon the third bill of exceptions.

The fourth bill of exceptions brings before us the pleas filed by the defendants Robert and Joseph Pippin, and the judgment of the court upon these pleas. Upon this point it is sufficient to say, the issues presented by these pleas were wholly immaterial. These defendants had signed the bond after the May term 1869. It was returned to the June term following with their names and with the justices' certificate of acknowledgment. In this condition it was delivered to and accepted by the county court. As already stated, it was a valid bond as to these defendants, although never acknowledged by them nor proved in open court. The record indeed states they are sureties; but if it was altogether silent on this subject, they would be bound by the signing, sealing and delivery, and estopped to deny they are such.

It was therefore no sufficient answer to the motion in this case to say there was no record binding these parties as sureties. Their obligations and duties resulted from the bond, and not from the record. The court would have been fully justified in rejecting the pleas in the first place; but, having received them, it was proper to disregard them upon the trial. The judgment was plainly right upon this point, whatever may have been the ground upon which the court proceeded.

We come now to the fifth and last bill of exceptions. The plaintiffs, with a view to

show the amount of the county levies collected by the sheriff and never *accounted for by him, offered in evidence a settlement made by the sheriff with a commissioner appointed by the county court. This settlement showed a balance against the sheriff for which the supervisors are proceeding in this case. The defendants objected to this evidence, upon the ground they had no notice of the settlement, were not parties to it, and had not been notified to attend at the time it was made, as required by the 18th section of the 53rd chap. of the Code of 1860. This section certainly makes provision for summoning the sureties upon the official bond; and if so summoned the settlement would be held to be conclusive as to them. They would not be permitted to controvert it in any future proceeding. But it is not indispensable the sureties should be notified. In the absence of any notification the settlement, upon general principles, would at least be prima facie evidence of the amount of the sheriff's indebtedness. That testimony of this character is legally admissible to charge the sureties of a public officer upon their bond of indemnity, is fully established by the decisions of this court in numerous cases. *Munford &c. v. Overseers of the Poor of Nottoway*, 2 Rand. 313; *Jacobs v. Hill*, 2 Leigh 393; *Cox et als. v. Thomas*, 9 Gratt. 323. In the more recent case of *Crawford et als. v. Turk*, 24 Gratt. 176, this court held that a judgment against the high sheriff, in the absence of fraud or collusion, is conclusive of the default of the deputy as against the sureties of the latter, the deputy having appeared and being examined as a witness in the action against the high sheriff. These were cases of judgments against the principal; but the same principle applies in the present case. See also the case of the *United States v. Echsford*, 1 How. U. S. R. 250; in which it was held that a treasury transcript of the

623 *accounts of a collector was prima facie evidence against the sureties of moneys received by him during his term. These authorities are conclusive upon the question of the admissibility of the settlement in this case as evidence against the defendants. This disposes of all the defendants' bills of exceptions, and, indeed, of all the points raised by him in this court or in the court below.

Before concluding this opinion it is proper to allude to a question raised and strongly pressed by the plaintiffs, who are the appellants here. It is in regard to the sufficiency of the first three bills of exceptions to bring before the appellate court the alleged errors set forth in those bills. It is deemed unnecessary, however, to consider these matters; as this court is of opinion the case is more satisfactorily disposed of upon the merits. Upon the whole, we are of opinion, that the judgment of the circuit court should be reversed, and that of the county court affirmed.

Judgment of the circuit court reversed, and judgment of the county court affirmed.

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Lancaster v. Wilson.

June Term, 1876. Wytheville.

1. Courts of Record—Proceedings of—Conclusiveness—Attachment.—J and C brought an action at law against W in the county court of W, and sued out an attachment, which was served on certain real estate of W. Plaintiffs having recovered a judgment, the court made an order directing the sheriff to sell the real estate attached, and the sheriff having sold to L, the court made an order appointing a commissioner to convey the real estate to L, which was done. In ejectment by W against L to recover the said real estate—Held: The county court being then a court of general jurisdiction, no irregularities or error in its proceedings can be inquired into in this case, but they are conclusive upon the rights of the parties to the property.*

2. Same—Same—Collateral impeachment.—A judgment of a court of record cannot be impeached in another action, except for want of jurisdiction in the court, or fraud in the parties or actors in it.

This was an action of ejectment in the circuit court of Washington county, brought by A. T. Wilson against Thomas C. Lancaster. On the trial of the case the jury found a special verdict, upon which the court rendered a judgment in favor of the plaintiff. And thereupon Lancaster applied to a judge of this court for a writ of error and supersedeas; which was

625 *awarded. The case is stated by Judge Christian in his opinion.

Gilmore and D. Trigg, for the appellant.

York, for the appellee.

Christian, J., delivered the opinion of the court.

*For monographic note on Attachments, see end of case.

†NOTE BY THE REPORTER.—The jurisdiction of the court in a common law cause, to make the orders for the sale and conveyance of the property, seems not to have been questioned in this case: And yet it is one of grave doubt; and as it is a very important practical question, the reporter trusts he will be excused for calling attention to it. See *Baltimore & Ohio R. R. Co. v. Gallahue's adm'r.* 12 Gratt. 655; and same case, 14 Gratt. 563; *Same v. McCulloch & Co.* 12 Gratt. 596; *Orange & Alex. R. R. Co. v. Fulvey*, 17 Gratt. 386.

‡Proceedings of Courts of Record—Conclusiveness—Collateral impeachment.—It may be said to be an axiom of the law—so well established is it—that the judgments of a court of record are conclusive and cannot be collaterally assailed, "except for want of jurisdiction in the court, or fraud in the parties." See the following authorities, citing the principal case: *Neale v. Utz*, 75 Va. 487; *Perkins v. Lane*, 82 Va. 62; *Woodhouse v. Fillbates*, 77 Va. 321; *Pennybacker v. Switzer*, 75 Va. 686; *Pannill v. Callaway*, 78 Va. 394; *Wilcher v. Robertson*, 78 Va. 67; *Withers v. Fuller*, 30 Gratt. 553; *Nulton v. Isaacs*, 29 Gratt. 742; *Gray v. Stuart*, 33 Gratt. 358, 359. Dissenting opinion of PRESIDENT LEWIS in *Gresham v. Ewell*, 85 Va. 5, 6 S. E. Rep. 700; *Blanton v. Carroll*, 86 Va. 541, 10 S. E. Rep. 329; *Leach v. Buckner*, 19 W. Va. 47; *Hall v. Hall*, 12 W. Va. 13; *McMillan v. Hickman*, 35 W. Va. 718, 14 S. E. Rep. 231. See also, *Barton v. Ch. Pr.* (2d Ed.) p. 920, and note; 1 Va. Law Reg. 354.

This case is before us upon a writ of error a judgment of the circuit court of Washington county. The action was ejectment brought by the defendant in error against the plaintiff in error, for the recovery of certain lots in the town of Goodson.

The jury to which the case was submitted, at the May term 1874, found a special verdict. That verdict found that the plaintiff had title to the land in controversy until a sale made in the case of Johnston & Campbell v. the plaintiff Wilson. The verdict after setting forth the fact, that the original papers in the case of Johnston & Campbell v. Wilson had been destroyed), finds certain matters of record taken from the execution books and minute books of the county court, as follows: Record of a judgment by default at March term 1861, in favor of Johnston & Campbell v. Wilson for \$10, with interest from 17th April 1860 till paid; costs \$8.24; fi. fa. satisfied, and money paid plaintiffs. See reports and orders of the May.

Also an order entered upon the minute book of said county court, dated June 25th, 1861, which after reciting the judgment above referred to, and the issuance of an attachment, and the levy of the same on the lots in controversy, and the fact that the plaintiffs had executed bond with security as required by law, directs the sheriff

of said county to make sales of so much or so many of the lots of the defendants so attached as will be sufficient to satisfy the judgment and costs plaintiffs, and that the same be sold for cash.

The special verdict further finds that the following orders were entered in said attachment suit, to wit:

"No. 3."—From Minute Book, April 28, 1862.

Johnston & Campbell, plt's
v. On an attachment.
A. T. Wilson, defendant.

William King Heiskell, sheriff of this county, having returned, upon the order of the court issued in this cause, that he had sold the property therein named to Thomas C. Lancaster for the sum of \$615, it is ordered at the said Heiskell, sheriff of this county, aforesaid, execute, acknowledge, and deliver to the said Lancaster a deed with special warranty, conveying to him the lots the said order of sale, and other proceedings in the cause mentioned.

No. 4.—From Minute Book, March 2, 1866.
Johnston & Campbell

v. On debt.
A. T. Wilson.

By an order heretofore made in this case, William K. Heiskell, sheriff of the county, is directed to sell — lot in Goodson, the property of the defendant, and in obedience to said order he sold the same, as will appear by his report filed, and Thomas Lancaster became a purchaser at the sum

of \$615. It is therefore ordered that James C. Campbell be and he is hereby appointed a commissioner to convey said lots to the purchaser, Lancaster, with special warranty.

627 *The special verdict also sets out in *hæc verba* the deed executed by James C. Campbell to Lancaster, the purchaser, in accordance with this last named order; and concludes as follows:

"If the said proceedings and conveyance pass the title of the plaintiff to defendant, to the property in controversy, it being admitted that the property conveyed by commissioner Campbell to defendant is the property in controversy, then we find for the defendant; if they do not pass the title of plaintiff to defendant, then we find for the plaintiff the premises in question; and we find for the plaintiff \$368.75 for mesne profits of the property from the — day of March, 1868, to the institution of this suit, being five years lacking one month."

Upon this special verdict the circuit court of Washington entered a judgment for the plaintiff; and to this judgment a writ of error was awarded by this court.

The court is of opinion that the circuit court erred in rendering a judgment for the plaintiff, and that upon this special verdict the judgment ought to have been rendered in favor of the defendant.

While the papers in the attachment suit had been destroyed, the orders and judgments taken from the execution book and minute book of the county court, show, conclusively, that in the suit of Johnston & Campbell v. Wilson, an attachment had issued, and was levied upon the lots in controversy, and that a sale was made by the sheriff; that that sale was approved by the court; that at that sale Lancaster became the purchaser, and that a deed was directed to be executed and delivered to him by

628 a special commissioner of the court, conveying to him the lots thus levied upon and sold by the sheriff.

Now it is conceded that the county courts of the commonwealth, at the time this suit was brought, were invested by law with general jurisdiction in cases of attachment. Every presumption must be made in favor of the correctness of the proceedings set forth in that verdict; and in the absence of any thing in the record to show the contrary, the court will presume that proper process in a proper case was issued and served upon the defendant, and that he was properly before the court when these several orders were entered in the said attachment suit. We must treat the case then, as one in which the court had jurisdiction of the subject matter, and of the parties. Thus treating it, the question is, can the plaintiff in an action of ejectment oust the defendant of his possession, and defeat his title acquired as a purchaser from the sheriff at the sale made under the proceedings in the attachment suit? It is conceded in this case that Lancaster is a bona fide purchaser, who paid a full and fair price for the land in controversy. Fraud and collusion between

him and the sheriff, or between him and the plaintiffs in the attachment suit, is neither proved nor even charged. But it is insisted that there were certain irregularities in the attachment suit which makes the sale void; and therefore no title was conferred upon the purchasers. In my view of the case it is not necessary to enquire whether such irregularities existed. No matter how irregular or how erroneous may have been the proceedings in that suit, they cannot be enquired into in this. That would be to assail collaterally the judgment of a court of record which had jurisdiction of the parties and the subject matter. This can never be done. But the judgment

629 of such a *court until reversed, upon writ of error to an appellate court, must be accepted always and everywhere, as a final adjudication of the questions between the parties to the suit. This is the settled doctrine of the courts. It is not merely an arbitrary rule of law, established by the courts, but it is a doctrine founded upon reason and the soundest principles of public policy. It is one which has been adopted in the interest of the peace of society, and the permanent security of titles. If after the rendition of a judgment by a court of competent jurisdiction, and after the period has elapsed when it becomes irreversible for error, another court may in another suit enquire into the irregularities or errors in such judgment, there would be no end to litigation, and no fixed established rights. A judgment though unreversed and irreversible, would no longer be a final adjudication of the rights of litigants, but the starting point from which a new litigation would spring up; acts of limitation would become useless and nugatory; purchasers on the faith of judicial process would find no protection; every right established by a judgment would be insecure and uncertain, and a cloud would rest upon every title. As was well said by Mr. Justice Baldwin in the case of *Vorhees v. The Bank of the United States*, 10 Peters R. 449, 474: "If the principle once prevails that any proceeding of a court of competent jurisdiction can be declared to be a nullity by any court, after a writ of error or appeal is barred by limitation, then every county court and justice of the peace in the union may exercise the same right. If after its rendition, the judgment is declared void for any matter which can be assigned for error only on a writ of error or appeal, then such court not only usurps the jurisdiction of an appellate court, but collaterally nullifies *what such court is prohibited by

630 express statute law from ever reversing." * * * "The errors of a court do not impair their validity. Binding until reversed, any objection to their full effect must go to the authority under which they have been conducted!"

These principles have been repeatedly declared by the decisions of the supreme court of the United States, as well as the decisions of this court, and cannot now be questioned. See *Elliott v. Peirsol*, 1 Peters

R. 328, 340; 2 Peters 169; 6 Peters 729; *Harvey v. Tyler*, 2 Wall. U. S. R. 328, 339; *Slater v. Maxwell*, 6 Wall. U. S. R. 368; *Cooper v. Reynolds*, 10 Wall. U. S. R. 308; *Cox & als. v. Thomas' adm'r*, 9 Gratt. 33; *Ballard v. Thomas and Ammon*, 19 Gratt. 14; *Cline's heirs v. Catron*, 22 Gratt. 373.

Recognizing the doctrine firmly settled by these decisions, neither this court nor the court below can enquire whether the proceedings in the attachment suit were in accordance with law. It is needless, therefore, even to note the irregularities and errors pointed out by the learned counsel for the appellees in the record in the attachment suit. There is one, however, much relied upon, I will notice. It is said the sheriff acted without authority in making the sale of both lots, when the order of the court directed him to sell only so much as might be necessary to pay the judgment and costs; and that this want of authority in the sheriff affected the purchaser, because he was bound to see that the sale was made in accordance with the order of the court. The obvious answer to this view is, that the sale was reported to the court and confirmed, and thereby the sale became an act of the court. The remedy was, to correct the error by motion in that court, or by writ of error in an appellate court. It

631 is not the case of an unauthorized act of the sheriff, or other officer, selling property not directed to be sold by the court. In such case the sale would be a nullity, and such sale would not be a proceeding of the court. But when the sale is reported and confirmed, it then becomes an act of the court, and cannot be enquired into collaterally in another suit. Conceding, therefore, that the irregularities were many and the errors gross, they could only be remedied by motion in that suit, or by writ of error to the judgment. In the action of ejectment the door was closed to all enquiry except whether the court in the attachment suit had jurisdiction of the subject matter, or whether the purchaser was a fraudulent purchaser.

Want of jurisdiction, or fraud in the purchaser, may be shown in any case, and when established, will always vacate the sale and annul the deed made under it; but nothing else will, when relied upon in another suit which brings in to question collaterally the judgment of a court of competent jurisdiction.

The judgment of the circuit court of Washington cannot be sustained without a violation of principles which ought to remain inviolable. I am therefore of opinion that the judgment should be reversed and a judgment entered for the defendant.

Judgment reversed.

ATTACHMENT.

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- B. Absent, Removing or Concealed Debtors
- C. Fraudulent Conversion or Transfer of Property

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I. NATURE, OBJECT AND CONSTRUCTION.

Attachment is an extraordinary remedy, whereby

the property of the party complained of is summarily seized, upon an *ex parte* complaint. 4 Min. Inst. (3rd Ed.) pt. 1, 404.

"This summary remedy," says Mr. Daniel in the preface of his works on attachments, "may be fitly termed the light cavalry of the law. To seize swiftly upon the effects of a nonresident or flying adversary and to hold him and them amenable to the issue of the proceeding are its chief functions in Virginia."

"An order of attachment is an execution by anticipation. It empowers the officer to seize and hold the estate of the alleged debtor for the satisfaction of a claim or demand to be established in the future and for which a judgment may never be obtained. The claim may be entirely unfounded, and even, when the demand is just the order may issue and be levied before it has become due and payable. The proceeding is to some extent the reverse of the ordinary course of judicial proceedings. The latter subjects the demand of the plaintiff to judicial investigation and permits the seizure of the debtor's property only after judgment obtained, while the former commences with the seizure of the debtor's property and afterwards subjects the plaintiff's claim to such investigation." SNYDER, J., in *Delaplain v. Armstrong*, 21 W. Va. 211. See also, *Bart. Law Pr.* (2d Ed.) 900.

Object.—"The prime object in levying the attachment," says the court, in *Dorrier v. Masters*, 88 Va. 450, 2 S. E. Rep. 927, "is to obtain, *pendente lite*, a lien; or, in other words, to put the property in the custody of the law until by the judgment of the proper tribunal the plaintiff's claim is established, when the lien becomes effective as of the date of the levy, but must be enforced, not by virtue of the writ of attachment, but by the judgment of the court ordering a sale of the property which the attachment has simply held in waiting."

Construction.—"The remedy by attachment is in derogation of the common law and exists only by virtue of statutes, and being summary in its effects and liable to be abused and used oppressively, its application must be carefully guarded and confined strictly within the limits prescribed by statute. *Delaplain v. Armstrong*, 21 W. Va. 211. "This extraordinary remedy," says JOYNES, J., in *Clafin v. Steenbeck*, 18 Gratt. 842, "is not only harsh towards the defendant himself, but its operation is harsh towards the other creditors of the defendant, over whom the attachment creditor obtains priority. It is susceptible of great abuse and has often been greatly abused. It is, therefore, closely watched, and will never be sustained unless all the requirements of the law have been complied with." As to the strict construction of the statute in attachment proceedings, see also, *Barnett v. Darnielle*, 3 Call 415; *Mantz v. Hendley*, 2 Hen. & M. 808; *Kelso v. Blackburn*, 3 Leigh 290; *Brien v. Pittman*, 12 Leigh 379; *Barksdale v. Hendree*, 2 Pat. & H. 47; *Lambert v. Jones*, 2 Pat. & H. 163.

While "attachment, being a summary process, and liable to abuse, ought to be carefully watched by the courts, and kept within the bounds prescribed by statute. I do not mean, that the party must be held to the very letter, and that the slightest departure from it is to be caught at, to set aside the proceeding; but that there should be, at least, strictness and certainty to what my LORD COKE calls 'a common intent in general.'" CARR, J., in *Jones v. Anderson*, 7 Leigh 308.

"It is true, the attachment proceeding is a summary and harsh remedy, and is doubtless often

much abused, and while it should be strictly, it should at the same time be rationally, construed. It must be borne in mind, however, that it was the will of the legislature that made it summary and necessarily harsh, and that the rule of construction was made for the protection of the debtor defendant." RICHARDSON, J., in *Dorrier v. Masters*, 88 Va. 450, 2 S. E. Rep. 927.

II. ATTACHMENT IN ACTIONS AT LAW.

A. Foreign Corporations and Nonresident Debtors.—The Virginia and West Virginia statutes authorize attachments against foreign corporations and nonresident debtors. Va. Code 1887, § 2560, subd. 1 (see Acts, 1891-92, p. 520); W. Va. Code 1890, ch. 88, § 1, subd. 1.

Foreign Corporations.—"A foreign corporation is one created by the law of another state or country, which may transact in any other country any business warranted by its charter, and not prohibited by the local law of that country. But it cannot change its residence or citizenship." 4 Min. Inst. (3d Ed.) 407.

In *Cowardin v. Universal Life Ins. Co.*, 22 Gratt. 445, the court says, "Nothing is better established by all the cases and text writers on the subject of corporations, than that a corporation can have no legal existence outside of the boundaries of the sovereignty by which it was created. While it may, by its agents, transact business anywhere, unless prohibited by its charter or prevented by local law, it can have no residence or citizenship except where it is located by or under the authority of its charter. As was said by CHIEF JUSTICE TANEY, 13 Peters R. 519, 'it exists by force of the law (creating it), and where that ceases to operate, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty.' In *ex parte Schollenberger*, 6 Otto 377, CHIEF JUSTICE WARREN said, 'A corporation cannot change its residence or its citizenship. It can have its legal home only at the place where it is located by or under the authority of its charter, but it may, by its agents, transact business anywhere, unless prohibited by its charter or excluded by local law.' In *Drake on Attachments* (3d Ed.) § 80, the proposition is stated, on abundant authority, as follows: 'The foreign character of a corporation is not to be determined by the place where its business is transacted, or (even) where the incorporators reside, but by the place where its charter was granted. With reference to inhabitancy it is considered as an inhabitant of the state in which it was incorporated.' As to what constitutes a foreign corporation, see also, *Rece v. Newport News etc., Co.*, 22 W. Va. 164, 9 S. E. Rep. 212.

In accordance with these principles, the court held that an insurance company, incorporated under the laws of New York, even though it had complied with the statutory provisions in relation to foreign insurance companies doing business in Virginia, was not a resident, and its property was therefore subject to foreign attachment. *Cowardin v. Universal Life Ins. Co.*, 22 Gratt. 445.

In *Balt. & O. R. Co. v. Koontz*, 104 U. S. 5, reversing *Balt. & O. R. Co. v. Noell*, 22 Gratt. 304, it was held that a Maryland corporation, by leasing a railroad in Virginia from a Virginia corporation, with the assent of that state, did not thereby make itself a corporation of Virginia. MR. JUSTICE WAITE, saying that corporations "by doing business away from their legal residence do not change their citizenship, but simply extend the field of their operations."

They reside at home, but do business abroad." See also, *Rece v. Newport News, etc., Co.*, 32 W. Va. 164, 9 S. E. Rep. 212.

In November 1864, during the Civil War, the plaintiffs issued an attachment in a chancery suit against the Bank of Virginia as a nonresident on notes of that bank owned by them, some of which were payable at branches of that bank in Virginia and had not been presented at such branch banks for payment. *Held*, that the attachment was properly issued against the Bank of Virginia as a nonresident. *Hall v. Bank of Va.*, 14 W. Va. 584.

Prior to the statute authorizing attachments against foreign corporations in express terms, it was held that such corporation could be proceeded against in equity as an absent debtor under 1 Rev. Code 1819, p. 474, c. 123. *Kyle v. Connelly*, 3 Leigh 719.

Nonresident Debtors.—Who a Nonresident.—Instead of the present term "not a resident," the Code of 1819, ch. 123, § 1, contained the expressions "absent defendants" and "parties who are out of this country." In *Kelso v. Blackburn*, 3 Leigh 290, it was held that these expressions did not include residents and citizens of the state, absent temporarily for pleasure or business, but that "nonresidence" was the ground of attachment which the legislature had in view. All ambiguity, however, was removed by the provisions which the revisers of 1849 recommended, and the legislature adopted. See Rep. of Revisers, 1849, p. 756, *note*.

A person becomes a nonresident, subject to attachment, the moment he leaves the state without the *animus revertendi*; and with the fixed purpose of taking up his future residence elsewhere. *Moore v. Holt*, 10 Gratt. 284.

Where a person conveys away his property, abandons his residence, and commences to remove to another state with the purpose of residing there, he is a nonresident, in the sense of the attachment law, before he has actually left the state. *Clark v. Ward*, 12 Gratt. 440.

Where a person domiciled in Washington obtained a contract to construct certain sections of a railroad in Virginia, rented his house in Washington, and removed with his family to a place on the route of the railroad, where he kept house, it was held that he was a resident of Virginia, within the statutes relating to foreign attachments, the court saying that in the statutes relating to attachments, "actual residence is contemplated, as distinguished from legal residence. The word is to be construed in its popular sense * * * as the act of abiding or dwelling in a place for some continuance of time." *Long v. Ryan*, 30 Gratt. 718. "See the comments on this case in the note on page 427, 32 Am. Dec., to the case of *Frost v. Brisbin*, 19 Wend. 11; attention being called to the fact that the case of *Long v. Ryan* illustrates the difference between residence and domicile, in that while *Ryan* was a resident, within the meaning of the attachment statute, yet 'there could have been no pretence that *Ryan* was domiciled in Virginia.'" *Bart. Law Pr.* (2d Ed.) 911. See also, *Dean v. Cannon*, 37 W. Va. 123, 16 S. E. Rep. 444, where the definition of "residence" given in *Long v. Ryan*, 30 Gratt. 718, is quoted with approval.

In *Didier v. Patterson*, 93 Va. 534, 25 S. E. Rep. 661, 2 Va. Law Reg. 615, following *Long v. Ryan*, 30 Gratt. 718, it was held that one who is dwelling in Virginia with no intention of leaving, being engaged in constructing public improvements under a contract that will occupy him for an indefinite period, is not a non-

resident within the meaning of the attachment laws, although his family lives out of the state.

Where a person entirely abandons his former residence in one state, with no intention of resuming it, and goes with his family to another residence, which he has rented in another state, with the intention of making the latter his residence for an indefinite time, the latter state is his domicile, notwithstanding that after he and his family arrive at the new residence, which is only about a half a mile from the state line, they go on the same day on a visit to spend the night with a neighbor in the former state, intending to return in the morning of the next day, but he is detained there by sickness until he dies, and never does in fact return to his new home. *White v. Tennant*, 31 W. Va. 790, 8 S. E. Rep. 596.

If a man's family has been removed to West Virginia, and his business, means and property have been carried there, and he is engaged in business there, and dwells there, and his business engagements are such as to render his stay wholly uncertain and indefinite as to duration, he is not a nonresident of that state within the purview of the attachment law. *Andrews v. Mundy*, 36 W. Va. 22, 14 S. E. Rep. 414.

Residence once established is presumed to continue until proved to have been changed. The property of a fugitive from justice, who suddenly departs from the state, leaving his family, cannot be attached as that of a nonresident, since he, as wanderer and fugitive, though outside of the state, can acquire no residence which would make him a nonresident under the attachment laws. The proper remedy is to proceed against him as a removing or absconding debtor. *Starke v. Scott*, 78 Va. 180.

Volunteer Soldiers.—A resident of West Virginia, who enters the volunteer service of the United States, and with his regiment goes beyond the limits of the state, and remains for some time in such service, does not thereby become a nonresident of the state, within the meaning of the attachment law; and a valid attachment cannot, on that ground alone, be sued out against his property. In order that a person may become a nonresident of the state, it is necessary that he should leave the state with the intention of remaining absent therefrom. *Lyon v. Vance*, 46 W. Va. 781, 34 S. E. Rep. 761.

B. Absent, Removing or Concealed Debtors.—It will be noted that, in order to warrant an attachment, the Virginia Code provides that the debtor shall be removing or about to remove out of the state with intent to change his domicile (Va. Code 1887, § 2969, subdivision 2), while the corresponding statute of West Virginia provides for attachment where the debtor has left, or is about to leave the state, with intent to defraud his creditors, or so conceals himself that a summons cannot be served upon him. (W. Va. Code 1899, ch. 106, § 1, subdivisions 2 and 3.)

An original attachment, prior to the act of Jan. 25, 1806, ought not to have been granted to a creditor on the ground that his debtor intended to remove privately, or to abscond or conceal himself so that the ordinary process of law could not be served on him, but only on the ground that he was actually doing so. *Mantz v. Hendley*, 2 Hen. & M. 308.

The property of a fugitive from justice, who suddenly departs from the state, leaving his family, cannot be attached as that of a nonresident, since he, as a wanderer and fugitive, though outside of the state, can acquire no residence which would make him a nonresident under the attachment

laws. The proper remedy is to proceed against him as a removing or absconding debtor. *Starke v. Scott*, 78 Va. 180.

Where the surety to a bond has removed from the country leaving the principal within it, the obligee may proceed against him as an absent defendant and attach any effects or debts he may have in the state. But if the obligee has parted with any security in his hands by which the debt or a part of it might have been paid, the surety will be discharged *pro tanto*. *Loop v. Summers*, 3 Rand. 511.

C. Fraudulent Conversion or Transfer of Property.—See Va. Code 1887, § 2959, subdivisions 4 and 5; W. Va. Code 1899, ch. 106, subdivisions 5 and 6.

Fraudulent Intent—Burden of Proof.—It is not enough that creditors believe and allege the existence of fraudulent intent. They must prove its existence. *Wingo, Ellett & Crump v. Purdy & Co.*, 87 Va. 472, 12 S. E. Rep. 970; *Burruss v. Trant*, 88 Va. 984, 14 S. E. Rep. 845.

The burden of proving that an attachment was issued on sufficient cause rests on the plaintiff, and he should introduce his evidence first when the defendant moves an abatement. *Wright v. Rambo*, 21 Gratt. 158; *Sublett v. Wood*, 76 Va. 318; *Burruss v. Trant*, 88 Va. 980, 14 S. E. Rep. 845.

Threats to Assign.—A *bona fide* request for an extension of time of payment and a declaration of a purpose, if necessary, to make a general assignment for the benefit of all creditors cannot be held to be evidence of an intent to dispose of property to defraud creditors, especially where such debtor shows his intention to surrender all his property if required for the purpose of paying his indebtedness. *Wingo, Ellett & Crump v. Purdy & Co.*, 87 Va. 472, 12 S. E. Rep. 970.

Failure to Pay Proceeds to Creditors.—Just before leaving the state, the defendant, at a large discount, assigned an obligation given him for the purchase money of a steamboat and carried the proceeds away, without leaving any adequate means to satisfy the claims of the plaintiff and other creditors, having mortgaged nearly all his real estate before leaving. *Held*, that these facts did not justify an attachment on the ground that he had fraudulently disposed of his property. *Capehart v. Dowery*, 10 W. Va. 130.

Failure to Record Deed of Trust.—The mere failure of a bank to record a deed of trust given to secure a note, in the absence of evidence of a request or desire on the part of the defendants that it should not be recorded, cannot be construed as an attempt on the part of the defendants to hinder or defraud their creditors and is no ground for an attachment against them. *Burruss v. Trant*, 88 Va. 980, 14 S. E. Rep. 845.

III. ATTACHMENT IN EQUITY.

A. In General.—It will be observed that as Va. Code 1887, § 2964, authorizes attachments in equity whether the claim be legal or equitable, the grounds which justify attachments at law under Va. Code, § 2959, as amended by Acts 1891-92, p. 520, also authorize attachments in equity. The section of the Code of West Virginia corresponding to § 2959 of the Code of Virginia expressly provides that the attachment may be either at law or in equity. W. Va. Code 1899, ch. 106, § 1.

Prior to the Code of 1887, attachment in equity lay in Virginia only where the claim was actually due and payable. *Batchelder v. White*, 80 Va. 108; *Cirode v. Buchanan*, 22 Gratt. 206; *O'Brien v. Stephens*, 11 Gratt. 610. But the present statute, Va. Code 1887, §

2964, declares that "when a person has a claim, legal or equitable, to any specific personal property, or a like claim to any debt, whether such debt be payable or not, or to damages for the breach of any contract, express or implied, if such claim exceed \$20, exclusive of interest, he may, on a bill in equity filed for the purpose, have an attachment to secure and enforce the claim," etc. But "this section (2964) shall not be construed as giving to a court of equity jurisdiction to enforce by attachment a claim to a debt not payable, when the only ground for the attachment is that the defendant, or one of the defendants, against whom the claim is, is a foreign corporation, or is not a resident of this state, and has estate or debts owing to the said defendant within the county or corporation in which the suit is, or issued with a defendant residing therein." Hence, in *Wingo v. Purdy*, 87 Va. 472, 12 S. E. Rep. 970, where the suit was by attachment in equity against a firm of nonresident merchants for debts which were not yet due, on the ground that the defendants were about to make an assignment to hinder, delay or defraud their creditors, it was held that proof of the fraudulent intent was essential to the jurisdiction of the court; and that, as the plaintiffs had failed to prove such fraudulent intent, the attachment should be abated, notwithstanding the fact that the debtors were nonresidents. Nor is it enough that the attaching creditor believes and alleges the fraudulent intent; he must prove reasonable and rational grounds for his allegations and belief as the basis of his attachment proceedings. See *Burruss v. Trant*, 88 Va. 984, 14 S. E. Rep. 845.

It has been held that a guarantor of a debt may maintain a foreign attachment against his principal before he has paid the debt. *Moore v. Holt*, 10 Gratt. 284. See also, *Williamson v. Bowie*, 6 Munf. 176.

Several creditors having distinct demands cannot unite in one suit in equity to attach the property of an absent debtor. *Corrothers v. Sargent*, 20 W. Va. 34.

Bailment.—A claim against a nonresident of Virginia arising out of a contract of bailment made out of Virginia, by which flour was deposited in a warehouse in Georgetown, D. C., and there destroyed by fire is a claim for debt for which a foreign attachment in chancery lies. *Peter v. Butler*, 1 Leigh 25.

B. Jurisdiction.—The levy of the attachment as shown by the officer's return on the nonresident defendant's property, is the foundation of the suit. If the property attached be not the defendant's property, the court is without jurisdiction. *Calbertson v. Stevens*, 82 Va. 406.

Equity has jurisdiction over an attachment to subject a legacy in the hands of an executor as garnishee, to the payment of the plaintiff's debt; for the proceeding involves the settlement of accounts which could not be done at law. *Whitehead v. Coleman*, 31 Gratt. 784.

A creditor residing in Maryland may sue out an attachment in chancery against the debtor, residing also in Maryland, and others residing in Virginia, indebted to, or having in their hands effects of such debtor. *Williamson v. Bowie*, 6 Munf. 176.

A creditor at large may maintain an attachment suit in equity to set aside as fraudulent a deed conveying real estate, made by his debtor, where both the debtor and his grantee are living out of the commonwealth. *Peay v. Morrison*, 10 Gratt. 148.

C. Removal of Property.—The shipment of the products of an enterprise out of the state in due course of trade, where the removal is not permanent and the proceeds are brought back within the state, is

is sufficient ground for an attachment. *Clinch v. Mer Mineral Co. v. Harrison*, 91 Va. 122, 21 S. E. Rep. 1.

IV. ATTACHMENT BEFORE ACTION BROUGHT.

A. In General.—The five grounds of attachment used in section 2969 of Va. Code of 1887, require an affidavit "at the time of, or after the institution of an action at law," and the attachment is issued by the clerk of the "court in which the action is." Since an action will not lie for a debt before it is due, no attachment can be maintained for such debt under this section. See *Bart. Law Pr.* (2d Ed.) §32. But sections 2961 and 2962 of the Va. Code of 1887, provide for attachment before the maturity of the debt claimed, and of course before the institution of any suit, against a debtor removing his effects out of this state, whether the claim is payable or not, and against a tenant removing his effects from the leased premises.

B. Removal of Property.—One member of a mercantile house, to which a debt has been contracted but which has not yet fallen due, is competent to make complaint on oath and to sue out an attachment against the debtor under the provisions of the statute. 1 Rev. Code 1819, ch. 123, § 14; *Kyle v. Connelly*, Leigh 719.

Where the defendant has removed a portion of his property out of the state and is about to remove the remainder, and it appears from the evidence that there are numerous pending suits and judgments against him, these facts warrant an attachment under Va. Code 1873, ch. 148, § 3. *Weiss v. Hobbs*, 84 Va. 489, 5 S. E. Rep. 367.

C. Attachment for Rent.

1. For What Rent Attachment Will Issue.—Prior to the present provisions (Va. Code 1887, § 2962) allowing attachment for rent which is yet to become due and which will be payable within one year, attachment could not issue for more than the installment of rent next due, whether that was for a month, quarter, year, etc. *Redford v. Winston*, 3 Rand. 148. See also, *Glassell v. Thomas*, 3 Leigh 118.

2. Will Not Issue before Commencement of Term.—An attachment for rent which is to become due at a future time cannot be issued before the commencement of the term for which it is to be paid; for until that time the relation of landlord and tenant does not exist. If such attachment be issued and served, the lessee, although he has entered into a recognizance to pay the rent, may have the attachment and recognizance quashed upon motion. *Johnston v. Garland*, 9 Leigh 149.

3. When Preferred to Distress.—Since distress for rent will not lie where the property has been removed from the demised premises, the claim of an attaching creditor to such property should be preferred to that of a landlord who has distrained, if this is true although the attaching creditor, on account of some alleged defect in the attachment bond, has entered into a compromise giving the landlord the preference, such agreement being without consideration and void. *Mosby v. Leeds*, 3 All 439.

4. Attachment without Bail—Interpleader.—Section 123, 1 Rev. Code 1819, allowing any person to interplead in attachments without bail applies only to attachments for debt, and not for rent. *Hallam Jones, Gilmer* 142.

5. Affidavit of Landlord.—Where an attachment is sued against the estate of a tenant for rent to become due at a future day, on the oath of the land-

lord that he has sufficient grounds to suspect that his tenant will remove his effects out of the county or corporation before the expiration of his term, it is not competent for the tenant, on the return of the attachment, to plead that his landlord had not sufficient grounds to suspect that the tenant was about to remove. *Redford v. Winston*, 3 Rand. 148.

6. Removal of Goods in Course of Trade.—The statute which authorizes a landlord to sue out an attachment against the goods of his tenant for rent not due, when the tenant intends to remove or is removing his effects from the leased premises, so that there will probably not be left on the leased premises property liable to distress sufficient to satisfy the rent when due, applies as well to removals in the regular course of business as to other removals. No exception is made in the statute. *Offterdinger v. Ford*, 92 Va. 686, 24 S. E. Rep. 246, 2 Va. Law Reg. 877.

7. Deed of Trust on Property on Leased Premises.—The trustee in a deed of trust given by the lessor on property after it has been carried on leased premises cannot remove the property from the leased premises without securing to the lessor one year's rent. He can stand on no higher ground than the lessee. And the intention of the trustee to remove said property by sale or otherwise, without securing a year's rent, is of itself sufficient cause for suing out an attachment by the landlord. *Offterdinger v. Ford*, 92 Va. 686, 24 S. E. Rep. 246.

V. ATTACHMENT FOR CONTEMPT.

A. Object.—An attachment for contempt has no other object than to bring the party into court. When the contempt is in open court, the party being present, there is no need of any process to bring him in. *Commonwealth v. Dandridge*, 2 Va. Cas. 408.

B. When Attachment for Contempt Will Lie.—An attachment for contempt in disobedience of a decree of the chancery court will only lie for disobedience of what is decreed, and not for what may be decreed. *Tallaferrro v. Horde*, 1 Rand. 242.

An attachment ought not to be awarded against a party for refusing obedience to a decree, which as yet remains general and uncertain, and the extent of which, as it relates to him, he cannot ascertain without applying to the court for a further decree. *Birchett v. Bolling*, 5 Munf. 442.

When an injunction has been awarded by a judge of the court of appeals, the chancellor ought to restrain any disobedience to that order by attachment or other proper process. *Toll Bridge v. Free Bridge*, 1 Rand. 206.

An attachment to enforce a decree pronounced against a person who was out of the commonwealth cannot be awarded against him after his return, until twelve months have elapsed from the time of service of a copy of such decree. *Horton v. Horton*, 4 Hen. & M. 408.

C. How Executed.—An attachment for not performing an order or decree of a court of equity should be executed by committing the party to the county jail till the court, or judge in vacation, is satisfied that such order or decree has been complied with. *Lane v. Lane*, 4 Hen. & M. 437. As to executing attachments to compel appearance, see *Watts v. Robertson*, 4 Hen. & M. 442.

VI. PROPERTY SUBJECT TO ATTACHMENT.

A. Real Property.—No sale of real estate which has been attached can be ordered until all the personal property attached has been sold. *Camden v. Haymond*, 9 W. Va. 680.

Contingent Remainder.—A contingent remainder which is a mere possibility is not within Va. Code 1873, ch. 148, § 1, allowing an attachment against "estates or debts" in certain cases. *Young v. Young*, 80 Va. 675, 17 S. E. Rep. 470. See extensive note appended to this case in 23 L. R. A. 642.

Interest of Heirs.—A creditor of a deceased debtor may proceed by foreign attachment against the heirs residing abroad to subject land or its proceeds, in the state, descended to them from the debtor. *Carrington v. Didler*, 8 Gratt. 280.

Interest of Tenants in Common.—The undivided interest of a tenant in a common may be levied upon and sold under an attachment. The co-tenants of the debtor are not proper parties to a suit for such purpose. *Curry v. Hale*, 15 W. Va. 867.

B. Personal Property.—An attachment was served upon trustees in a deed of trust for the payment of certain debts, and among them the debts due to the plaintiff in the attachment. *Held*, that there could be no surplus in the hands of the trustees until the plaintiff's debts were paid, and consequently there could be no surplus in their hands liable to his attachment. *Clark v. Ward*, 12 Gratt. 440.

Choses in Action.—Under Va. Code 1873, ch. 148, § 11, debts due to a nonresident debtor by open account may be attached in the hands of resident garnishees. *Porter v. Young*, 85 Va. 49, 6 S. E. Rep. 803.

Wife's Interest as Legatee.—A wife's interest as legatee in her father's estate, in the hands of the executor, may be subjected by the creditor of her husband, by a proceeding by foreign attachment when the husband resides out of the state. *Vance v. McLaughlin*, 8 Gratt. 289.

Funds in Hands of State Treasurer or Public Officer.—Funds in the hands of the state treasurer, which he holds by law in pursuance of a trust, are not liable to attachment at the suit of an individual. *Rollo v. Andes Ins. Co.*, 23 Gratt. 509, 14 Am. Rep. 147; *Buck v. Guarantors' Co.*, 97 Va. 719, 84 S. E. Rep. 950, 5 Va. Law Reg. 854; *Foley v. Shriver*, 81 Va. 568.

Steamboats.—A process issued against the owners of steamboats navigating the waters of the state can be levied on such boats. *Commonwealth v. Fry*, 4 W. Va. 721.

Chattels Pawned.—A chattel pawned or mortgaged is not attachable in an action against the pawnor or mortgagor. *Neill v. Rogers Bros. Produce Co.*, 41 W. Va. 87, 23 S. E. Rep. 702.

Bill of Sale.—Where a bill of sale is executed from one party to another, for a steamboat navigating the Ohio river, and delivery accompanies the act, thereby rendering the sale complete, there is no such right of ownership or title in the vendor as would authorize a creditor of the vendor to attach the boat under Va. Code 1860, ch. 151, § 5, for money due on an account of materials furnished in building and equipping said boat. *Hobbs v. Interchange*, 1 W. Va. 57.

Corporate Stock.—The shares of a stockholder in a railroad corporation are liable to attachment. *Shenandoah Valley R. Co. v. Griffith*, 76 Va. 913; *C. & O. R. Co. v. Paine*, 29 Gratt. 502.

Municipal Corporations.—A municipal corporation may be garnished or attached for a debt due to one of its creditors just as a natural person may be. Such a proceeding is not contrary to the public policy of this state. *Portsmouth Gas Co. v. Sanford*, 97 Va. 124, 33 S. E. Rep. 516, 5 Va. Law Reg. 172.

Ownership or Possession.—The levy of the attachment, as shown by the officer's return on the nonresident defendant's property, is the foundation of

the suit. If the property attached be not the defendant's property, the court is without jurisdiction. *Culbertson v. Stevens*, 82 Va. 408.

A house sold by parol contract to a purchaser, who has paid the purchase money and taken possession of the property cannot be taken by an attachment against the vendor as an absent debtor and subjected to the payment of his debt. *Hicks v. Biddick*, 3 Gratt. 418.

VII. AFFIDAVIT.

A. Necessity.—In a proceeding by foreign attachment in chancery where there has been no affidavit, as required by 1 Rev. Code 1819, ch. 123, § 1, that the defendants are absent from the country so that they cannot be served with process, it is error to decree a sale of their property, although one of the defendants answer admitting his nonresidence. *Brien v. Pittman*, 12 Leigh 879.

B. Time of Making.—It is not necessary for the plaintiff in a foreign attachment to file with the clerk an affidavit of the nonresidence of his debtor before the process is issued, in order to constitute it with the endorsement thereon in the nature of an attachment, a valid lien when served. *Moore v. Holt*, 10 Gratt. 284.

The affidavit required by the statutes (Va. Code 1849, ch. 151, § 2; Acts 1852, ch. 95, § 1) to authorize a creditor to sue out an attachment against the effects of an absent debtor may be made either before or after the bill is filed. *O'Brien v. Stephens*, 11 Gratt. 610.

The affidavit in an attachment suit against a nonresident, under Va. Code 1849, ch. 151, § 1, may be made at any time before the abatement of the suit by the return of the officer. *Pulliam v. Aler*, 5 Gratt. 54.

When the bill states a good case for a foreign attachment suit, the affidavit of nonresidence required by the statute may be made at any time, before third persons have acquired rights; and the endorsement on the subpoena is not necessary to render the attachment valid. *Cirode v. Buchanan*, 22 Gratt. 205.

C. Who May Make.—The affidavit may be made by "any credible person," and the affidavit need not state that the affiant is a "credible person," as that will be presumed until the contrary appears. *Ruhl v. Rogers*, 29 W. Va. 779, 2 S. E. Rep. 798; *Delaplaine v. Rogers*, 29 W. Va. 783, 2 S. E. Rep. 800.

In Behalf of Firm.—One member of an attaching firm may make the affidavit in behalf of the firm. *Kyle v. Connelly*, 8 Leigh 719.

Agents and Attorneys.—Under 1 Rev. Code 1808, ch. 78, § 6, the affidavit on which an attachment was issued, and the bond and security for its due prosecution, ought to be made and given by the creditor himself, and not by his attorney at law. *Mant v. Hendley*, 2 Hen. & M. 308.

The affidavit may now be made by the plaintiff, his agent or attorney. See Va. Code 1887, §§ 2954, 2955, 2964, 2988.

In a foreign attachment in chancery, the affidavit required by the statute, Va. Code 1900, pages 645, 646, may be made by the agent of the plaintiff. *Fisher v. March*, 26 Gratt. 705.

Under Va. Code 1873, ch. 148, § 2 (see Code 1887, § 2989) which provides that "on affidavit, at the time of or after the institution of any suit . . . the clerk shall issue an attachment," etc., the affidavit may be made by any person who knows the facts. It is not necessary that it be made by the plaintiff or his authorized agent. *Benn v. Hatcher*, 81 Va. 33.

D. Formal Requisites.—It is not a sufficient ground to quash an attachment that the affidavit does not technically allege that the affiant is entitled to recover the amount of his claim "in the suit" at bar as that sufficiently appears from the filing of the affidavit in the suit, and stating therein that the affiant is justly entitled to recover a certain sum by virtue of a note, describing it, and that the same is due and unpaid, and that affiant has instituted a suit in chancery for the purpose, and is about to issue an attachment in such suit, it further appearing that the attachment was issued in said chancery suit, and the debt was one that could properly be recovered therein. *Altmeyer v. Caulfield*, 37 W. Va. 847, 7 S. E. Rep. 409.

E. Jurat or Certificate of Officer.—Although the statute requires that the complaint to sue out an attachment against a debtor shall be made on oath as the foundation of the process, it does not require that the fact of the complaint having been verified by oath shall be certified by the justices and made a part of the record. *Kyle v. Connelly*, 3 Leigh 719.

Where a paper purporting to be an affidavit contains no jurat and does not show on its face that the party seeking the attachment was sworn, it is not a sufficient paper on which to base an order of attachment. *Cosner v. Smith*, 36 W. Va. 788, 15 S. E. Rep. 77.

But where such an affidavit as the law requires has been made in an attachment proceeding the accidental omission of the jurat when the affidavit was signed by the officer who administered the oath, was held not to vitiate the attachment. *Farmers' Bank of Va. v. Gettinger*, 4 W. Va. 306.

F. Averments.

1. Ownership.—In a suit in equity against an absent defendant where it appears from the bill that the court has jurisdiction of the case, it is not necessary for the affidavit to state that the defendant has property in the county where the suit is brought, but it is sufficient to state that he has property and effects in any county of the state. *Anderson v. Johnson*, 32 Gratt. 558.

2. Knowledge or Relief.—Under Va. Code 1873, ch. 148, § 1, (see, however, Va. Code 1887, § 2959) every averment in an affidavit to support an attachment had to be stated as a fact, and upon affiant's own knowledge and not upon belief, or information and belief. *Clowser v. Hall*, 80 Va. 864.

Affidavits as to the ground of attachment are always to be strictly construed, and any omission of the requirements of the statute is fatal to the attachment, but if the language of the affidavit necessarily implies the fact, it is sufficient. Hence, in affidavit "that the claim is just" and "that the defendant is converting, etc." is a sufficient compliance with the statute, Va. Code 1887, § 2959, which requires an affidavit "that the claim is believed to be just," and "that to the best of affiant's belief defendant is converting," etc. *Clinch River Mineral Co. v. Harrison*, 91 Va. 122, 21 S. E. Rep. 600, 1 Va. Law Reg. 37.

Under the statute, W. Va. Code, ch. 106, § 1, requiring the affidavit to state the material facts relied on, where the attachment is sought on the ground that the defendant so conceals himself that a summons cannot be served on him an affidavit that "affiant and her friends have been informed by his friends that the defendant has left the state so that a summons cannot be served upon him personally," is sufficient because it does not allege the facts positively. *Hudkins v. Haskins*, 22 W. Va. 645.

Necessity.—Under W. Va. Act of 1867, an affidavit that the affiant "thinks" the plaintiff ought to recover the sum named is not equivalent to an affidavit that he "believes" he ought to recover such sum, and is not sufficient to authorize an attachment. *Rittenhouse v. Harman*, 7 W. Va. 380.

3. Nature of Claim.—Under W. Va. Code, ch. 106, § 1, providing that the affidavit must state the nature of the claim, an averment "that his claim is founded upon a written contract for the delivery of certain timber by the plaintiff to the defendant," without stating in what respect the defendant failed to comply with such contract, is insufficient. *Cosner v. Smith*, 36 W. Va. 788, 15 S. E. Rep. 977.

An affidavit in an attachment case stating that the claim "is for transcript of foreign judgment" sufficiently sets forth the nature of the claim. *Todd v. Gates*, 20 W. Va. 464.

In an attachment suit upon the ground that the debtor has assigned his property with intent to hinder, delay or defraud his creditors, it is not sufficient for the affidavit to set forth that the debtor did certain acts which of themselves are not necessarily fraudulent, with an intent to defraud his creditors. This is a conclusion of law and should appear, not by averment, but from the facts. *Landeman v. Wilson*, 29 W. Va. 702, 2 S. E. Rep. 203.

4. Indebtedness.

a. Justice of Demand.—Under the W. Va. Statute of 1867, ch. 118, § 1, requiring that the affidavit for an attachment shall state that the plaintiff's claim is just, it is sufficient if the affidavit state that "the plaintiffs are justly entitled to recover." *Gutman v. Va. Iron Co.*, 5 W. Va. 22.

W. Va. Code, ch. 106, § 1, prescribes that the affidavit for an attachment shall state the nature of the plaintiff's claim, and the amount, at the least, which the affiant believes the plaintiff is justly entitled to recover. Held, the term "justly" is not superfluous or insignificant, but is a material qualification of the rest of the phrase, "entitled to recover," and it, or its equivalent, must be used in order to constitute a substantial compliance with the statute. *Reed v. McCloud*, 38 W. Va. 701, 18 S. E. Rep. 924. See also, *Crim v. Harmon*, 38 W. Va. 596, 18 S. E. Rep. 758.

b. Amount of Debt.—The affidavit for an attachment is not sufficient if it does not show the amount the plaintiff is entitled to recover in the action, as well as the nature of the plaintiff's claim. *Cosner v. Smith*, 36 W. Va. 788, 15 S. E. Rep. 977.

But it is not necessary in Virginia to state the character of the claim, whether due by bond, note, account, or otherwise. *McCluney v. Jackson*, 6 Gratt. 96.

Under West Virginia Statute.—Where the affidavit for an attachment in designating the amount which the affiant believed the plaintiffs were entitled to recover, omits the words "at the least" contained in the statute, W. Va. Code, ch. 106, § 1, and uses no words equivalent thereto, such defect is fatal and the attachment should be quashed. *Neill v. Rogers Bros. Produce Co.*, 41 W. Va. 37, 23 S. E. Rep. 702; *Dulin v. McCaw*, 39 W. Va. 721, 20 S. E. Rep. 681; *Crim v. Harmon*, 38 W. Va. 596, 18 S. E. Rep. 753; *Altmeyer v. Caulfield*, 37 W. Va. 847, 17 S. E. Rep. 409.

c. Maturity of Debt.—Under W. Va. Acts 1886, ch. 38, it is not necessary that the affidavit for an attachment shall in express terms state that the "debt is due," but it is sufficient if it states "the amount at the least which the affiant believes the plaintiff is justly entitled to recover in the action." *Ruhl v.*

Rogers, 29 W. Va. 779, 2 S. E. Rep. 798; Delaplain v. Rogers, 29 W. Va. 783, 2 S. E. Rep. 800.

5. Nonresidence.—In an attachment suit against an absent debtor under 1 Rev. Code 1819, to subject lands fraudulently conveyed by him in the hands of home defendants, the affidavit must distinctly aver the nonresidence; and if this be denied by the answer, it must be proved, or the chancery court is without jurisdiction. *Kelso v. Blackburn*, 3 Leigh 299.

6. Sufficiency.

a. Following Language of Statute.—In an attachment proceeding against a corporation on the ground that it has failed to comply with the requirements of section 37, ch. 54 of the Code of W. Va., in reference to the appointment of a person to accept service of process, the affidavit must show that the requirements of said section have not been complied with before an order of attachment can issue by reason of such noncompliance. *U. S. Baking Co. v. Bachman*, 38 W. Va. 84, 18 S. E. Rep. 382.

b. Stating Specific Facts.—The grounds for attachment are conclusions of law and an affidavit is not sufficient which states that the debtor did certain acts, which of themselves are not necessarily fraudulent, with an intent to defraud his creditors. This, being a conclusion of law, should appear from the facts themselves, not by averment. *Landeman v. Wilson*, 29 W. Va. 702, 2 S. E. Rep. 208; *Hale v. Donahue*, 25 W. Va. 414; *Delaplain v. Armstrong*, 21 W. Va. 211.

Where the affidavit upon which an attachment is issued charges that the grantors made the assignment with intent to hinder, delay or defraud creditors, and in "material facts" sets out the provisions of the deed in which said intent is claimed to appear, showing that the deed is fraudulent upon its face, the affidavit is supported by such "material facts." *Landeman v. Wilson*, 29 W. Va. 702, 2 S. E. Rep. 208.

But an affidavit alleging the "material facts" for an attachment to be "that the defendant is hiding and concealing a large part of the stock of liquors and wines which the plaintiff sold and delivered to him is not sufficiently definite to sustain the order of attachment." *Sandheger v. Hosey*, 26 W. Va. 221.

c. Stating Good and Bad Grounds.—Where the affidavit for an attachment contains two grounds for the attachment, the one good and the other bad, it is sufficient. *Ruhl v. Rogers*, 29 W. Va. 779, 2 S. E. Rep. 798; *Delaplain v. Rogers*, 29 W. Va. 783, 2 S. E. Rep. 800.

G. Supplemental Affidavit.—A defective affidavit for an order of attachment cannot be supplemented by a subsequent affidavit or proofs. *U. S. Baking Co. v. Bachman*, 38 W. Va. 84, 18 S. E. Rep. 382.

Although the affidavit does not state the "nature of the plaintiff's claim" as required by the statute, the attachment suit will not be quashed where a second affidavit has been filed before the rights of other parties have intervened. *Chapman v. R. Co.*, 26 W. Va. 299.

H. Effect of Defective Affidavit.—Defective or irregular affidavits, although a ground for reversing a judgment or decree in attachment proceedings for error in departing from the directions of the statute, do not render such a judgment or decree or the subsequent proceedings void. *Hall v. Hall*, 12 W. Va. 1.

Objections in Appellate Court for First Time.—Objection to an attachment because not supported by an affidavit, or because the affidavit is defective, is ground for a motion to abate the attachment, but

the objection must be made in the court below, and cannot be made for the first time in the appellate court. If, however, the bill upon which the attachment issues contains all necessary averments is sworn to and filed before the attachment issued, and the affidavit adopts the bill, this is all that is required. *Sims v. Tyrer*, 96 Va. 5, 26 S. E. Rep. 584; *Va. Law Reg.* 530.

VIII. BOND.

A. Necessity.—Where the sheriff is not directed to take possession of the attached property, no bond is required under Va. Code 1887, § 2988. *Keneck v. Caulfield*, 88 Va. 122, 18 S. E. Rep. 343.

An order of attachment should not be issued requiring the officer to whom it is directed to take into his possession the property upon which it is levied until bond has been given as required by W. Va. Code, ch. 106, § 6. *Cosner v. Smith*, 36 W. Va. 38, 5 S. E. Rep. 977.

B. By Whom Given.—The attachment bond of one partner of a mercantile house suing out an attachment, conditioned that the partner shall pay all costs in case the house shall be cast in the suit, and all damages that shall be adjudged against him for suing out the attachment, is a good bond. *Kyle v. Connelly*, 3 Leigh 719.

But where an attachment is sued out in the name of a firm and one of the partners gives bond conditioned that if "he" shall be cast in the suit, "he" shall pay all costs and damages which shall be recovered against "him," the bond cannot be considered as that of the firm and is not good. *Jones v. Anderson*, 7 Leigh 308.

Under the act of 1792, the attachment bond had to be given by the creditor himself, and not by his attorney. *Mantz v. Hendley*, 2 Hen. & M. 308.

C. Amount.—Judgment on attachment will not be quashed because the bond given on suing it out recites only the sum due, without interest. *Smith v. Pearce*, *Gilmer* 84.

Where the claim of the plaintiff in an attachment against an absconding debtor is stated as for a certain sum due by negotiable note, with interest from the day when such note should have been paid, and the attachment bond describes it as sued out for the sum of money mentioned therein, saying nothing of interest, the variance is not material. *Smith v. Pearce*, 6 Munf. 555.

D. Amendment.—The failure of the clerk to endorse on an attachment bond that it has been acknowledged and approved may be cured at any time with the permission of the court. *Anderson v. Kanawha Coal Co.*, 12 W. Va. 526.

E. Action on.

1. Necessary Averments.—In an action on an attachment bond, it is not sufficient to allege in the declaration, that the defendant "did not pay all such costs and damages as have accrued, etc.," but it must be expressly averred that costs and damages have been actually sustained. *Dickinson v. McCraw*, 4 Rand. 158.

2. Parties.—The provision in an attachment bond, under Va. Code 1871, ch. 136, § 6, to pay all damages "sustained by any persons by reason of their suing out said order of attachment," does not enure to the benefit of the sheriff, who levied the attachment and took the attached property into his possession and custody. *Mitchell v. Chancellor*, 14 W. Va. 22.

The bond authorized by Va. Code 1840, ch. 151, § 1, in relation to attachments, is not a general indemnifying bond; but where the attachment issues

against the effects of the defendant generally, he alone can sue upon the bond; and where the attachment is issued against specific property, only the defendant or owner of such property can sue upon the bond. When the attachment is issued against the effects of the defendant generally, and is levied upon the property of a third person, such third person has no remedy upon the attachment bond. *Davis v. Commonwealth*, 13 Gratt. 130.

3. *Plea*.—Either *non damnificatus* or *de injuria* is a good plea to a suit on an attachment bond where the condition is that the plaintiff in the attachment "shall pay all costs and damages which may be awarded against him, or sustained by any person by reason of his suing out said attachment." *Hoadley v. Roush*, 8 W. Va. 280.

4. *Liability of Sureties*.—In an action upon an attachment bond with condition to pay all costs and damages which may be awarded against the plaintiff in the attachment, or sustained by any person by reason of the plaintiff having sued it out, it is necessary for the plaintiff to prove that the attachment was sued out without sufficient cause. The sureties in the attachment bond, when the attachment has been sued out with good cause, are not responsible for the failure of the officer to discharge his duty, or for a trespass committed by him. *Offterdinger v. Ford*, 92 Va. 636, 24 S. E. Rep. 246, 2 Va. Law Reg. 877.

The court in which a forthcoming bond for property levied on is taken may, in a proper case, direct an *exoneretur* of the surety, and need not require him to seek his remedy by *audita querela* or by bill in equity. *Steele v. Boyd*, 6 Leigh 547, 29 Am. Dec. 218.

5. *Damages*.—Upon an attachment bond with condition to pay all costs and damages which may be awarded against the plaintiff in the attachment, or sustained by any person by reason of the plaintiff having sued it out, the defendant may maintain an action not only to recover damages awarded against the plaintiff in the attachment, but also other damages sustained by the defendant by reason of the attachment having been sued out without sufficient cause. The words "any person" include the defendant in the attachment. *Offterdinger v. Ford*, 92 Va. 636, 24 S. E. Rep. 246, 2 Va. Law Reg. 877.

The defendant in attachment may have his action on the attachment bond, to recover damages sustained in consequence of suing out the attachment, without previously ascertaining his damages in some other action. *Dickinson v. M'Craw*, 4 Rand. 158.

Evidence.—Where a party is engaged in the performance of a contract on a railroad, using his teams and utensils in removing dirt at so much per cubic yard, and his teams and utensils are seized and sold under an attachment wrongfully sued out against him, whereby he is prevented from the performance of his contract, the profit of the contract, which he has thus been prevented from realizing, is a proper element of damage in an action upon the attachment bond, where such profit can be readily ascertained. *State v. Andrews*, 39 W. Va. 35, 19 S. E. Rep. 385, 45 Am. St. Rep. 864.

IX. WRIT OF WARRANT.

A. *Requisites*.—The endorsement on the subpoena by the clerk of the court of chancery that the suit is brought to attach the effects of the absent defendant is sufficient to restrain the application of them to any other use, until the plaintiff's demand is satisfied. *M'Kim v. Fulton*, 6 Call 106.

The order of attachment provided for by the W. Va. Act of 1867, ch. 118, § 1, is not a writ and need not

run in the name of the commonwealth. *Gutman v. Va. Iron Co.*, 5 W. Va. 22. But it was held in *Sims v. Bank of Charleston*, 3 W. Va. 415, that an endorsement for attachment was insufficient which was not directed to the sheriff or any one else, did not require the sheriff to attach the property of the defendant, and did not run in the name of the commonwealth.

B. *To What Officer Directed*.—Where the writ is not directed to the sheriff of the county where the attached property lies and does not require him to make the attachment, the attachment is invalid. *Sims v. Bank of Charleston*, 3 W. Va. 415.

An attachment against a nonresident defendant may be directed to the sheriff of another county where he has effects. *Pendleton v. Smith*, 1 W. Va. 16.

C. *Names of Parties—Recital of Cause of Action*.—A writ is fatally defective which does not specify the sum demanded, or the names of the plaintiffs or defendants, or to whom the property levied on belongs. *Clay v. Neilson*, 5 Rand. 506.

D. *Recital of Proceedings*.—An order of attachment otherwise sufficient is good although it does not recite that an affidavit has been filed or refer to any affidavit on its face, where it appears by the record that a sufficient affidavit was filed by the plaintiff with the clerk when the order of attachment was issued. *King v. Board*, 7 W. Va. 701.

E. *Variance*.—The mistake of the clerk in issuing the order of attachment for a greater amount than that named in the affidavit is not such a clerical error as may be corrected on motion, and such attachment should be quashed on motion of the defendant. *Ballard v. Great Western Mining & Mfg. Co.*, 39 W. Va. 394, 19 S. E. Rep. 510.

X. LEVY.

A. *Upon Real Property*.—Va. Code 1880, ch. 151, § 7, provides that every foreign attachment, except when it is sued out specially against specified property, shall be sufficiently levied in every case by serving a copy of such attachment on such persons as may be designated by the plaintiff in writing, or be known to the officer to be in possession of effects of, or to be indebted to, the defendant; and as to real estate, by such estate being mentioned and described by endorsement on such attachment or on the subpoena. *Held*, that the endorsement on the subpoena is not necessary to render the attachment valid in such foreign attachment suit, where the bill particularly describes the real estate. *Cirde v. Buchanan*, 22 Gratt. 205.

B. *Upon Personal Property*.—Under Va. Code 1878, ch. 148, §§ 7, 8, the attachment may be levied on any visible and tangible effects of a nonresident debtor in his actual or constructive possession, in the common law mode, as in the case of an execution. If those effects, whether visible and tangible or not, are in a third person's possession, they may be sufficiently levied on by delivering a copy of the attachment to such person. But they cannot be seized and taken possession of, unless the creditor has given a bond with security in a penalty at least double the amount sued for; the giving of which bond is optional with the creditor who acquires a lien by the levy without the seizure. *Dorrier v. Masters*, 33 Va. 459, 2 S. E. Rep. 927.

To constitute an effectual levy, it is not essential that the officer make an actual seizure. If he have the goods in his view and power, and note on the writ the fact of his levy thereon, this will in general suffice. *Dorrier v. Masters*, 33 Va. 459, 2 S. E. Rep. 927; *affirming Bullitt v. Winstons*, 1 Munf. 269.

To make a valid levy of an attachment upon chattels, the officer, though he need not physically seize or even touch them, must have them in his view and power, and do some act indicative of an intent to levy and of the act of levying, and, if the chattels are of a nature to admit of it, must take them into his custody and control. *Poling v. Flanagan*, 41 W. Va. 191, 28 S. E. Rep. 685.

XI. LIEN.

A. When Lien Commences.—The lien of an attachment commences at the time of the levy. *Williamson v. Bowie*, 6 Munf. 176; *Poling v. Flanagan*, 41 W. Va. 191, 28 S. E. Rep. 685.

B. Extent of Lien.—The attachment operates as a lien only upon the debts and effects of the absent debtor, in the hands of the home defendants against whom, and upon whom, it is served. *Farmers' Bank v. Day*, 6 Gratt. 360.

C. How Lien on Wife's Interest as Legatee Defeated.—Though the service of the process upon the executor, in a proceeding by foreign attachment, creates a lien upon the wife's interest as legatee in her father's estate in favor of the creditor, yet if the husband dies pending the proceedings, leaving his wife surviving him, the lien of the creditor is defeated, and the property belongs to the wife. *Vance v. McLaughlin's Adm'r*, 8 Gratt. 280.

D. Priorities.

1. Between Attachments.—Among attaching creditors proceeding by foreign attachment, the creditor whose subpoena is first sued out and served is entitled to priority of satisfaction. *Farmers' Bank v. Day*, 6 Gratt. 360.

Two attachments against an absconding debtor are levied on the same property. The first levied is quashed by the county court, but upon appeal this judgment is reversed. Pending the appeal an order is made in the second attachment case for a sale of the property, and it is sold and the proceeds are paid over to the creditor in the second attachment. *Held*, an action for money had and received will lie by the first attaching creditor against the creditor in the second attachment for the proceeds of the sale. *Caperton v. McCorkle*, 5 Gratt. 177.

Since the question of priority between several attachments is determined not by priority of judgments but of attachments, the first attachment creditor may enjoin a creditor under a subsequent attachment but prior judgment. *Moore v. Holt*, 10 Gratt. 284.

Under 1 Rev. Code 1819, ch. 123, creditors of an absent defendant who have proceeded by foreign attachment in equity have priority over creditors seeking, by a subsequent attachment on the same property issued after the service of the subpoena in chancery on the home defendant, to enforce an appearance in an action at law. *Ersine v. Staley*, 12 Leigh 406.

2. Between Attachments and Other Liens.

a. Verbal Lien on Land.—A recital that the attachment issued in the cause was returned served on personal property and real estate is not evidence of the issue and levy of such attachment that will constitute a lien on the real estate mentioned as against third persons seeking to enforce a prior verbal lien upon such real estate. *Houston v. McCluney*, 8 W. Va. 135.

b. Execution Lien.—A *feri facias* placed in the hands of an officer for execution is a legal lien under Va. Code 1860, ch. 188, § 3, and continues in effect after the return day. Such lien has priority over an at-

tachment subsequently levied, or execution lien under the same law, even though there has been a proceeding by suggestion under the junior, prior to that under the senior execution. *Charron v. Boswell*, 18 Gratt. 216; *Puryear v. Taylor*, 12 Gratt. 401.

c. Lien on Property Pledged.—An attachment levied upon pledged property is subject to the lien of the pledge. *First Nat. Bank of Parkersburg v. Harkness*, 42 W. Va. 156, 24 S. E. Rep. 548.

d. Lien on Partnership Effects.—Where partners have been declared bankrupts, one creditor of the partnership cannot attach the partnership effects so as to obtain a preference over the other partnership creditors. *Lindsey v. Corkery*, 29 Gratt. 650.

e. Pendency of Suit.—An attachment against the effects of the husband as an absconding debtor, levied before the institution of a suit by the wife for a divorce, entitles the attaching creditor to be satisfied out of the attached effects, in preference to the claim of the wife. *Jennings v. Montague*, 2 Gratt. 284.

3. Between Attachments and Alienations.

a. Deed of Trust.—A subpoena in chancery was sued out against an absent debtor and home defendants. The subpoena was returned executed on the home defendants, but the date of its service upon them was not stated. After the issue of the subpoena, but before the return day thereof, the debtor executed a deed to secure certain creditors, which was duly filed. *Held*, that the attachment was postponed to the deed. *Richeson v. Richeson*, 2 Gratt. 497.

b. Sale of Shares of Stock.—A creditor attaching the shares of a stockholder in a railroad company acquires a claim superior to that of a subsequent bona fide purchaser of such shares for value without notice of the attachment. *Shenandoah Valley R. Co. v. Griffith*, 76 Va. 913.

c. Sale of Negotiable Note.—S, the owner of the negotiable note of M, endorses the same and deposits it with a bank as collateral security for a loan obtained upon the discount by the bank of the note of B. S sells the note to O, and gives O an order on the bank to deliver the note to O. On the same day O presents the order at the bank, and is told the president of the bank is absent from town. Some days thereafter O has an interview with the president at the bank, and is then informed that the debt of S is nearly paid, and that he would deliver to O the note but for the service of attachment upon the bank. The debt of S is afterwards paid in full. Before the sale by S to O, an attachment had been served upon M at the suit of a creditor of S; but of this O had no notice when he purchased the note. After the sale and notice to the bank by O, an attachment was served on the bank by another creditor of S. *Held*, that the sale by S to O is valid, and he is entitled to the note as against the attaching creditors of S. *Howe v. Ould*, 28 Gratt. 1.

d. Assignment of Legacy.—A creditor, at whose suit process of foreign attachment against an absent debtor is served on one of two executors, is entitled to priority of satisfaction, out of a legacy to the absent debtor, over an assignee of the legacy who claims under an assignment dated the day after the service of the attachment on the executor. *Sandridge v. Graves*, 1 Pat. & H. 101.

4. As Effected by the Recording Acts.—Prior to the Va. statute, Acts 1893-94, page 545, requiring foreign mortgages to be recorded, the lien of a mortgage creditor upon a chattel, subject to a mortgage in another state duly recorded according to the law of that state, though not recorded in Virginia, had

iority over the lien of an attaching creditor in this state. *Craig v. Williams*, 90 Va. 500, 18 S. E. Rep. 899, Am. St. Rep. 934.

Since the Virginia statute of registry does not embrace choses in action, an assignment of such chose in action to a trustee to pay the debts of the signor is valid against a subsequent attaching creditor of the assignor. *Kirkland v. Brune*, 31 Gratt. 126; *Gregg v. Sloan*, 76 Va. 497.

A purchaser of land without notice of an attachment which had been previously levied upon it, but which had not been recorded or docketed as required by Va. Code 1873, ch. 182, § 5, is entitled to hold the land free from the lien of the attachment. *Ummack v. Soran*, 30 Gratt. 292.

Under the Virginia Registration Laws (1866-67, page 538; Va. Code 1867, § 2465), an attachment has priority over a deed of trust, conveying goods and chattels, recorded in another state but not in Virginia. *Smith v. Smith*, 19 Gratt. 545.

XII. DISPOSITION OF ATTACHED PROPERTY.

A. Sale.—Upon a foreign attachment in chancery, subject lands of an absent debtor to a debt claimed by the attaching creditor, payable in instalments, some of which have, and others have not, been due at the time of the decree, *held*, that the court ought not to direct the sale of the subject to satisfy more than the instalments already due, but could order a sale to satisfy what is due, and hold the creditor's attachment a lien on the subject, for the instalments afterwards to fall due. *Watts v. Inney*, 3 Leigh 272.

A sale in a foreign attachment suit under W. Va. Code, ch. 151, without the bond required by section of said chapter conditioned that the plaintiff will perform such future order as may be made upon the appearance of said defendant, and his making "fense," will be set aside. *Hall v. Lowther*, 22 W. Va. 570.

Where there is a valid attachment and levy of the same, a decree of a court of competent jurisdiction, an order or decree of sale, and a sale by a commissioner appointed by the court, and confirmation thereof with direction to make a deed to the purchaser, a deed made by the commissioner, by recitation of the purchaser, to his assignee is admissible in another suit in connection with the record, *et c.*, to show title in the assignee. *Hall v. Hall*, 12 W. Va. 1.

B. Delivery on Forthcoming or Delivery Bond.—Special bail to replevy the attached effects and a plea to the action ought to be received, in behalf of the defendant upon an attachment issued against him as an absconding debtor; notwithstanding he did not appear in person or by attorney; such bail and plea being offered at the term to which the attachment is returned executed, and before the judgment upon it is pronounced. *Smith v. Pearce*, 4 Munf. 585.

It is error to quash a forthcoming bond on motion, simply because the name of the obligee therein has been misspelled, or so written as to make it doubtful as to the person intended. *Ambach v. Armstrong*, 29 W. Va. 744, 3 S. E. Rep. 44.

XIII. PROCEEDINGS TO SUPPORT OR ENFORCE ATTACHMENT.

A. In General.—In an attachment suit in equity, it is not necessary or proper to direct an inquiry whether the rents and profits of the real estate will pay the debt within a reasonable time. *Curry v. Sale*, 15 W. Va. 867.

B. Process and Service.

1. Necessity.—In an attachment in equity against property alleged to belong to nonresident debtors, complainants, who asked for no order of publication against such nonresident debtors, who failed to serve them personally with process, and who consented to the hearing of a motion by the claimant of the property to abate the attachment, cannot object to a decree abating the attachment, on the ground that no process, personal or by publication, had been executed against the defendants. *Kern v. Wyatt*, 89 Va. 885, 17 S. E. Rep. 549.

Objections to the regularity of attachment proceedings may be taken advantage of, not only in the trial court, but in an appellate court, although not raised in the trial court; and the court may, of its own motion, dismiss an irregular attachment, and ought to do so when there has been no appearance by the nonresident debtor, and no personal service upon him. *McAllister v. Guggenheimer*, 91 Va. 317, 21 S. E. Rep. 475.

2. Sufficiency.—Va. Code 1873, ch. 148, § 27, providing on what conditions the defendant, after a decree, may petition for a rehearing, but exempting from its operation one who has been served with a copy of the attachment or with process in the suit, issued more than sixty days before the date of the decree, only refers to such a service in the proceedings in the suit, and not to a service out of the suit and out of the state. *Anderson v. Johnson*, 32 Gratt. 558.

Under Va. Code 1873, ch. 148, § 27, defendants in foreign attachment may appear pending the suit, tender security for costs and have it reheard. The exception of a defendant served with a copy of the attachment, or with process in the suit, does not refer to a service thereof outside the proceedings in the suit or outside the state. And such service can have no greater effect than an order of publication duly posted and published. *Smith v. Chilton*, 77 Va. 585; *approving Anderson v. Johnson*, 32 Gratt. 558.

C. Order of Publication.—Where a defendant in an attachment suit has been served with process, although he has not been served with a copy of the order of attachment, he need not be proceeded against by order of publication, and has no time given him by W. Va. Code, ch. 106, in which to appear in the suit after the term at which judgment is rendered against him on the claim and an order made to sell the attached effects or estate; nor is any bond required to be given as provided for in section 23 of said chapter. *Capehart v. Dowery*, 10 W. Va. 180.

Where an attachment proceeding is instituted against a firm consisting of two members and service of the writ is had upon only one partner, order of publication, as prescribed by the statute, should be had against the other partner; but if both partners appear by attorney, and submit motions or file a plea, this is an appearance to the suit, and the court may proceed as if both parties had been served. *Andrews v. Mundy*, 36 W. Va. 22, 14 S. E. Rep. 414.

A joint judgment was rendered against several of the defendants in a suit in which an attachment had issued against all the defendants as nonresidents. One of them, who had pleaded, took an appeal, and the court of appeals affirmed the judgment. Another of the defendants against whom the joint judgment was rendered, a nonresident, who had not pleaded, after due notice, moved the circuit court which had rendered the judgment to reverse and annul the same, because there had been a personal

Judgment against him, though he had never been served with process. *Held*, that the circuit court properly overruled his motion, it being conclusively presumed that he was notified of the appeal and that all questions raised by his motion had been considered and decided adversely by the court of appeals when it affirmed the joint judgment, summons of the nonappealing defendants being necessary to vest the court of appeals with jurisdiction. *Newman v. Mollohan*, 10 W. Va. 488.

Necessity of Posting Notice.—Where, before an attachment is returned "executed," an order of publication is made, but the order is not posted by the clerk at the front door of the courthouse on the first day of the court next after it is entered, the attachment should be abated. Va. Code 1887, §§ 2979, 3281; *Petty v. Frick*, 86 Va. 501, 10 S. E. Rep. 886.

D. Appearance.—The defendant in an attachment may enter bail and plea without appearing in person. *Smith v. Pearce*, *Gilmer* 34.

Special bail to replevy the attached effects and a plea to the action ought to be received in behalf of the defendant upon an attachment issued against him as an absconding debtor, notwithstanding he did not appear in person or by attorney, where such bail and plea is offered at the term to which the attachment is returned executed and before the judgment upon it is rendered. *Smith v. Pearce*, 6 Munf. 585.

In an attachment proceeding instituted against a firm consisting of two partners, only one of whom is a resident, if both partners appear by attorney, and submit motions or file a plea, this is an appearance to the suit, and the court may proceed as if both parties had been served. *Andrews v. Mundy*, 86 W. Va. 22, 14 S. E. Rep. 414.

E. Sufficiency of Pleading.—A demurrer will not lie to a bill in equity for the failure of the plaintiff in an attachment suit to aver that an attachment has issued. *O'Brien v. Stephens*, 11 Gratt. 610.

Answer or Plea.—Complainants sued out an attachment under Va. Code 1873, ch. 148, § 11, and filed their bill averring a breach of warranty in a sale of phosphate to them. Defendants demurred to the bill, moved to abate the attachment, and filed their answer denying every material allegation of the bill. No testimony was taken. *Held*, that though the demurrer should be properly overruled and the motion to abate might not be properly sustainable, yet the bill being denied as to all its material averments, should be dismissed with costs to the defendant. *Boyce v. McCaw*, 76 Va. 740.

In a proceeding by foreign attachment to collect the price of personal property, it is competent for the defendant to plead and rely on a breach of warranty in reduction or abatement of the price, and when such defence is plead and relied on in the answer, it is unnecessary to file a cross-bill for that purpose. *Baker v. Oil Tract Co.*, 7 W. Va. 454.

F. Judgment.

1. In General.—In an attachment suit under the act of April 3d, 1862, giving a remedy in equity to a creditor against his absent debtor where the debtor has estate or debts due to him in the county or corporation where the suit is brought, when the court has properly taken jurisdiction, it must proceed to give relief according to the principles of equity. *O'Brien v. Stephens*, 11 Gratt. 610.

Stock of a corporation, attached as in the hands of a garnishee, should be sold under an order of court made for that purpose; but it is error for the court

to render a judgment against the garnished corporation for the value of the stock, unless it appears that the lien of the attaching creditor on the stock was lost by the act of the corporation. *C. & O. R. Co. v. Paine*, 29 Gratt. 502.

Upon a foreign attachment in chancery to subject lands of the absent debtor to a debt claimed by the attaching creditor, payable in instalments, some of which have, and others have not fallen due, at the time of the decree, *held*, that the court ought not to direct a sale of the subject to satisfy more than the instalments already due; but should order sale to satisfy what is due, and hold the creditor's attachment a lien on the subject, for the instalments afterwards to fall due. *Watts v. Kinney*, 3 Leigh 272.

In an attachment against an absconding debtor, judgment should first be entered against the debtor, and then the garnishee should be ordered to pay it. *George v. Blue*, 3 Call 455.

2. In Personam or in Rem.—In an attachment proceeding under the act of April 3d, 1862, if an absent defendant does not appear in the cause there cannot be a personal decree against him; but the attached effects alone can be subjected. But if he does appear, there may be a personal decree only against him, or there may be both a personal decree and a decree subjecting the attached effects. *O'Brien v. Stephens*, 11 Gratt. 610.

The attaching creditor, having established the debt, is entitled to a personal decree against the absent debtor, though the whole property attached is exhausted in paying the debt of the home defendant. *Williamson v. Gayle*, 7 Gratt. 152. See also *Schofield v. Cox*, 8 Gratt. 583.

Where an attachment has been sued out against a nonresident corporation which has the equitable title to real estate attached in the cause, a personal decree may be rendered against such nonresident corporation, which appears in the cause; but the attached property will not be sold in the absence of the trustees who hold the legal title; they must either be served with process, or, if nonresidents, an order of publications must issue against them and be duly published. *Chapman v. P. & S. R. Co.*, 15 W. Va. 184.

3. Validity.—A decree for the plaintiff in a proceeding by foreign attachment in chancery was erroneous, where it was without affidavit of the defendant's nonresidence; was for a sale of lands without requiring bond with surety from the plaintiff with condition for performing future orders or decrees and was for a sale of land for cash, with directions for payment of money to the creditor and conveyance of land to the purchaser, before the sale was reported and confirmed. *Brien v. Pittman*, 12 Leigh 388.

Presumption.—In a suit by attachment the record may show upon its face that the debtor did or did not appear; and if it does, the judgment will have effect accordingly. If the record does not show whether he did or did not appear, the presumption is in favor of the validity of the judgment. *Fisher v. March*, 26 Gratt. 765.

G. Right to Rehear.—Under Va. Code 1873, ch. 148, § 27, Code 1887, § 2986, defendants in foreign attachment may appear pending the suit, tender security for costs and have it reheard. The exception of a defendant served with a copy of the attachment or with process in the suit, does not refer to a service thereof outside the proceedings in the suit or outside the state. And such service can have no greater effect than an order of publication duly posted and

published. This rule applies to acknowledgments of such services made outside the state. *Smith v. Chilton*, 77 Va. 585; *Anderson v. Johnson*, 32 Gratt. 558. As to reopening case by nonresident defendant, see *Smith v. Life Ass'n of America*, 76 Va. 380.

XIV. RETURN.

A. Time for Making.—Prior to the Virginia statute, Acts 1893-94, p. 495, allowing attachments to be made returnable to a rule day, all attachments, whether by regular writ or by endorsement on the summons, had to be made returnable to a term of the court in which the suit was pending, and not to a rule day of such court. Va. Code 1887, § 2965; *Craig v. Williams*, 90 Va. 500, 18 S. E. Rep. 899, 44 Am. St. Rep. 934; *Clinch River Mineral Co. v. Harrison*, 91 Va. 122, 21 S. E. Rep. 660, 1 Va. Law Reg. 37; *Grinberg v. Singerman*, 90 Va. 645, 19 S. E. Rep. 161; *McAllister v. Guggenheimer*, 91 Va. 817, 21 S. E. Rep. 475.

B. Requisites.—The return must show that the attachment was levied on the property of the defendant in order to make it valid. *Offending v. Ford*, 86 Va. 917, 12 S. E. Rep. 1.

The return must show that the attachment was levied upon the property as the property of the defendant in order to make a valid levy on real estate under Va. Code 1873, ch. 148, §§ 7 and 9. And in attachment proceedings in equity against a nonresident, under section 11, the officer's return that he "served the summons on—by delivering a copy to him," and that "he resided on the premises within described," does not show a valid levy. *Robertson v. Hoge*, 83 Va. 124, 1 S. E. Rep. 667.

A sheriff has no power to execute an attachment outside of his bailiwick. Hence, if the return is regular on its face, it will be presumed, in the absence of evidence to the contrary, that the attachment was legally executed, and the return need not show that it was executed in his bailiwick. *Guarantee Co. v. Nat. Bank*, 96 Va. 490, 28 S. E. Rep. 909, 3 Va. Law Reg. 873.

C. Description of Land.—The levy of an attachment in equity on real estate must contain such general description of the real estate, and describe it with such substantial accuracy, that it may be easily identified when conveyed, by looking alone to the levy, without the aid of extrinsic evidence. *Raub v. Otterback*, 92 Va. 517, 23 S. E. Rep. 888, 1 Va. Law Reg. 841.

XV. CLAIMS BY THIRD PERSONS.

A. Right to Question Validity of Attachment.—Any person interested in the property attached, who was not originally a party to the suit, may intervene to have his rights adjudicated by the court in which the attachment suit is pending. *Capehart v. Dowery*, 10 W. Va. 130.

To entitle a person, who claims to have a mortgage lien on land attached by a creditor in a suit in equity in which an attachment is sued out against a nonresident debtor under W. Va. Code, ch. 106, § 24, to dispute the validity of the attachment, such person must appear in the court in which the proceeding is had and file his petition and give security for costs. *Tappan v. Pease*, 7 W. Va. 682.

A mere creditor at large of the absconding debtor is not a person interested in disputing the attaching plaintiff's claim within the meaning of W. Va. Code, ch. 106, § 23. *Crim v. Harmon*, 38 W. Va. 596, 18 S. E. Rep. 758.

B. Right of Subsequent Attaching Creditors.—A subsequent attaching creditor may appear to the

first attachment and, either in his own name or in the name of the absconding debtor, contest the right of the first attaching creditor to recover. *M'Cluney v. Jackson*, 6 Gratt. 96.

A subsequent attaching creditor, whose attachment was issued in another county but levied in the county where the effects or property of the debtor are, may appear by petition and move to quash the preceding attachment for good grounds. *Pendleton v. Smith*, 1 W. Va. 16.

Parties who claim to be subsequent attaching creditors cannot come into court and dispute the validity of a prior attachment on mere motion. They must file their petition in accordance with Va. Code 1860, ch. 151, § 25. The same provision is found in W. Va. Code 1860, ch. 106, § 24. *Ludington v. Hull*, 4 W. Va. 130.

C. Proceedings to Determine Claims to Property.—The complainant in an attachment against property of a nonresident debtor, who had not been served with process personally or by publication, consented to the hearing of a motion by a claimant of the property to abate the attachment. *Held*, that a decree abating the attachment and declaring the estate not to belong to said debtors was not premature or erroneous. *Kern v. Wyatt*, 89 Va. 885, 17 S. E. Rep. 549.

Retention of Cause.—Where, in such case as the above, the court abated the attachment because the property was not owned by the nonresident firm, the decree ends the cause and it will not be retained to inquire whether one of said firm had an attachable interest in the property. *Kern v. Wyatt*, 89 Va. 885, 17 S. E. Rep. 549.

Where Claims Sustained.—The attaching creditor, proving his debt, is entitled to a personal decree against his absent debtor, though the property may be adjudged to the assignee. *Schofield v. Cox*, 8 Gratt. 533.

Appearance.—Where an affidavit is filed, along with the answer of a corporation whose stock has been attached, alleging that some third person claims the said stock, and that the corporation claims no interest therein, nor colludes with such claimant, but is ready to dispose of the stock as the court shall direct, the court should require such third person to appear and state the nature of his claim, and maintain or relinquish the same. *C. & O. R. Co. v. Paine*, 29 Gratt. 502.

Petitions.—A plaintiff in attachment, who has a deed of trust on the property attached, cannot unite with the trustees in the deed and come into the attachment suit by petition and ask to have the attached property delivered to the trustees. Section 2984 of the Code of 1887 was intended for the protection of the rights of third parties, and not of the plaintiff in the attachment. In this case the plaintiff, though united with the trustees, was the real petitioner, and, the attachment having been quashed because issued without sufficient cause and upon false suggestion, the property was rightly restored to the defendant. *Littell v. Lansburg*, 96 Va. 540, 32 S. E. Rep. 63, 4 Va. Law Reg. 843.

Proper Issue.—Where the petitioner claims the attached property under Va. Code 1873, ch. 148, § 25, the proper issue to be tried is, "whether or not petitioner has any title to, lien on or interest in the attached property or its proceeds." See Va. Code 1887, § 2984; *Starke v. Scott*, 78 Va. 180.

Right to a Jury.—Prior to Va. Code 1887, § 2984, where persons claiming the property attached, or some interest therein, were admitted as parties in the

cause, it was error for the court to pass upon the claim without the intervention of a jury. *Anderson v. Johnson*, 82 Gratt. 558.

XVI. DISSOLUTION.

A. What Will Effect Dissolution.

1. **Bankruptcy.**—Under the federal bankruptcy act of 1867, the bankruptcy of the defendant in an attachment proceeding, and the assignment of his effects to a commissioner in bankruptcy dissolved any attachment not issued four months prior to the commencement of the proceedings in bankruptcy. *Weisenfeld v. Mispelhorn*, 5 W. Va. 46.

2. **Death of Defendant No Dissolution.**—The death of a debtor whose real property has been attached in a suit of equity, and proceeding therein by attachment against him and his estate as a nonresident, does not dissolve the attachment or lien thereon, where the death occurs after the attachment is levied. *White v. Heaven*, 7 W. Va. 324.

3. **Failure to Require Security.**—Where the plaintiff in an attachment suit waives the statutory right to require security from the defendant upon his appearance, the attached property is held to be thereby discharged. *Tiernans v. Schley*, 2 Leigh 25.

4. **Lien of Prior Attaching Creditor.**—See *ante*, "Lien of Attachment."

B. Procedure for.

1. Motion to Quash.

a. **In General—Right to Quash.**—An attachment irregularly issued ought to be quashed *ex officio* by the court to which it is returned, though bail be not given, nor any plea filed by the defendant. *Mantz v. Hendley*, 2 Hen. & M. 808.

Upon a motion under Va. Code 1860, ch. 151, § 22, to abate an attachment on the ground that it has been issued on false suggestions or without sufficient cause, the question is whether, upon all the evidence, there was probable cause to believe the defendant was doing the act which would authorize the attachment; and not whether the facts as they appeared to the affiant, though only a small part perhaps of the facts of the case, afforded him reasonable grounds for such a belief. *Claffin v. Steenbock*, 18 Gratt. 842.

b. **Who May Make Motion to Quash.**—Any party interested may move the court to quash an affidavit and attachment. *Capehart v. Dowery*, 10 W. Va. 130.

c. **Waiver of Right to Move to Quash.**—The right to move to quash an attachment on the ground of an insufficient affidavit is not, under W. Va. Code, ch. 106, § 19, waived by appearance and filing an answer. *Dulin v. McCaw*, 30 W. Va. 721, 20 S. E. Rep. 681.

d. **Effect of Decision Denying Motion.**—The power given to circuit judges to quash or dismiss attachments in vacation is not final, and does not supersede the defendant's right to make defense at the trial in term under the Virginia statutes. *Dunlap v. Dillard*, 77 Va. 847.

e. **Province of Court and Jury.**—Where the plaintiff, on a motion to abate an attachment, declines to express any wish for a jury, and the defendant expresses a wish that a jury may be dispensed with, the court should hear and decide the cause without a jury. *Claffin v. Steenbock*, 18 Gratt. 842.

f. **Evidence—Burden of Proof.**—Upon a motion to abate an attachment the burden of proof is on the plaintiff to show that the attachment was issued on sufficient cause, and he may, therefore, be required to introduce his evidence first. *Wright v. Rambo*, 21 Gratt. 158.

The burden of proving that an attachment was issued on sufficient cause rests on the plaintiff, and

he should introduce his evidence first, when the defendant moves an abatement. *Sublett v. Wood*, 7 Va. 318.

Fraud.—Where an attachment is sued out on the ground that the plaintiff has executed a deed with intent to defraud creditors, the burden of proving such fraud rests on the attaching creditors. *Burns v. Trant*, 88 Va. 980, 14 S. E. Rep. 845.

Residence.—Residence once established is presumed to continue until proved to have been changed; and the burden of proving the change is on him that asserts it. *Starke v. Scott*, 73 Va. 180.

2. Plea in Abatement.

a. **In General.**—A plea that the sum for which an attachment issued was not due at the date of the affidavit on which it was based should not be received as a plea in abatement of the attachment. *Anderson v. Kanawha Coal Co.*, 12 W. Va. 526.

Where the bill shows on its face proper matter for the jurisdiction of the court, no exceptions for want of such jurisdiction can be taken except by plea in abatement. *Middleton v. White*, 5 W. Va. 52.

The fact that an attachment bond is signed by the plaintiff's attorney, without authority, cannot be taken advantage of by a motion to quash. The proper remedy, if any, is by a plea in abatement. *Tingle v. Brison*, 14 W. Va. 295.

b. **How Plea Should Conclude.**—A plea in abatement to an attachment ought not to conclude with praying judgment if the plaintiff ought to have, and maintain his action, but only that the attachment be quashed. *Mantz v. Hendley*, 2 Hen. & M. 808.

3. **Voluntary Dismissal of Attachment.**—Where the plaintiff has sued out an attachment both at law and in equity, he may dismiss his attachment at law and proceed on his attachment in equity. *Magill v. Manson*, 20 Gratt. 627.

4. **Effect of Dismissal.**—Attachment in equity cannot be maintained on undue debts on the ground that the debtors are nonresidents unless they have disposed of their effects fraudulently, or are about to do so; and upon abatement the court cannot retain the suit and grant relief, but must dismiss the bill. Va. Code 1887, § 2964; *Wingo v. Purdy*, 6 Va. 472, 12 S. E. Rep. 970.

XVII. ACTIONS FOR WRONGFUL ATTACHMENT.

A. **Grounds of Action.**—Both malice and probable cause are necessary to sustain an action for wrongfully suing out a foreign attachment. *Marshall v. Bussard*, Gilmer 9.

In an action for damages for suing out a writ of attachment, it is necessary to allege in the declaration that it was sued out maliciously and without probable cause. *Burkhart v. Jennings*, 2 W. Va. 32.

Probable Cause.—Probable cause for suing out an attachment is a belief by the attaching creditor in the existence of the facts essential to the prosecution of his attachment, founded upon facts which might induce such a belief on the part of a man of ordinary caution, prudence and judgment. *Burkhart v. Jennings*, 2 W. Va. 242; *Spengler v. Davy*, 13 Gratt. 881. See also, *Claffin v. Steenbock*, 18 Gratt. 842.

B. **Form of Action.**—Trespass on the case is the proper action against a person who maliciously and without probable cause sues out an attachment and causes it to be levied on the property of another. *Shaver v. White*, 6 Munf. 110; *Olinger v. McClesner*, 7 Leigh 670.

C. **Persons Liable.**—A firm assigned its goods and two stores on premises of which they held leases in trust to pay certain debts, with authority to

take possession, sell the goods, and collect the debts. W attached said goods. On the same day, two hours later, a bank sued out an attachment against the goods and leased premises. The same officer made both levies. F interpleaded and there was a judgment in his favor; and afterwards the suit of W was dismissed. F then sued the bank for the damages he had sustained by the levy of their attachment. *Held*, that F had a right to recover from the bank all the damages he had sustained by the levy of the bank upon the two storehouses held under lease and the withholding the possession from him. *Fechheimer v. Nat. Exch. Bank*, 81 Gratt. 661.

Several Liability.—Where attaching creditors wrongfully levy successive attachments on the same property, they are severally liable for the damages. *Fechheimer v. Nat. Exch. Bank*, 81 Gratt. 661.

D. Evidence.—Where several attachments have been wrongfully levied upon the same property, it is not admissible to introduce parol evidence, in an action for damages therefor, to show that the property was exclusively held under the first attachment levied. *Fechheimer v. Nat. Exch. Bank*, 81 Gratt. 661.

632 *Johnson v. Gibbons.*

June Term, 1876, Wytheville.

1. **Attorney and Client—Authority of Attorneys.**—In 1860 attorneys at law receive two notes, and give a receipt, which says:—Received for collection, and after describing them says:—On the above notes we are to bring suit, and prosecute them to judgment, and to have a fee of five dollars in each case. Though the last clause of the receipt may be construed to relieve them from the obligation to collect, and from the corresponding compensation or commission for collecting, it cannot be construed to deny to them the authority to collect, or to limit them to the function of prosecuting the claims to judgment.

2. **Same—Same—Laches of Client—Ratification.**—Judgments having been recovered in the cases and executions issued, which were stayed, the debtor in April 1862 pays to the attorneys \$2,000 in part of these debts, the payment being in confederate money, neither the attorneys nor the debtor having any notice that the creditor was unwilling to receive confederate money, and the attorneys write immediately to the creditor that they have this money for him; and he, holding that the attorneys had no authority to collect the money, does

not reply to their letter; and neither attorneys nor debtor hear of any objection to their receipt of the money until 1874. The creditor is concluded by his failure to give his attorneys notice of his objection to their receiving the money.

In January 1874, H. C. Gibbons gave notice to James M. Johnson that he would move the county court of Washington county to quash two executions, and also two writs of venditioni exponas, which had been issued from the clerk's office of said county court in the name of said Johnson against said Gibbons and others. By consent the cases were removed to the circuit court of Washington county, and came on to
633 *be heard in that court in February 1874. The material facts are as follows:

In 1860, Bekem & Campbell, attorneys at law, practising in the county of Washington, received from Johnson two notes, and gave him a receipt therefor, in which they say:—Received of James M. Johnson for collection a note drawn by A. F. Bradley and payable to H. G. Gibbons for \$500, dated, &c.; another note drawn by same, payable to same, dated at the same time, and payable four months after date for \$2,000, at, &c. On the above notes we are to bring suit, and prosecute them to judgment, and to have a fee of five dollars in each case.

Bekem & Campbell instituted suits on these notes in the county court of Washington, and recovered judgments against Bradley and Gibbons, and executions were issued upon them, and forthcoming bonds taken and forfeited; and executions were issued on the forfeited forthcoming bonds, returnable to May 1861. On these executions stay bonds were executed in July 1861 by Gibbons, with William King Heiskell, the sheriff, as his surety. About the same time, Gibbons, who had been the previous sheriff, put into the hands of Heiskell tax and other tickets, amounting to \$3,197.94, which Heiskell was to collect and account for in paying the two executions of Johnson against Gibbons, &c. And on the 5th of April 1862 Heiskell paid to Bekem & Campbell \$2,600 on the said two executions. This payment was in confederate money.

Johnson's statement, which was received as evidence, is—That after the executions had gone to the officer's hands, he had been pressing both Gibbons and Heiskell for the money. In 1861, about June of that year, when pressing Heiskell for the money,

634 *Heiskell said he had property levied on, I think he said cattle, and unless I would attend the sale and make the property bring something like it would have brought in the fall before, I could not get my money; stating that some law of that kind had been passed. I told him I would take nothing but coin. Heiskell then said, then you cannot get your money. I replied, I will wait until I can get such money. * * * * In the spring of the year 1862 I received a letter from Mr. Bekem, in which he stated he had \$2,000 in confederate money

*For monographic note on Attorney and Client, see end of case.

†**Authority of Attorneys—Laches of Client—Ratification.**—In *Higginbotham v. May*, 90 Va. 290, 17 S. E. Rep. 941, the court said: "In *Law v. Crop*, 1 Black's R. 539, MR. JUSTICE GREEN, speaking for the whole court, said: 'When informed by his agent of what he had done, if the principal did not choose to affirm the act, it was his duty to give immediate information of his repudiation. He cannot, by holding his peace and apparent acquiescence, have the benefit of the contract if it should turn out to be profitable, and retain a right to repudiate it if otherwise. The principal must, therefore, when informed, reject within a reasonable time, or be deemed to adopt by acquiescence.' These remarks are applicable to this case as to that. *Johnson v. Gibbons*, 27 Gratt. 636; *Coffman v. Miller*, 26 Gratt. 698."

for me, and that I could get the rest of my money in that currency whenever I wanted it. To which letter I made no reply, as Mr. Bekem had no authority to collect this debt for me.

It was agreed that Heiskell was dead. Gibbons testified that he had no notice that Mr. Bekem was not authorized to collect these debts. And it was further agreed, that the original executions went into the hands of Gibbons, who was then deputy sheriff of Washington county, and who was fined \$50 at March court 1861 for the failure to return the said executions upon the motion of Johnson; in which motion he was represented by Bekem & Campbell as his attorneys.

The cases were by consent heard together; and the court rendered a judgment by which the executions and the writs of venditioni exponas were quashed. And it was adjudged that the \$2,600 paid to Bekem & Campbell should be applied to satisfy the judgment on the note for \$2,000, and the balance should be entered as a credit on the other judgment. And Johnson thereupon applied to a judge of this court for a writ of error and supersedeas; which was awarded.

Gilmore and D. Trigg, for the appellant.

*635 J. A. Buchanan and R. M. Page, for the appellee.

Anderson, J., delivered the opinion of the court.

The court is of opinion that there is no error in the judgment. Johnson was promptly informed by his attorney, Bekem, of the payment made to him on the 5th of April 1862, in confederate money, upon his executions against Gibbons. Johnson admits that he made no reply to the letter of Mr. Bekem informing him of the payment; for which he assigns the very insufficient reason, that he had no authority to collect the debt for him. Mr. Bekem was an attorney at law, engaged in the practice of his profession in connection with Mr. Campbell, in the firm name of Bekem & Campbell, when they receipted to Mr. Johnson for the notes upon which they obtained the judgments for which the executions in question were issued. In their receipt they say: "Received of James M. Johnson, for collection, a note"—which they describe—also "another note"—which they describe—and conclude, "on the above notes we are to bring suits, and prosecute them to judgment, and to have a fee of \$5 in each case," &c. This last clause of the receipt seems to indicate that the undertaking of the attorneys was to prosecute the suits to judgment, for which their compensation is fixed; but it can hardly be construed as a revocation of the first clause, which authorizes them to collect, or of the general authority of an attorney to collect. Though it may be construed to relieve them from the obligation to collect, and from the corresponding compensation or commission for collecting,

which it is probable was intended, it cannot be construed, we think, to deny to them the authority to collect, or to limit them 636 to the function *of prosecuting the claims to judgment. And this view is confirmed by the fact, that a motion was prosecuted by the same attorneys against the deputy sheriff, to a judgment for a fine of fifty dollars, for failing to return the executions.

If Johnson was really of opinion that Bekem had no authority to collect the money, he had reason to believe, from what has been narrated, and from his having actually received the money, that he considered he had authority to collect it; and so far from the fact of his belief that he had not, furnishing a reason or excuse for not replying to his letter, it made it the more incumbent on him to have promptly replied, and to have informed him that he did not acknowledge his authority to collect the money, and that he did not approve of his receiving confederate money, and would not receive it from him. Mr. Justice Greer, of the supreme court of the United States, in *Law v. Crop*, 1 Black's R. 539, says, speaking for the whole court: "When informed by his agent of what he had done, if the principal did not choose to affirm the act, it was his duty to give immediate information of his repudiation. He cannot, by holding his peace and apparent acquiescence have the benefit of the contract (in this case payment) if it should turn out to be profitable, and retain a right to repudiate it if otherwise. The principal must, therefore, when informed, reject within a reasonable time, or be deemed to adopt by acquiescence."

It does not appear that Bekem had ever received an intimation that his client did not wish him to collect the executions, or that he would not receive confederate money in payment. It was contended by the learned counsel for the plaintiff in error that Heiskell, the sheriff, was aware of it. If he was, it is not presumable 637 *that he would have communicated it to the attorney to whom he offered to pay it; nor can it be presumed that he communicated it to the debtor Gibbons, who swears that he had no notice that Mr. Bekem was not authorized to collect; and if Bekem had been thus restricted in the general powers of an attorney, the debtor's payment to him would not be invalidated unless he had notice of the restriction.

But was Heiskell, through whom the payment was made to Bekem, aware that Johnson was unwilling to receive confederate money at the time he made the payment in question? It seems that about a year before he informed Johnson that he had levied his executions upon cattle, and that unless he would attend the sale and bid on them, and make them bring about as much as they would have brought the fall before, under a law then in force, he could not make his money, when Johnson declined, and said he would take nothing but gold or coin for his debt. At that time confederate money was not in circulation, and he could not have

made the declaration with reference to it. And will Heiskell be held to have had notice from that casual conversation, twelve months afterwards, when confederate money was freely paid out and received by the banks and in all business transactions, and had become the almost exclusive circulating medium of the country, that Johnson was unwilling to receive payment of his debt in that currency, which it is known to the court that many persons then regarded as equal to coin as a medium of exchange? We think not. And after silently acquiescing in the payment made to his attorney, without an intimation to the defendant in error, to the contrary, so far as this record shows, from the 5th of April 1862, 638 when it was *made, until the 19th of January 1874, when the executions in question were sued out, it would not be equitable nor reasonable, that he should be allowed to repudiate it now. Upon the whole, the court is of opinion to affirm the judgment of the circuit court.

Judgment affirmed.

ATTORNEY AND CLIENT.

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IX. Lien of Attorney.

I. DEFINITION.

An attorney is defined to be one who is set in the place of another, and he is either public, as an attorney at law, or private, as being delegated to act for another, in private contracts or agreements. *In re Leigh*, 1 Munf. 408.

II. ADMISSION.

A. Statutory Regulations for Obtaining License.

1. In General.—For the rules and regulations for licensing persons to practise law in Virginia, see Acts 1896-6, p. 49; Rules of Supreme Court, 96 Va. xv, 4 Va. Law Reg. 252. For form of application, recommendation and certificate, see 3 Va. Law Reg. 153. For questions propounded by the supreme court at recent bar examinations, see 2 Va. Law Reg. 774; 3 Va. Law Reg. 815, 405; 4 Va. Law Reg. 270, 405, 707; 5 Va. Law Reg. 273, 422, 723.

2. Practising Lawyer in Another State.—Under Va. Code 1887, § 3192, as amended by Acts 1897-8, p. 400, any duly licensed and practising lawyer of another state may practise in Virginia without further examination. See 4 Va. Law Reg. 325.

A Virginia license to an attorney, resident in West Virginia at the time of its formation, avails as fully as if granted in the latter state. *Ex parte Quarrier*, 2 W. Va. 509.

B. Eligibility.—A person, who had practised as an attorney before the Civil War, applied for admission to practise in the courts of West Virginia. He admitted that he had voted for the ordinance of secession, that he had voluntarily entered the military service of the Confederate States, and that he had borne arms against the United States of America. He also produced a copy of the amnesty oath which he had taken and subscribed under the proclamation of the chief executive of the United States. *Held*, that as the applicant had not been convicted of treason according to the course of the common law, and as no treason against the state to whose courts he applied for admission had been proved or confessed, he could not be refused permission to qualify and practise. *Ex parte Quarrier*, 2 W. Va. 509.

C. Oath.—An attorney is not bound, as a requisite to his admission to the bar of any court, to take the oath prescribed by the act to suppress duelling. *In re Leigh*, 1 Munf. 468.

An attorney is not an officer within the meaning of the act of November 16th, 1863, and is not required to take the oath therein prescribed for officers. *Ex parte Faulkner*, 1 W. Va. 269.

A licensed attorney has as unquestioned a right to qualify by taking the oaths required at the time of his application for admission as he has to practise after he has qualified. *Ex parte Quarrier*, 2 W. Va. 569.

A pardon granted to rebels from the federal government restores the parties to the rights and privileges derived from it only. It does not entitle an attorney, who was admitted to the practice of the law before the Civil War, to resume his practice without complying with the terms of the state statute requiring a certain oath to be taken by attorneys. *Ex parte Hunter*, 2 W. Va. 122. This case, however, was practically overruled by *Ex parte Garland*, 4 Wall. (U. S.) 353.

A person, who had qualified as an attorney before the passage of the attorneys' test oath act of February 14, 1866, did not acquire such a vested right in the office of attorney as released him from being required to take the oath prescribed in that act. Nor is said test oath act unconstitutional. *Ex parte Quarrier*, 4 W. Va. 210.

D. License Tax.—A city ordinance imposing a specific license tax "on every attorney at law" includes nonresident attorneys who have offices and practise their profession in the city, as well as resident attorneys. *Petersburg v. Cocke*, 94 Va. 244, 26 S. E. Rep. 576.

The city of Richmond has authority to lay a tax on lawyers as such. *Ould & Carrington v. Richmond*, 23 Gratt. 464.

E. Effect of Acting as Attorney.—If a suit is brought by an attorney not qualified to practise, it should not be dismissed; but the attorney should himself suffer the punishment imposed by law. *Rader v. Snyder*, 3 W. Va. 413.

III. PRIVILEGES, DISABILITIES AND LIABILITIES.

A. General Nature of Office of Attorney.—While one person was holding the office of county judge under an unexpired commission, another was appointed thereto. *Held*, that the former did not abandon his title to the office by taking up the practice of the law, an attorney not being an officer. *In re Bland & Giles County Judge Case*, 33 Gratt. 443.

An attorney at law is not a public officer. Nor is the practice of the law an office or place within the meaning of the act to suppress duelling. *In re Leigh*, 1 Munf. 468.

The clerk of a court cannot be permitted to practise as an attorney in the court of which he is clerk, although he has a license to practise in all the courts of the commonwealth. *Ex parte Collins*, 2 Va. Cas. 222.

In a criminal trial, the prosecutor may employ counsel to aid the attorney for the commonwealth, and such counsel will be permitted to aid in the prosecution. *Hopper v. Commonwealth*, 6 Gratt. 684.

B. Exemption from Arrest.—Attorneys at law are exempt from arrest in civil suits during their attendance at court. *Commonwealth v. Ronald*, 4 Call 97.

C. Assignment as Counsel by Court.—Courts of equity, as well as the common law courts, have jurisdiction in suits of paupers for freedom; and, in a

proper case, will appoint counsel to prosecute for the pauper. *Dempsey v. Lawrence*, Gilmer 33.

D. Liability for Costs.—Where an attorney knowingly brings ejectment in the name of a deceased demandant, he is liable for cost. *Howard v. Raven*, 2 Leigh 733.

E. Liability for Contempt.—The failure of an attorney in a cause to attend court at the time of trial previously fixed with his consent is not a contempt of court where it appears that he subsequently accepted a retainer, and entered upon the trial of another cause with every reasonable expectation of being able to complete it before the time fixed for the hearing of the first cause, and, finding this impossible, notified the court of the fact, and disclosed a courteous and respectful consideration for the court. *Wise v. Commonwealth*, 97 Va. 73, 34 S. E. Rep. 453.

Where a rule is made against a person to show cause why he shall not be punished for a contempt of the court in aiding to obstruct the execution of its decree, he purges himself of the contempt by answering under oath that in what he had done he acted as counsel in good faith with no intention of committing any contempt of the court. *Wells v. Commonwealth*, 21 Gratt. 500.

F. Influencing Legislation.—Section 6, chapter 1 of the Criminal Code, Acts 1877-78, p. 295, aims at the offense of paying money or other compensation to secure the passage or defeat of any measure, and was doubtless intended to apply to the use of money in buying votes, etc., and not to contracts with attorneys for purely professional services. Hence contracts for the latter purpose are valid. *Yates v. Robertson*, 80 Va. 475.

IV. SUSPENSION AND DISBARMENT.

A. Jurisdiction.—Circuit courts have jurisdiction and power, upon their own motion, without formal complaint or petition, in a proper case, to strike the name of an attorney from the roll, provided he had reasonable notice, and an opportunity to be heard. *State v. McClaugherty*, 33 W. Va. 259, 10 S. E. Rep. 407.

B. Grounds.—The circuit court may, by summary proceedings, according to the common law, strike from its roll the name of an attorney who is guilty of writing and publishing in a newspaper a false and libelous charge against the judge of such court in respect to his official conduct, and the disclaimer by the attorney of intentional wrong or disrespect to the judge or court will not excuse him, when the contrary appears upon a fair interpretation of the language employed. *State v. McClaugherty*, 33 W. Va. 250, 10 S. E. Rep. 407.

C. Proceedings.—Under the provisions of 1 Rev. Code 1819, ch. 76, § 6, a court cannot, for malpractice of an attorney, committed in its presence, suspend the license of the party offending, in a summary way, but must direct an information to be filed against him, and inflict the punishment on the verdict of guilty found on such information. *Ex parte Fisher*, 6 Leigh 619.

V. DEALINGS BETWEEN ATTORNEY AND CLIENT

A. Agreement for Additional Compensation.—Dealings between an attorney and his client for the former's benefit are presumptively invalid as constructively fraudulent, and the onus is on the attorney to show that the contract was perfectly fair, and was entered into by the client freely and with full understanding as to his rights and as to its effect. *Thomas v. Turner*, 87 Va. 1, 12 S. E. Rep. 146.

Va. Code 1873, ch. 180, § 2 (see Code 1887, § 3201), enacting that "any contract made with an attorney for other or higher fees shall be valid and may be enforced in like manner with other contracts" does not apply to an agreement made after the relation of attorney and client is established. *Thomas v. Turner*, 87 Va. 1, 12 S. E. Rep. 149.

An agreement in a note "to pay, in default of payment at maturity, ten per centum on the face of this note, for attorney's fees for collection" is a penalty, and not enforceable. *Rixey v. Pearre*, 89 Va. 113, 15 S. E. Rep. 498.

B. Purchase from Client.—Where an attorney at law undertakes the collection of a claim for his client and, while such relation exists, buys the claim from his client, whether under false representations or not, or even if the claim was sold for an adequate price, such sale is voidable at the option of the client. *Lane v. Black*, 21 W. Va. 617. But such sale cannot be avoided after it has been deliberately ratified or confirmed on full information. *Lewis v. Broun*, 86 W. Va. 1, 14 S. E. Rep. 444.

An attorney cannot, as a general rule, make a valid purchase of the property of his client in litigation, but the same is voidable at the option of the client. However, the suit to avoid such sale must be brought within a reasonable time. Nor can it be set aside as against subsequent purchasers for value without notice; the only remedy of the client in such case being against the attorney. *Lewis v. Broun*, 86 W. Va. 1, 14 S. E. Rep. 444.

C. Acquiring Property Adversely to Client's Interest.—In a suit by the beneficiaries against the trustee for an accounting, the court directed a sale of the trust estate and a partition of the proceeds. The attorney of the trustee bought in the property in the name of a third person, and the sale was confirmed in ignorance of this fact. *Held*, that the beneficiaries have a right to have the sale set aside without any inquiry as to the adequacy of the price. *Newcomb v. Brooks*, 16 W. Va. 32.

Conflicting Interests.—An attorney employed in a cause is not a competent commissioner to take an account ordered in the cause. *Bowers v. Bowers*, 29 Gratt. 607.

D. Privileged Communications.—There is no rule of law better settled than that a counsel, solicitor or attorney shall not be permitted to divulge any matter which has been communicated to him in professional confidence. *Chahoon's Case*, 21 Gratt. 822; *Parker v. Carter*, 4 Munf. 273.

An attorney, employed as such to draw a deed, must be considered as acting in the line of his profession, and bound to conceal the facts disclosed by the person who employs him. *Parker v. Carter*, 4 Munf. 273.

Communications by assignor to attorney of assignee are not privileged where the attorney was acting for his client. *Hall v. Rixey*, 84 Va. 790, 6 S. E. Rep. 215.

Under the particular circumstances of this case, a letter written by a mortgagee to his attorney, informing him that the mortgage debt had been paid, and requesting him to dismiss a suit then pending to foreclose the mortgage, was held to be proper evidence in a controversy with the executor of the mortgagee, who had revived the proceedings to foreclose. *Lyle v. Higginbotham*, 10 Leigh 63.

Waiver.—The rule of law which protects professional communications is for the benefit of the client, and there is no doubt he may waive this

protection, but the waiver must be distinct and unequivocal. *Tate v. Tate*, 75 Va. 522.

VI. RETAINER AND AUTHORITY.

A. Presumption and Proof of Retainer.

1. In General.—Where an attorney institutes a suit, he is presumed to have authority to appear. *Low v. Settle*, 22 W. Va. 387; *Fisher v. March*, 26 Gratt. 765.

Where the petitioner in a petition suit died and the suit was revived in the name of his widow and infant son, the counsel employed by the deceased petitioner will be presumed, in the absence of evidence to the contrary, to be continued as counsel in the cause. *Wilson v. Smith*, 22 Gratt. 407.

Where an execution is delivered to the sheriff of a county other than that in which the creditor resides, and the creditor employs an attorney, practising in the sheriff's county, to collect the money, without, however, giving the attorney a written order, and the attorney makes a demand of the money from the sheriff; such demand, if no objection be made at the time to the authority of the attorney to receive the money, is a sufficient demand to justify a judgment against the sheriff. *Chapman v. Chevis*, 9 Leigh 297.

Where an attorney makes an acknowledgment of service on the back of the summons, it will be presumed that he had authority for so doing. *Marling v. Robrecht*, 13 W. Va. 440.

2. Estoppel to Deny Authority.—Where a court, having jurisdiction of plaintiffs' ancestor's estate and person, orders sale of latter's property to satisfy his indebtedness, and the record shows that plaintiffs appeared and were made parties, and that they acquiesced in the sale and took no steps to avoid it for thirteen years, knowing that the purchasers had sold the property, such plaintiffs cannot annul the sale on the ground that they were never summoned or appeared in the cause; and where it appears that the attorney for plaintiffs' ancestor was authorized to represent him in such suit, and that plaintiffs were aware of such fact and did not, after their ancestor's death, revoke or question his authority pending said suit, such plaintiffs, after such sale has been made, are estopped from denying the said attorney's authority to represent them in said suit. *Marrow v. Brinkley*, 85 Va. 55, 6 S. E. Rep. 605.

B. Extent of Authority.

1. In General.—The attorney for a husband and wife, in whose favor a decree has been obtained, has authority to instruct the clerk to correct a palpable error therein, which resulted from a mistake in the calculation of interest. *Hill v. Bowyer*, 18 Gratt. 364.

The counsel in an action has authority to do such acts only as his client, if in court, might do himself. He has no authority to enter into private or executory contracts; nor can he bind a person not a party to the suit. *Herbert v. Alexander*, 2 Call 498.

An attorney who is counsel for parties having interests adverse to those of infant parties cannot be allowed to consent to a decree on behalf of such infants. *Walker v. Grayson*, 86 Va. 337, 10 S. E. Rep. 51.

2. Acting for Persons Other Than Clients.—In a suit to set aside a fraudulent conveyance made by a husband to his wife, where depositions are taken after notice given to the wife, the counsel of the wife has no right to appear for her husband, at her request, to object to the depositions for him, on the ground that he had no notice of the taking of such depositions. *Silverman v. Greaser*, 27 W. Va. 550.

3. Submission to Arbitration.—While an attorney at

law, as such, has no authority, before or after the institution of a suit, to make an agreement *in pais* to submit his clients' cause to arbitrators, he may, if his clients are adults, consent in open court to submit their cause to arbitration. *McGinnis v. Curry*, 18 W. Va. 29.

4. **Delegation of Authority.**—Where an attorney at law has been employed to prosecute a suit, he cannot, in the absence of direction, from his client, delegate his authority as such to another attorney. *Crotty v. Eagle*, 35 W. Va. 143, 18 S. E. Rep. 59.

An attorney of record, or the original counsel employed by a party to collect a debt, or conduct a suit, may appoint another to act in his place, if so authorized by his client. *Ellis v. Heptinstall*, 8 W. Va. 388.

5. **Ratification by Client.**—An attorney at law, employed to collect a debt, takes in satisfaction thereof the debtor's assignment to the creditor of a bond of third persons held by the debtor, and institutes a suit on the assigned bond against the obligors. The creditor prosecutes the suit, which is long pending, and pays the costs therein incurred. *Held*, that the creditor does not thereby ratify the act of the attorney in commuting the original debt; and the recovery against the obligors in the assigned bond having proved unavailing, the debtor's original liability still continues. *Wilkinson v. Holloway*, 7 Leigh 277.

Where an attorney at law, employed to collect a debt, accepts notes, bonds, etc., of the debtor as collateral security for the debt, such agreement becomes binding when ratified by his client. But a recitation in a bill afterwards filed against the debtor that the attorney had made such an agreement is not necessarily a ratification. *Wiley v. Mahood*, 10 W. Va. 206.

C. Authority to Accept Payment.

1. **In General.**—In general, payment to an attorney is good, especially if he has possession of the evidence of the debt. Under particular circumstances, it may be otherwise; as if notice be given that no such power is vested in the attorney. *Hudson v. Johnson*, 1 Wash. 9.

Where a judgment or decree is paid to the attorney who obtained it, before his authority is revoked, and due notice of such revocation given to the defendant, such payment is valid and binding on the plaintiff, so far, at least, as the defendant is concerned. *Yoakum v. Tilden*, 8 W. Va. 167.

An attorney's receipt for claims for collection may be so far added to by parol testimony as to show a contemporaneous additional contract on the part of the attorney to receive the claims as collateral security for debts due him from the client. *Tuley v. Barton*, 79 Va. 387.

A receipt was given by attorneys for certain notes, received for collection, containing a description of the note followed by the clause, "On the above notes we are to bring suits, prosecute them to judgment, and to have a fee of five dollars in each case." *Held*, that while this clause may be construed to relieve them from the obligation to collect, and from the corresponding compensation for collecting, it cannot be construed to deny to them the authority to collect. *Johnson v. Gibbons*, 27 Gratt. 632.

2. **Acceptance of Payment in Property Other Than Money.**—Where an attorney is employed to collect a debt, he has no authority to accept anything else in satisfaction or as collateral security for the debt without express authority from his client. *Kent v. Chapman*, 18 W. Va. 485; *Wilkinson v. Holloway*, 7 Leigh 277.

An attorney has no right to receive a bond from the debtor in discharge of his client's claim, without the assent of his client. If he does, he is the agent, not of the plaintiff, but of the defendant, and the plaintiff may still proceed against the defendant. *Smock v. Dade*, 5 Rand. 639, 16 Am. Dec. 780.

Substituting Attorney's Personal Debt.—Where an attorney employed to collect a debt discounts from it a debt he himself owes the debtor, and takes for the balance the debtor's assignment of a bond of third persons, the creditor is not bound by such arrangement. *Wilkinson v. Holloway*, 7 Leigh 27; *Wiley v. Mahood*, 10 W. Va. 206.

3. **Acceptance of Payment in Depreciated Currency.**—An attorney has no authority to receive depreciated currency in satisfaction of his client's debt. *Harper v. Harvey*, 4 W. Va. 539.

4. **Acceptance of Less Than Amount Due—Compromise.**—An attorney at law, employed to collect a debt, merely as such, has no power to compromise after judgment, and accept a sum of money less than the full amount of the judgment as satisfaction. *Walt v. Brookover*, 35 W. Va. 323, 18 S. E. Rep. 1097.

Where an attorney collects a portion of his client's debt and gives a fraudulent receipt for the whole amount, such receipt is not binding on his client. *Chalfants v. Martin*, 25 W. Va. 394.

In the absence of express authority, an attorney has no power to compromise or settle his client's claim. *Crotty v. Eagle*, 35 W. Va. 143, 18 S. E. Rep. 59.

5. **Acceptance of Payment in Satisfaction of Judgment.**—An attorney may receive the money due on a judgment and his receipt will discharge the judgment. *Branch v. Burnley*, 1 Call 147; *Wilson v. Stokes*, 4 Munf. 455.

6. **Acting for Persons Having Different Interests.**—Where an attorney employed to collect a debt, without the consent of his client, accepts bonds, etc., of the debtor, with the understanding that he is to collect and apply them as payment on the claim when collected, he is acting as attorney for the debtor, and not as attorney for his original client. But as soon as he receives any money on the claim, thus put in his hands for collection by the debtor, it is a payment, to that extent, less his fees for collecting, upon the claim of his original client. *Wiley v. Mahood*, 10 W. Va. 206.

An attorney receives a claim for collection, brings suit upon it and obtains judgment. The debtor then puts into his hands the bond of a third person for about the amount that is due on the judgment; and the attorney gives him a receipt by which he says he has received the bond on which he is to bring suit, and after paying himself his fee and commission, is to apply the balance to the credit of the judgment. The attorney receives the money on the bond but does not pay it over to the creditor. *Held*, that this is a valid payment by the judgment debtor. *Smith v. Lamberts*, 7 Gratt. 138.

VII. LIABILITY OF ATTORNEY TO CLIENT.

A. Liability for Negligence.

1. **In General.**—While an attorney is not bound to undertake to conduct a suit for another without compensation, yet if he voluntarily engages to do so, he is liable for the consequences of his improper management, and cannot allege a want of consideration for his services. *Stephens v. White*, 2 Wash. 38.

An attorney, acting in accordance with his best judgment, after consultation with other attorneys, cannot be considered negligent. *Tanner v. Bennett*, 83 Gratt. 251.

2. **In the Collection of Demands.**—An attorney accepted confederate currency in settlement of his client's claim. At the time this was the only currency, and very little depreciated. *Held*, that he was not liable to his client for receiving such money, he not having forbidden it. *Pidgeon v. Williams*, 21 Gratt. 251.

Where the client fails to show that claims put in the attorney's hands were solvent, or that the attorney was negligent in the discharge of his duty, or that he was injured by the attorney's conduct of the business, the attorney is not chargeable. *Staples v. Staples*, 85 Va. 76, 7 S. E. Rep. 199.

3. **In the Conduct of the Action.**—Where an attorney is charged with negligence in failing to file a declaration, the proof must show that he was employed at the time when it should have been filed. *Stephens v. White*, 2 Wash. 203.

B. Liability for Money Collected.—A purchaser at a judicial sale executed her bonds to S as receiver. To him, as her attorney, she also assigned certain claims to collect and pay on her bonds. Part of the collections he applied as directed; the balance he did not so apply. There was nothing to show that he had charged himself, as such receiver, with said balance. *Held*, that as S collected the money as the purchaser's attorney, she was not entitled to have it credited on her bonds until he had so applied it. *Paxton v. Steele*, 86 Va. 811, 10 S. E. Rep. 1.

A debt due from an attorney to his client for money collected on a judgment is only a debt by simple contract. *Gathright v. Marshall*, 1 H. & M. 427.

An attorney, having collected a debt, deducted his fees from the amount, and deposited the balance in a bank of good credit, not in his own name but to "collection account," an account in which he deposited all money collected by him for his clients. The name of the client, for whose benefit the deposit was made, was written in the bank book opposite the entry of the deposit. The client failed to call for the money for several years and in the meantime the bank had failed. *Held*, that the attorney was not liable for the money so lost. *Pidgeon v. Williams*, 21 Gratt. 251.

Where a decree is collected and the money paid to the plaintiff's attorneys and disposed of as the plaintiff directs, after reversal, an action will not lie against attorneys to recover the money paid by a defendant who did not appeal, because of want of privity between him and them. *Green v. Brengle*, 84 Va. 913, 6 S. E. Rep. 608.

The 15 per cent. damages allowed by act, Feb. 18, 1819, against sheriffs for failing to pay money received on executions, is not recoverable against an attorney, who receives the money of his client and fails to pay it to him. *Taylor v. Armistead*, 8 Call 200.

C. Liability for Interest.—Prior to statutory enactment, Va. Code 1887, § 2676, allowing interest in such case, where an attorney at law was employed to collect debts, and some of them were lost to his client through his negligence, he was chargeable for the principal of the debts so lost, but not with interest thereon. *Rootes v. Stone*, 2 Leigh 650. This case seems to be in conflict with *Chapman v. Shepherd*, 24 Gratt. 385.

D. Defense to Action—Statute of Limitations.—The statute of limitations is a good plea to a suit in equity brought to recover money collected by an attorney for his client and not accounted for by him. *Kinney v. McClure*, 1 Rand. 284.

VIII. COMPENSATION.

A. Right to Compensation.—A law firm was em-

ployed to assist in the prosecution of a suit in the state court upon a contingent fee, and when the cause was ready for trial, the plaintiff, without the consent of his counsel, dismissed his suit in the state court, and employed one of the said firm, after the dissolution of the partnership, to bring a suit in the circuit court of the United States for the same purpose, and filed substantially the same bill. *Held*, that this was a separate and distinct suit, that the former employment had nothing to do with it, and that the old firm was not entitled to any of the fees earned in the new suit. *Tomlinson v. Polesley*, 81 W. Va. 108, 5 S. E. Rep. 457.

A client cannot refuse to pay his attorney his fees, although he is practising without a license. *Yates v. Robertson*, 80 Va. 475.

Upon the final determination of a cause, the decree for costs must follow the recovery, and go to the party who substantially prevails. And upon no principle can the attorneys of the losing party be adjudged fees out of the amount recovered by the winning party. *Allen v. Shriver*, 81 Va. 174.

B. Amount.—In a contest between an attorney and his client about the amount charged for fees, where it appears that the client is old and ignorant, and wholly unacquainted with the conduct of business affairs, it is the duty of a court of equity to scrutinize with jealous care the transactions between them and to allow no advantage to be taken of the client's necessities and inexperience. It is incumbent upon the attorney to show that the transactions were fair, and that the fees charged were reasonable and just. *Cullop v. Leonard*, 97 Va. 256, 33 S. E. Rep. 611.

An agreement between attorneys and their client, whereby they should "have ten per cent. on whatever might be recovered in a certain chancery suit for their services in the prosecution of it; and if nothing were recovered in it, then no compensation for their said services, in attending before the commissioners to take accounts, or in court, or in taking depositions," is not such an agreement as is forbidden by 1 Rev. Code 1819, ch. 76, § 14, for it comprehends services not embraced by that act, such as taking depositions, etc. *Major v. Gibson*, 1 Pat. & H. 48.

An agreement that an attorney shall receive ten per cent. on the amount which he may succeed in getting reduced on a certain decree against his client is not champertous. *Nickels v. Kane*, 82 Va. 309.

The clerk of the court cannot tax against the losing party in a suit any greater fees than those prescribed by statute. But contracts, express or implied, between attorney and client for fees, are not limited as to amount, and may be enforced as other contracts. *Yates v. Robertson*, 80 Va. 475.

C. Contingent Fees.—P. & Son, attorneys, contracted in writing with L. as follows: "It is agreed that P. & Son are to receive \$100 certain and if the suit (referred to and mentioned in the agreement) is decided in favor of L. then P. & Son are to receive \$200, making \$300 in all." P. & Son brought an action of assumpsit, setting forth the agreement and alleging that L. dismissed said suit without their consent and thereby hindered P. & Son from prosecuting said suit to a final decision, although plaintiffs were ready and willing to do so. The declaration also contained the common counts for work and labor. *Held*, that P. & Son were not necessarily entitled, upon issue joined on a plea of nonassumpsit, to recover the whole amount of the contingent fee

therein specified; but for breach of said contract, by defendant, might recover such damages, by way of compensation for their time, labor and attention, as these were reasonably worth, and for any loss or injury they might have sustained; provided the whole recovery did not exceed the amount stipulated in the contract. *Polsley v. Anderson*, 7 W. Va. 202, 23 Am. Rep. 618.

D. When Attorney's Fees Recoverable as Part of Damages.—As a general rule fees paid to counsel cannot be recovered as damages. If the injury complained of was not wanton or malicious, and exemplary damages are not recoverable, no greater attorney's fee can be recovered against the defendant than that prescribed by law to be taxed in favor of the winning party. *Burruss v. Hines*, 94 Va. 418, 26 S. E. Rep. 875, 3 Va. Law Reg. 180.

In an action on an injunction bond with condition "to pay all such costs as may be awarded against the plaintiff, and all such damages as shall be incurred in case the said injunction be dissolved," fees paid to counsel in the injunction suit cannot be recovered as damages, although the bill be a pure bill of injunction. *Wisecarver v. Wisecarver*, 97 Va. 452, 34 S. E. Rep. 56, 5 Va. Law Reg. 462, and notes, pp. 465, 578.

In a suit upon a breach of warranty of title to land, the grantee cannot recover his counsel fees for defending the title, where the grantor had employed competent counsel for that purpose. *Conrad v. Effinger*, 87 Va. 50, 12 S. E. Rep. 2.

E. Payment of Attorney's Fees Out of Trust Funds—Reimbursement.—Where trustees in good faith engage counsel to aid them in the execution of the trust, they are entitled to pay them out of the trust fund, or to be reimbursed out of that fund for all expenses which they have incurred, including reasonable attorney's fees. *Cochran v. Richmond, etc.*, R. Co., 91 Va. 380, 21 S. E. Rep. 664.

Creditors have no legal right to be reimbursed by their debtors for counsel fees contracted by them. *Gurnee v. Bausemer*, 80 Va. 867.

IX. LIEN OF ATTORNEY.

An attorney at law has a lien on the judgment or decree obtained by him for his client for services and disbursements in the case, whether the amount of his compensation is agreed upon or depends upon a *quantum meruit*. This lien, however, is subject to all the equitable liens of the defendant in such judgment or decree existing at the time of the rendition thereof. *Renick v. Ludington*, 16 W. Va. 378.

An attorney has no lien upon land for his fee or compensation for services in a suit wherein the land is recovered for his client. *Hogg v. Dower*, 35 W. Va. 200, 14 S. E. Rep. 995.

An attorney has no lien upon a fund arising from the sale of land of a person or estate, already owned by such person or estate, for services purely defensive, in resisting suits to establish demands against it. *Fowler v. Lewis*, 36 W. Va. 112, 14 S. E. Rep. 447.

An attorney has no lien against land for prosecuting a suit to recover it for his client, or for defending a suit to recover it from his client, or to subject it to a debt or claim. *Fowler v. Lewis*, 36 W. Va. 112, 14 S. E. Rep. 447; *McCoy v. McCoy*, 36 W. Va. 772, 15 S. E. Rep. 978.

Where an attorney is employed to institute proceedings in equity to subject land to the payment of debts and liens, and obtains a decree directing a sale for the satisfaction of the same, and the debtor compromises and pays off the claims asserted

against him, the attorney for the plaintiff has no lien against the land of said defendant which would entitle him to a sale thereof. *McCoy v. McCoy*, 36 W. Va. 772, 15 S. E. Rep. 978.

639 *Colhoun & Cowan v. Wilson.

June Term, 1876, Wytheville.

Leases—Written Contracts to Repair—Time of Performance.—In November 1868 the White Sulphur Springs company, by deed signed by both parties, lease to W their springs property for five years beginning the 1st of January 1869, and W is to make repairs upon the property; but nothing is said in the lease as to the time when the repairs are to be made. On the 22d of April 1873 the parties agree in writing what repairs W is to make; but nothing is said as to the time of making them. On the same day W enters into a contract with C to lease C one equal moiety of all the property, furniture, &c., and nothing is said in this contract as to the time when W shall make the repairs. In June, by a verbal contract made between W and C, C acquired the whole of W's lease, and purchased the furniture on the premises for \$13,000; and nothing was said as to the repairs which W was to make under his contract with the springs company in April 1873. In October 1873 C executed his note to W for \$5,379.75, part of the \$13,000 he was to pay for the lease and furniture. W sues C on this note, and C files a special plea of part failure of consideration, on the ground that W had contracted verbally with C to make repairs in time for the springs season of 1873, and had failed to do it, whereby C was injured to the amount of \$3,000. **HOLD:**

1. **Same—Same—Same.**—No time having been specified in the contracts between the springs company and W as to the time when the repair should be made, W has to the end of his lease to make them.

2. **Same—Same—Same—Parol Evidence.**—Parol evidence is inadmissible to prove a contract of W to make the repairs in time for the springs season of 1873; and this applies to such evidence intended as a foundation for proof of the parol contract.

3. **Same—Same—Same—Inferences.**—The fact that the note sued on was executed in October 1873, when the springs season was nearly over, is a strong circumstance, if not conclusive, to prove that the claim which grew out of the transactions in June were then waived or settled.

640 *between the parties, and cannot be asserted by way of defence to an action on the note.

4. **Same—Same—Same—Parol Evidence.**—As W had by his written contract with the springs company until the end of his term to make the repairs, a verbal agreement to make them at an earlier period is inconsistent with his written contract, and therefore does not come within the exception to the general rule:—That parol evidence may be introduced when it establishes an agreement additional to but consistent with the written agreement.

5. **Same—Same—Same—Fixed by Law.**—The fact that the time allowed to W to make the repairs is fixed by the law governing his contract will

*Written Contracts—Parol Evidence.—As to the admissibility of parol evidence to alter a written contract, see *Miller v. Fletcher*, 27 Gratt. 408, and note.

the springs company, and not by the express terms of the contract, does not affect the general rule as to the admissibility of parol evidence to vary or contradict the written contract.

This was an action of debt in the circuit court of Montgomery county, brought by Thomas Wilson against Charles A. Colhoun and John T. Cowan, partners, upon a note for \$5,379.75, executed by Colhoun & Cowan to Wilson. The defendants pleaded the general pleas of payment and set-off, and a special plea of failure of the consideration of the note in part, on which issues were tried. On the trial there was a verdict and judgment for the plaintiffs, and Colhoun & Cowan applied to a judge of this court for a writ of error and supersedeas; which was allowed. The case is stated by Judge Christian in his opinion.

Shelton and Walker, for the appellants.

Phlegar, for the appellee.

Christian, J., delivered the opinion of the court.

The action in this case was debt. It was founded on a promissory note drawn by the plaintiffs in error and payable to the defendant in error, for the sum of \$5,379.75, payable on demand, and bearing date October 1st, 1873.

The pleas tendered by the plaintiffs in error (defendants in the court below) were payment, set off, and a special plea in mitigation, alleging, in effect, failure of consideration as to part of said note. That plea is set out in the record; and as the only question in controversy turns upon the admissibility of the evidence under that plea, it is here inserted as follows:

3rd. And the defendants for further plea say, that for and in consideration of the sum of \$13,000, by the said defendants paid and agreed to be paid to the said plaintiff, the said plaintiff, who was the lessee of a certain watering place in the county of Montgomery, known as the "Montgomery White Sulphur Springs," for the term of five years, which term ended and expired on the 1st day of January 1874, agreed and contracted with the said defendants on the 1st day of June 1873, to sell to said defendants all the furniture belonging to said plaintiff and then in the use of the said plaintiff in and about the said watering place, and to assign, set over and transfer to the said defendants the unexpired term and lease of the said plaintiff in the said watering place; and the said defendants further say, that the said plaintiff, in consideration of the said sum of \$13,000 above specified, further agreed and contracted with the said defendants, to make and cause to be made and to furnish the materials for making certain repairs and improvements to the cabins, buildings, grounds, lawn, fencing, baths, &c., of the said watering place, and to have the said repairs and improvements done, and to furnish the material in time to have the same complete, in

time for the occupation and use of the same by the guests and visitors at the said watering place during the ensuing season of 1873; and which said repairs, so contracted to be made by said plaintiff as aforesaid, were necessary and requisite to the complete and full enjoyment of the said watering place and to the comfort and accommodation of visitors, and are more particularly and specially set forth in the bill of particulars filed with this plea.

And the defendants say, that the plaintiff wholly failed, neglected and refused to make or cause to be made or to furnish the materials for making the said repairs and improvements so contracted and agreed by him to be made as aforesaid, in time for the use and occupation of the same by the guests and visitors of said watering place during the season of 1873; whereby the said defendants were greatly injured and damaged, and suffered great loss in their business as keepers of said watering place, and were unable to accommodate and entertain many persons who applied for and sought entertainment at said watering place, and were unable to provide in a proper manner for the comfort and convenience of the guests and visitors at said watering place during the said season of 1873, by reason whereof many became dissatisfied and left.

And the said defendants say, that the said note in the plaintiff's declaration sued on was executed by the said defendants to the said plaintiff as a portion of the \$13,000 above specified and as a part of the consideration of the said repairs to said watering place agreed and contracted to be done by the said plaintiff as aforesaid; and by reason of the failure of the said plaintiff to make and cause to be made and to furnish the material for making the said repairs, as he agreed to do, there is a failure of the consideration for which said note in plaintiff's declaration mentioned was executed;

643 cited; and that by reason of such failure of consideration the said defendants would be entitled to recover damages in an action against the plaintiff to the amount of \$3,000, which sum of \$3,000 they pray may be allowed as a set-off against the plaintiff's demand in this suit. And this they are ready to verify; wherefore they pray, &c.

Upon this plea issue was made up, as well as upon the plea of payment and set-off. The jury found for the plaintiff (the defendant in error) the amount of the said promissory note, subject only to the credits endorsed thereon. For this amount a judgment was entered; to which judgment a writ of error was allowed by this court.

Eight bills of exceptions were taken to the rulings of the court, which, in different forms, present the question as to the admissibility of the evidence under the special plea. It is proper, however, before noticing these questions, to refer to the admitted facts in the case. It seems that on the 25th November 1868, the "Montgomery White Sulphur Springs company" leased to the defendant in error, Thomas Wilson, and

Lorenzo D. Lorentz, for the term of five years, commencing 1st day of January 1869, all the property of said company, consisting of a tract of land containing 1,300 acres, including the hotel, cottages and cabins upon the same, known as the Montgomery White Sulphur Springs, a watering place and popular resort for summer visitors, situated in the county of Montgomery.

This contract of lease was in writing, and was signed and sealed by the lessees, and also signed by the president of the company. In this contract of lease there were certain stipulations on the part

644 of the lessees for *repairs to the railroad belonging to the company, and also for repairs to the buildings on said property. In this contract there was no stipulation as to the time when these repairs were to be completed. By a subsequent agreement (which is not in the record), it seems that Wilson became the sole proprietor and successor to Wilson & Lorentz. On the 22nd of April 1873, the White Sulphur Springs company and Wilson entered into an agreement, by which it was definitely determined what was the character and extent of the repairs which Wilson, as the successor of Wilson & Lorentz, was to make under the contract of November 25th, 1868, between the company and Wilson & Lorentz. This contract is in writing, and nowhere designates the time within which the repairs are to be completed.

On the 22nd April 1873, Wilson, having acquired the whole lease, made a contract with Cowan & Colhoun, by which he leased to them "one equal moiety of the buildings, furniture of every kind and description, with all the privileges and appliances necessary for opening and conducting a watering place for the entertainment of visitors at the Montgomery White Sulphur Springs, for the season of 1873. This contract was also in writing, and nothing stipulated with regard to repairs. In June 1873, by a verbal contract between the parties, Colhoun & Cowan acquired the whole of Wilson's lease, and purchased of him the furniture on the premises for the sum of \$13,000; and it is admitted that the note upon which this suit is brought was part of the sum of \$13,000 agreed to be paid for the unexpired lease and furniture.

It is also admitted that in this verbal agreement nothing was said in reference to the repairs which Wilson had stipu-
645 lated to make in his contract of *April 22nd, 1873. I have thus stated, as concisely as I could, the undisputed and admitted facts disclosed by the record.

The plaintiff rested his case upon the note sued on, having proved its execution. The defendant admitting the due execution of the note, sets up as a bar to the plaintiffs' action a failure of consideration in this, that the repairs to the buildings, which were agreed to be made by Wilson in his contract with the Montgomery White Sulphur Springs company, were to be completed before the springs season of the year 1873 commenced, and that he had neglected,

refused, and failed so to complete them, and, by reason of such failure, the defendants had sustained damage to the amount of \$3,000.

The evidence upon which this defence is sought to be made good is that of an alleged parol agreement made by Wilson at the time of his written agreement with the springs company and with the defendants on 22nd April 1873; and the various bills of exception taken by the defendants raise in different forms, the question whether such parol evidence was admissible.

The circuit court ruled out all evidence tending to show any parol agreement, to the effect that the repairs referred to in the said written agreement were to be made before the commencement of the springs season of the year 1873.

The question we have to determine is, was evidence offered by the defendants tending to prove such parol agreement admissible? It will be observed, that in the several written agreements above referred to, no time is named within which the stipulated repairs are to be completed. That being the case, the law of such a contract is to give the tenant until the expiration of

the lease to fulfil his contract for re-
646 pairs upon the *leased premises, unless there be something in the nature of the repairs which require them to be made before. Therefore, though no time is specified, the expiration of the lease is fixed by law as the time within which they may be completed, as certainly as if it was so written in the agreement. This being the contract of the parties reduced to writing, and signed by them, can a parol agreement of another and different period, than the expiration of the lease, be received in evidence? The rule of law on this subject is now too well established to be questioned. It is the familiar rule, that "parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument." 1 Greenl. Ev., § 275. It was announced as a rule of the common law at as early day, and down to the present moment has been uniformly adhered to by the courts of England and of this country. In the Countess of Rutland's case, 5 Coke's R. 25, it was said "that it would be inconvenient that matters in writing, made by advice and on consideration, and which finally import the certain truth and agreement of the parties, should be controlled by an averment of parties, to be proved by the uncertain testimony of slippery memory."

In Crawford v. Jarrett's adm'r, 2 Leigh 630, Judge Green thus states the rule: "Parol evidence cannot be admitted (unless in cases of fraud or mistake) to vary, contradict, add to, or explain the terms of a written agreement by proving that the agreement of the parties was different from what it appears by the writing to have been. In Watson v. Hurt, 6 Gratt. 634, Judge Baldwin announces the rule in the following terms: "It is perfectly well settled, that the terms of a written contract cannot be varied by parol evidence of what

occurred between the parties previously
47 thereto or contemporaneously *there-
with." In *Towner v. Lucas*, 13 Gratt.
35, 715, Judge Allen, after an able review
of the cases, supposed to infringe upon this
rule, says: "I can find no case which deter-
mines that oral contemporaneous evidence is
admissible to contradict the terms of a
written agreement, or substantially vary
the legal import thereof, provided the in-
strument was a valid instrument, and the
party designed to execute it in its existing
form."

In *Woodward, Baldwin & Co. v. Foster*,
3 Gratt. 200, Judge Joynes, after referring
to *Towner v. Lucas*, (supra), says: "These
general principles are of the utmost impor-
tance in the administration of justice.
Without them there would be no certainty
in written contracts, and no safety in the
most formal transactions. They ought not
to be frittered away by nice distinctions to
meet the hardships, real or supposed, of
artificial cases."

It is insisted, however, by the learned
counsel for the plaintiffs in error here, that
they do not controvert the principles of the
rule of law above stated; but that this case
comes within some supposed exception to
the general rule. It is urged that the parol
agreement offered to be proved, was an in-
dependent collateral substantial agreement
relating to the same subject matter, and
forming part of the consideration thereof. It
is said, that Cowan & Colhoun were induced
to make the contract with Wilson for the
expired lease and furniture, because of
the independent verbal agreement of Wilson,
at the time of the written agreement bear-
ing date 22nd April 1873, that he would
complete the repairs (which he had bound
himself to make) by the time the springs
season of that year commenced: to-wit, in
June 1873. It is insisted that such an
agreement was an additional, inde-
48 pendent *agreement, and one consistent
with the original written agreement.
The cases relied upon by the learned coun-
sel for the appellants, to which I have had
access, seem to establish the following ex-
ceptions to the general rule, that "Parol
contemporaneous evidence is inadmissible to
contradict or vary the terms of a valid
written instrument." When the oral evi-
dence establishes an agreement additional
to, but consistent with the written agree-
ment.

2. Where the evidence is offered to show
fraud in the procurement of the written
contract, or a breach of confidence in per-
verting what was delivered conditionally or
in vivo intuitu, and using it as a valid in-
strument.

3. Where the evidence is offered as proof
of any mistake or omission, and a fraudu-
ent attempt to take advantage thereof.

This case is not within any of these ex-
ceptions, nor can it be brought within any
other well established exception (see *Towner*
v. Lucas, supra); for the parol agreement
attempted to be set up is entirely inconsis-
tent with the terms of the written agreement;

and indeed (if established), would in terms
vary and contradict the written agreement.
By the parol agreement (if indeed any such
ever existed) the defendant in error bound
himself to finish the repairs by the — day
of June 1873. By the written agreement he
bound himself to complete the repairs by
the 1st day of January 1874. It is true that
no particular time was designated within
which to complete the repairs: but in the
absence of any designated time, the law
fixes the period at the termination of the
lease. And when the legal import of a con-
tract is clear and definite the intention of
the parties is for all substantial purposes,
as distinctly and fully expressed as if
649 they had written *out in words what
the law implies. *Woodward, Baldwin*
& Co. v. Foster, 18 Gratt. 200, and cases
there cited.

It is plain, therefore, that when by the
written agreement the time fixed is the ex-
piration of the lease, any parol agreement
by which another and different period within
which the repairs shall be completed, is
established, does vary and contradict the
written agreement; and the case is thus
brought within the very terms of the rule.
I am therefore of opinion, that the circuit
court did not err in excluding from the
jury all evidence tending to set up such
parol agreement, and all evidence offered
for the purpose of laying a foundation for
the introduction of such evidence. This
disposes of all the bills of exceptions taken
by the plaintiffs in error. For the eight
bills of exceptions all present in different
forms the question as to the admissibility
of parol evidence inconsistent with the
written agreement, or the admissibility of
evidence upon which to lay the foundation
for the proof of such parol agreement. The
circuit court was right in excluding all the
evidence of this character.

But there is still another ground upon
which the circuit court was well warranted
in excluding the evidence offered. It was
this: The pretension of the plaintiffs in
error is that the verbal agreement relied
on was made in April 1873 with the Mont-
gomery White Sulphur Springs company,
and that in June of that year they took the
lease with the understanding that this verbal
stipulation was to be carried out. They
admit that nothing was said on the subject
of repairs then (June 1873), but that they
were to have the benefit of the alleged
verbal agreement made with the springs
company. Now there are two pregnant
facts to show that no such verbal
650 agreement was ever *made. The first
is, that the alleged verbal contract by
which it was agreed that the repairs were
to be made before the commencement of the
springs season was in fact made after that
season had actually commenced (28th June).
So that when they bought the lease and
furniture they knew that the repairs had
not been made; and that they could not be
made in time to affect in any degree the
season of 1873.

But another fact, utterly inconsistent

with the verbal contract relied upon, is that the note sued on bears date the 1st day of October 1873, when the springs season was pretty well over. Now it is unreasonable to the last degree, if not incredible, that Colhoun & Cowan should have executed their note to Wilson in October for \$5,079.75, if they on that day claimed that Wilson was indebted to them in the sum of \$3,000 for a failure to comply with his contract four months before. No such claim was then asserted, nor was any claim asserted under the alleged verbal contract of June until the institution of this suit.

The execution and delivery of the note in October is a powerful circumstance, if not conclusive proof, to show that the claim which grew out of the transactions in June, was then waived or settled between the parties, and could not be asserted by way of defence to an action on the note.

Upon the whole case, I am of opinion there is no error in the judgment of the circuit court, and that the same be affirmed.

Judgment affirmed.

651 *Sage & al. v. Hammonds.

June Term, 1876, Wytheville.

1. **Guardians—Duties—Liabilities.**—It is the duty of a guardian, whose power as such is revoked, to account to his wards, or to his successor as guardian, if there be one, for their estate, including evidences of claim which may have come to his hands; and if after such revocation he collect any money on account of any such claim, he and his surety as guardians are accountable therefor to the parties entitled thereto; at least, provided such payment be made in good faith by a person who is not informed of such revocation, and who believes when he makes it that the party claiming to be guardian is so in fact, and has authority as such to receive the money.

2. **Same—Bills against, by Wards—Receivers.**—In a bill by infants against their guardian for an account and payment, it being shown in the cause that the guardian is wholly unfit for the office, the court may appoint a receiver to collect and receive the property of the wards, and require the guardian to pay over to him the money of his wards in his hands, and to transfer and deliver to him the property of the infants.

3. **Same—Decree against, for Account.**—Where the property of the infants consists of a single claim, and the amount received upon it by the guardian is ascertained, and there is no doubt as to the amount due from the guardian to the wards, the court may decree against him for the amount, though no account has been taken.

The case is fully stated by Judge Moncure in his opinion.

Burns, for the appellants.

Hogan, for the appellees.

Moncure, P., delivered the opinion of the court.

652 *This is an appeal from a decree of the circuit court of Lee county, ren-

dered in a suit in which Mary Hammond and John P. Hammond, infants, suing by Andrew J. Litton, their next friend, were plaintiffs, and James W. Sage, their late guardian, and William W. Sage, his surety in his bond as guardian, were defendants. The material facts of the case, and proceedings therein, are as follows:

On the 18th day of March 1867, the said James W. Sage was appointed and qualified as guardian of the said infants in the county court of Lee county, where they resided, and he thereupon entered into bond as such, with his brother, the said William W. Sage, as his surety. The only estate to which the said infants were entitled was a claim to a pension, under an act of congress, in consideration of military services rendered by their father, Arnold P. Hammond, to the United States during their late war with the Confederate States, in the course of rendering which services he died. His widow, and the mother of the said infants, afterwards intermarried with their said guardian, at what precise time does not appear, though probably before he qualified as guardian. They seem to have separated not very long after such qualification; but at what precise time does not appear. The said guardian was a pension claim agent, and undertook as such the prosecution of the said claim of his wards. He succeeded in establishing their claim to a pension to the amount of twelve dollars per month, or one hundred and forty-four dollars per annum, during their minority, payable semi-annually. In little more than a year after the qualification of the said guardian, to wit: on the 18th day of May 1868, in a proceeding by motion in the county court of said county, in which the said surety,

William W. Sage, was plaintiff, and **653 *the said guardian, James W. Sage,** was defendant, the object of which motion was to require the defendant to show cause why he should not be required to give a new bond as guardian for Mary and John P. Hammond, an order was made by the said court in these words: "This day came the plaintiff, and it appearing to the court that the defendant has had legal notice of this motion, and he failing to show any cause why he should not give a new bond, it is ordered that the defendant be removed from his office of guardian aforesaid, and that the plaintiff be released from further liability as his security, and that the plaintiff recover against the defendant his costs."

The said James W. Sage, claiming to act as guardian of the said infants, and no doubt exhibiting to the proper authority an official copy of the order appointing him as such, obtained from the pension office in the department of the interior a certificate in due form, in his name as guardian of the said infants, showing their title to the said pension and his authority, as their guardian, to receive it for them. At what precise time this certificate was issued does not appear, though it was, no doubt, during the period between the date of the order of his appointment and the date of the said

of revocation. It does not appear that there was any appointment of another guardian of the said infants, at least for more than a year after the date of said order of revocation; and in June 1869, more than a year thereafter, the said James W. Sage, being still to have authority to act as guardian, received from the proper judicial functionary at Washington six hundred and sixty-eight dollars and seventy-one cents on account of said pension, and under in virtue of the said certificate; no notice having been given by the said James W. Sage, or any other person, to the authorities at Washington of said order of revocation, or that there was any doubt or question as to the conceded authority of said James W. Sage to receive the said pension, and the officer making such payment having received no information to the contrary, and acting in the matter under the belief that the said authority still existed.

Shortly thereafter, but how long does not appear, though probably not more than a month or two, Andrew J. Litton appears to have been appointed and to have qualified as guardian of the said infants, though there is in the record no copy of any order of court appointing him as such; and we do not, therefore, express any opinion as to the validity of his appointment. After his appointment he demanded of the said James W. Sage an account and payment of the money he had received on account of said pension, and a surrender of the certificate which had been issued to him in favor as aforesaid; but the said James W. Sage failing and refusing to render such account and make such payment or surrender said certificate, this suit was instituted to enforce his obligation and that of his surety in that respect. It was brought in November 1869.

The bill, which was filed by the said infants, by the said Andrew J. Litton as their next friend and guardian, they set out substantially the facts before stated, and set forth the object of the bill to be; to compel the said James W. Sage to deliver said certificate of pension to the said guardian, the proper guardian of said infants, so that he might be enabled to collect whatever was due them; also to have an account rendered and ascertain what amount of money he drew from the United States government as guardian of said infants, and what he then owed them; and, on a hearing, to obtain a decree against the said James W. Sage and William W. Sage his surety, holding them to a strict accountability to said infants, who were of tender ages as to be incapable of waiving their rights and enforcing them; they pray that the said James W. and William W. Sage be made defendants to the bill, and for special and general relief.

A copy of the guardianship bond was exhibited with the bill, and is in the usual form, the condition being that the guardian should faithfully perform the duties of his office of guardian according to law.

There was but one deposition taken in the case, and that was the deposition of the said A. J. Litton, which was taken by the defendant James W. Sage. The witness, in answer to questions propounded to him by the said defendant, testified, among other things, that the said defendant paid to the witness, wheat, flour, rent corn, bacon, &c. "in consideration of a settlement as mediator between Rebecca L. Sage the mother of said children, and defendant, which included all dealings between the plaintiffs and defendants at the separation, on or about May 1868. At the time these articles were paid, the defendant agreed to go on and prosecute a pension claim for the children of Mary and John P. Hammond, and when obtained he was to retain his fees and expenses, and pay over the balance to Rebecca L. Sage, or the children or their legal representative: that after or about the time A. J. Litton was appointed guardian of Mary and John P. Hammond, and after the certificate was obtained, the defendant James W. Sage agreed to take \$110 in full out of the claim, and pay the balance over to witness as soon as he was appointed guardian and had given bond."

After he was appointed guardian he notified the commissioner of pensions of that fact, and not to pay any money to James W. Sage on the pension certificate aforesaid. The said defendant shewed to the witness a letter received by said defendant from the said commissioner, dated February 2nd, 1870, requiring the former guardian and claim agent to return immediately to the pension office the pension certificate payable to the said defendant. Witness received a letter from the said commissioner of pensions some time after the one shown by said defendant as aforesaid, stating that the said certificate had never been received at Washington city, and that payment could have been made to witness on the old certificate. Witness afterwards received another letter from said commissioner, stating that he despaired of getting the old certificate, and directing the witness to make application for a new one, which he did; and defendant filled a blank for witness. These letters here referred to, as having been received by the witness from the commissioner of pensions, are copied in the record, and were probably returned with the said deposition as part thereof.

The defendants filed their several answers. That of James W. Sage contains nothing of importance. That of William W. Sage, after admitting the said guardianship of his brother, for which respondent had become surety, contains this statement: "Your respondent has heard that James W. Sage applied to the proper pension authority of the United States for granting pensions, to have a pension allowed to the complainants, and to place them on the pension roll as pensioners. But before he ever drew one cent of pension for them, your respondent was by order released from his suretyship, and absolved from the obligation of his bond, and was re-

leased therefrom; and James W. Sage was released from his said guardianship. Your respondent has heard that after his release aforesaid, and the removal of said guardian from his office of guardian, James W. Sage drew a pension for the complainants. What he did with the money your respondent can't state, except that he has heard it said he loaned one Joshua Fields all or the greater part thereof. But if he ever drew and loaned or squandered or disposed of any money, treasury notes, or national bank notes that belonged to complainants, he did so after your respondent had been released by the order aforesaid from his said suretyship; and the said James W. Sage had been removed from his said office; and consequently no liability therefor fell on respondent. Your respondent knows nothing of what his co-defendant did with the pension certificate, and was and is not responsible to any one for his acts, whether legal or illegal, done after your respondent's release from his suretyship aforesaid." With the said answer was filed a copy of the order of revocation aforesaid.

On the 4th day of June 1870, a decree was made in the cause in these words: "This cause coming on this day to be heard upon the bill, the separate answers of the defendants, J. W. and W. W. Sage, with the replications thereto, was argued by counsel. And thereupon, upon inspection of the papers in the case by the court, it appears that neither the exhibits of the plaintiff nor defendants have been filed, and that there is not such evidence before the court as enables it to make any decree in the premises, further than to order the defendant J. W. Sage to deliver up to the legally constituted guardian of the plaintiffs any effects and evidences of debt which he may have belonging to said plaintiffs. And 'it appearing to the court, that the
658 *answer of the defendant J. W. Sage, though not excepted to by the plaintiffs, is too scandalous to be allowed to remain on file among the records of this court, it is therefore ordered that the said J. W. Sage do surrender to the legally appointed guardian of plaintiffs any evidences of debt or other claim and any effects in his possession belonging to the plaintiffs, and especially that he surrender to such guardian any certificate or other evidence of the allowance of a pension by the United States to them in his possession or under his control." An order was then made, that the answer of James W. Sage should be taken off the file and referred to a commissioner of the court, who was directed to expunge from the same all scandalous and impertinent matter, leaving nothing therein but what is responsive or relevant to the matters contained in the bill; and the parties, plaintiffs and defendants, were directed before the next term of the court to file their exhibits, and time was given till then to take testimony.

The commissioner having executed the said order in regard to the answer of said

James W. Sage, it was returned to the court and again filed.

The deposition of A. J. Litton, though it appears to have been filed on the 3d day of June 1870, was not noticed in the decree which was made on the next day, the 4th of June 1870, as aforesaid.

On the 12th day of October 1870 the case came on further to be heard upon the paper formerly read, the depositions of witnesses (though there does not appear in the record any other deposition than that of A. J. Litton aforesaid), and the report of the commissioner to whom was referred the answer of said James W. Sage for scandal and impertinence, to which report there

was no exception, and was argued by
659 counsel; *on consideration whereof the court, after confirming said report and giving directions accordingly, decreed that the defendant James W. Sage received the check or draft of \$668.71, in the month of June 1869, as the guardian of the plaintiffs, and that at the time he so received the same he was liable therefor as guardian of the plaintiffs, and the defendant William W. Sage, as security of the said guardian, is also liable therefor. And the court being of opinion that James W. Sage had never been legally removed as guardian by the county court of Lee county, it was ordered that the plaintiffs recover from the defendants the sum of \$668.71, with interest from the 30th day of June 1869 till paid, subject to a credit of \$110 for the services of James W. Sage as pension agent and guardian of his said wards. And the court being further of opinion that there was no proper person to receive the said fund for the said infants or to make further collections for them, to preserve the money and estate of the said infant plaintiffs until a guardian can be duly appointed and qualified, M. B. D. Lane was thereby appointed a receiver, whose duty it should be to collect of the defendants the aforesaid sum; and to enable him to do so, he was authorized to sue out process of execution therefor against the goods and chattels of the said defendants. He was also directed to demand of and receive from James W. Sage, guardian as aforesaid, all moneys, debts, property, or evidences of debt, then in the hands of James W. Sage: And he was also directed to require A. J. Litton to turn over to him all notes, bonds, money, or other property, if any, then in his possession, belonging to the plaintiffs. But before receiving any property or collecting any money as aforesaid, the said receiver was directed to execute a bond, as prescribed by said decree, conditional
660 for *the due performance of his duties as such receiver. And he was directed at once to transmit to the commissioner of pensions a certified copy of said decree. And the cause was continued.

From the said decree the said James W. and William W. Sage presented to a judge of this court a petition for an appeal; which was accordingly granted. And that is the case which we now have under consideration.

We deem it unnecessary to decide, and therefore do not decide in this case, whether the authority of James W. Sage, as guardian of the appellees, was ever legally revoked or not; or whether Andrew J. Litton was ever legally appointed as their guardian or not. We are of opinion that, in either view, there is no error in the decree appealed from, and the appellants are both liable for the amount decreed against them. If the order made for the revocation of the guardianship be a valid order, then, of course, the said James W. Sage ceased to be guardian from the date of the order, and his surety as such guardian, were liable to account to the wards, or to their guardian, or to the court, for the estate of the wards, which had come to his hands as their guardian. The only estate which the said wards ever had was a claim against the United States for a pension. A guardianship was instituted for the very purpose, and only for the purpose, of raising and collecting that pension. The duty of the guardian, who was his brother, doubt knew that such was the condition of the wards, and such the object of the guardianship; and for the purpose of enabling the guardian to attain that object, became surety of the guardian in the official bond. The guardian proceeded accordingly to prosecute and establish the pension claim, and obtained a certificate from the pension office in his name as guardian, allowing the pension money; but before any money was received on account of it by the guardian, the order of revocation aforesaid was made. Afterwards the said guardian received of the pension agent, on account of said claim, a sum of \$668.71—having given no notice of the said order of revocation to the said infant, but claiming still to be such guardian—and the agent, believing that he was a guardian, and had full authority as such to receive the money, made payment to him accordingly. It was the duty of the defendant, James W. Sage, supposing his guardianship to have been revoked by the order aforesaid, to have so informed the pension agent, and not to have received from him the amount due to his wards on account of their pension, but to have returned to him the certificate which had been issued to him for the pension, or to have delivered it to the succeeding guardian, never one should qualify, or to such person as a court of competent jurisdiction might appoint to receive it. This was his duty as guardian, which he was bound by his official bond to perform, and his surety and bond is liable as such for the breach of such duty. It is the duty of a guardian, as such, to see that his powers as such are revoked to account to the wards, or to his successor as guardian, if there be one, for their estate, including evidences of claim which may have come to his hands; and if after such revocation he collect any money on account of such claim, he, and his surety as guardian, are accountable therefor to the wards entitled thereto; at least, provided

such payment be made in good faith by a person who is not informed of such revocation, and who believes at the time of making it that the party claiming to be guardian is so in fact, and has authority as such to receive the money. In *Armstrong's heirs v. Walkup &c.*, 12 Gratt. 608, which was cited by the counsel for the appellees, it was held by this court (as correctly stated by the reporter in the marginal abstract of the case) that "the estate of the ward having come into the possession of the guardian, his bond of office binds him in his lifetime, and his estate after his death, for the interest, hires and profits received by him, whether received before or after the expiration of his authority as guardian."

The principles just stated apply to this case. The guardian at the time of the revocation of his authority as such, supposing it to have been revoked, had in his hands as guardian a claim in favor of his wards against the United States for a pension; and, as evidence of that claim, held a certificate issued to him as such guardian by the commissioner of pensions. Instead of notifying the said commissioner of the said revocation, and returning the said certificate to him, or surrendering it to the succeeding guardian, if there was one, or to the court, he continues to hold it, and to claim to be entitled to receive under it the pension due to the said infants, and he actually receives under it, on account of said pension, \$668.71, which sum is paid to him by the commissioner of pensions, under the belief that he continued to be guardian of said infants, with full authority to receive the said sum of money for the said infants. And even after the said sum had been paid to him by the said commissioner, and after the latter had been informed of the supposed revocation of such authority, and had demanded a return to him by the said guardian of the certificate aforesaid, he fails and refuses so to return it, or to surrender it to the person claiming to be the succeeding guardian, and continues to hold possession of it against all claims and demands to the contrary. Under these circumstances,

663 *there can be no doubt of the liability of the supposed late guardian and his surety to the said infants for the amount of their money so received by him.

But such liability in this case stands on even stronger ground than that. The infants we have seen had no estate but their claim to the said pension. To enable him to receive the amount of that claim, James W. Sage becomes their guardian, and his brother, William W. Sage, becomes his surety as such. By becoming such surety, William W. Sage enables his said brother to receive the amount of the said pension. And after enabling him to do so, the said surety seeks to avoid his liability as such by having the guardianship of his brother revoked. The proceeding instituted for that purpose takes place in little more than a year after the qualification of the guardian, and under such circumstances as tend to

show that there was a fraudulent combination between the guardian and his surety to relieve the latter from liability, while the former might be able to receive the amount of the pension, and convert it to his own use, to the prejudice and injury of the infants, who would have no security to protect and indemnify them against loss. The conduct of the guardian, James W. Sage, in reference to said proceedings, is calculated to show that he connived at such a purpose, if it existed, on the part of his brother, William W. Sage, and participated therein. These two brothers were the only parties to that proceeding, and it does not appear that any friend of the infants had any knowledge or information about it, so as to be able, or have an opportunity, to guard their interest in the matter. They were too young to guard it themselves, and perhaps even to know of its existence. No opportunity was afforded to the guardian to give a new bond, nor does it appear

664 that he desired to have such *an opportunity. He was not even required to give such a bond. It is recited in the order that "this day came the plaintiff (the surety), and it appearing to the court that the defendant (the principal) has had legal notice of this motion, and he failing to show any cause why he should not give a new bond;" and then instead of ordering the defendant to give a new bond, and fixing a time for that purpose, it was "ordered that the defendant be removed from his office of guardian aforesaid, and that the plaintiff be released from further liability as his security, and that the plaintiff recover against the defendant his costs." In such a case the law requires the court to order the guardian to give a new bond in a reasonable time, to be prescribed by the court. Here no such order was made. Code, ch. 128, § 18, p. 949. Although the said surety no doubt knew that the principal had become guardian for the purpose of obtaining and receiving the said pension, and that the said principal would have it in his power to continue to receive the said pension if the commissioner of pensions should not be informed of the revocation of the authority of the principal as guardian, and that the infants were too young to know the importance of giving such information, or to be able to give it themselves, or have it given; yet the said surety did not himself give such information, nor have it given, but attempted to make his own escape from liability as such surety, while, as he supposed, he left the infants exposed to the danger of a loss, which, by his own act, he had enabled his brother to inflict upon them. Under these circumstances, it was certainly the duty of the surety, while using means to guard himself against the effect of illegal acts on the part of his brother, to use also the means necessary to guard these infants against the effect of such acts, especially *as he had by becoming such surety enabled his brother to commit those acts.

We are therefore of opinion that if the

order of revocation aforesaid be a valid order, the surety, William W. Sage, is liable for the amount decreed against him, and there is no error in the said decree. Let us now proceed to enquire, on the other hand, whether he be liable in the view taken of the case by the court below, that James W. Sage has never been, legally, removed as guardian by the county court of Lee county, and that he received the check or draft of \$668.71 in the month of June 1869, as the guardian of the plaintiffs, and that, at the time he so received the same he was liable therefor as guardian, and the defendant W. W. Sage as the surety of the said guardian.

In that view of the case there can be no difficulty in maintaining the propriety of the decree appealed from. Whether the order of revocation be valid or not, the evidence in the record is conclusive to show the propriety of taking the estate of the infants out of the hands of the person who was appointed their guardian and qualified and has been acting as such, but who is shown to be wholly unfit for the trust. The interest of the infants plainly requires that their estate shall be taken out of his hands, or prevented from going into them, and shall be taken possession of by a court of chancery, the ultimate and paramount guardian of all infant orphans, and placed in the hands of a receiver, to be taken care of and managed for them, until they are capable of taking care of and managing it for themselves, or another guardian is duly appointed and qualified for that purpose.

Now this is what the court below intended to do and has done by the decree appealed from. By it a receiver is appointed, 666 who is directed to collect, by *execution if necessary, the said sum of \$668.71, with interest from the 30th day of June 1869 till paid, subject to a credit of \$110, for the services of James W. Sage as pension agent and guardian of his said wards, and to demand and receive from James W. Sage, guardian as aforesaid, all moneys, debts, property, or evidences of debt now in his hands; and to require Andrew J. Litton to turn over to him all notes, bonds, money, or other property, if any, now in his hands, belonging to the plaintiffs in this suit. But before receiving any property, or collecting any money as aforesaid, the receiver is required to give bond &c., conditioned for the due performance of his duties as such receiver. Certainly this decree will be most beneficial to the infants, while it cannot be justly or properly excepted to, either by James W. Sage or Wm. W. Sage. It seems to be the very decree called for by the exigencies of the case, looking to the relative rights and obligations of all parties concerned. There was no necessity for an account of the guardianship in order to the decree which was rendered for the sum of \$668.71 with interest, subject to a credit of \$110 as aforesaid. It appears from the record that about the time the order of revocation was made there was a settlement between the mother of the said infants and their guardian which embraced

I dealings between them, and that they then owed him nothing. When, after that, he received on account of their claim to a pension, the sum of \$668.71, he became their debtor to that amount, subject only to credit of \$110, his charge as pension agent for tending to the claim. It was therefore proper to render a decree in their favor against him and his surety for the sum so received, and interest, subject to the said credit. But the decree, it will be observed, is interlocutory *only, and not final. The fund and the whole subject were to be placed in the hands of the court, through its receiver, and can be disposed of by the court hereafter according to the right of all persons who may be interested therein. It cannot with propriety be said, that in the view last taken, the guardian's authority continues to exist, and that therefore he is entitled to continue to hold the fund. The guardian and his surety can set up no such claim against the authority and duty of a court of chancery in such a case to impose and take charge of the estate of infants thus palpably endangered by the acts and defaults of the guardian. We think that in any view which can properly be taken of the case there is no error in the decrees rendered therein, and at the same ought to be affirmed.

Decree affirmed.

18 *Linkous for &c. v. Hale & al.

June Term, 1876, Wytheville.

Facte—Demurrer to Evidence—Inferences.—In debt against the endorsers of a protested note discounted at a bank at C, the protest of the notary states that "he placed in the post office of this place four written notices, one directed to the payer, and one directed to H. & L. at B, Va., endorsers, informing them, &c." On demurrer to the evidence. **HOLD:** The jury would have been warranted to infer from this evidence that the residence of the defendants was in B; and upon a demurrer to the evidence, the court must make the same inference.

The case is fully stated by Judge Moncure in his opinion.

Jenkins, for the appellant.

Ronald, for the appellees.

Moncure, P., delivered the opinion of the court.

This is a writ of error and supersedeas to judgment of the circuit court of Montgomery county, reversing a judgment of a county court of said county, rendered in an action of debt brought upon a protested negotiable note against the endorsers thereof. There was a demurrer to the declaration joined therein, and there were pleas of debt and the statute of limitations, to which the plaintiff replied generally. A jury was sworn to try the issues, but the defendants demurred to the evidence, and the plaintiff *joined in the demurrer: whereupon the jury returned verdict for the plaintiff, subject to the

judgment of the court upon the demurrer to the evidence. The county court gave judgment for the plaintiff upon the said demurrer; but the circuit court reversed the judgment of the county court, and rendered judgment for the defendants upon the said demurrer; and the plaintiff has brought up the latter judgment for the review of this court.

The only question of controversy in the case is as to notice of the protest of the note, whether the evidence on that subject was sufficient to charge the defendants as endorsers?

The only evidence on that subject was contained in the certificate of protest of the notary. The note was a note for four hundred dollars for value received, drawn by William Hale, dated at Christiansburg, August 20th, 1860, payable ninety days after date to John Hale or order, without offset, negotiable and payable at the office of discount and deposit of the Bank of the Valley at Christiansburg, and endorsed by John Hale and Abraham Smith, the defendants, and by B. R. Linkous (who sues as plaintiff in this action for the use and benefit of Charles H. Miller). The certificate of the notary is in these words:

"Virginia: Christiansburg, county of Montgomery, to wit:

"Be it known to all whom it may concern, that on this the 21st day of November, in the year of our Lord 1860, I, Samuel W. Shields, a notary public in and for the county of Montgomery, duly commissioned and qualified, at the request of the president and directors of the office of discount and deposit of the *Bank of the Valley in Virginia at Christiansburg, holders of the original note, a true copy whereof is above written, demanded payment at the office of discount and deposit of the Bank of the Valley in Virginia at Christiansburg, which being refused, and payment not having been made by the payer of the said note, I, after 3 o'clock, P. M., of this day, placed in the post-office of this place four written notices, one directed to the payer, and one directed to John Hale, Abraham Smith, B. R. Linkous, at Blacksburg, Virginia, endorsers, informing them of the non-payment and protest of said note: Now, therefore I, the said notary, at the request aforesaid, have protested, and do hereby most solemnly protest, as well against the said maker as against the endorsers, and all others whom it doth or may concern, for all loss, damages, principal, interest, costs and charges sustained, or to be sustained by reason of the demand, &c., aforesaid.

In testimony whereof I have hereunto subscribed my name and affixed my notarial seal at the town of Christiansburg aforesaid, the day and year aforesaid.

Saml. W. Shields, [Seal.]

Notary Public.

Protest, 50 cents; recording, 50 cents; tax, \$1.50; notice, 20 cents; postage, 12 cents—\$2.82."

Did this certificate afford sufficient evidence in regard to notice of protest to the

endorsers to warrant the court in rendering judgment against them on a demurrer to evidence?

It is not expressly stated in the certificate that the post-office of the said endorsers at the time of the protest of the note was "at Blacksburg, Virginia," at which place the

notice to them of the protest was directed *by the notary; nor that he was informed, on due enquiry, that such was their post-office; in either of which cases, notice to them, sent to the post-office was sufficient. But was it not properly inferred by the county court from the facts contained in the certificate, that such was the post-office of the endorsers, or at least, that the notary, upon due enquiry, was so informed?

We are decidedly of that opinion; and in support of that opinion, we need only to rely on a case which was referred to and much commented on in the argument of counsel in this court. We mean the case of the United States Bank v. Smith, 11 Wheaton R. 171. That case is so directly in point, and so much like this in all its features, that we deem it proper to quote largely from the judgment of the court therein delivered by Mr. Justice Thompson. Like this case, it was upon a demurrer to evidence. On that subject the court said: "By this demurrer, the defendant has taken the questions of fact from the jury, where they properly belonged, and has substituted the court in the place of the jury, and everything which the jury could reasonably infer from the evidence demurred to, is to be considered as admitted. The language of the adjudged cases on this subject is very strong to show that the court will be extremely liberal in their inferences, where the party, by demurring, will take the question from the proper tribunal. It is a course of practice, generally speaking, that is not calculated to promote the ends of justice. If the objection to the sufficiency of the evidence is made by way of motion for a non-suit, it might be removed by testimony within the immediate command of the plaintiff. The deficiency very often arises from mere inadvertence, and omission to make enquiries, which the witnesses examined could probably answer."

672 *These observations apply as strongly to this case as they did to the one in which they were made: and so do the following, which were made in that case after disposing of some preliminary questions: "And the remaining question is, whether due notice of the default of the maker was given to the defendant. The only objection to the sufficiency of the evidence on this point is, that the notice of non-payment was left at the post-office in the city of Washington, addressed to the defendant at Alexandria, without any evidence that that was his place of residence. The testimony on this point is that of Michael Nourse, a notary public, who swore that on the day the note fell due, he presented it at the store of the defendant, and demanded payment of his clerk, who replied that Mr.

Young was not within, and he would not pay it. And that on the same day he put in the post-office, notice of non-payment, and addressed to the defendant at Alexandria. If the defendant's place of residence was Alexandria, it is not denied, but that due and regular notice was given him. The notary was a sworn officer, officially employed to demand payment of this note, and it is no more than reasonable to presume that he was instructed to take all necessary steps to charge the endorsers. This must have been the object in view in demanding payment of the maker. And it is fair also to presume, that he made enquiry for the residence of the defendant, before he addressed a letter to him; for it is absurd to suppose he would direct to him at that place without some knowledge or information that he lived there, this being the usual and ordinary course of such transactions, and with which the notary was no doubt acquainted. The jury would, undoubtedly, have been warranted to infer from this evidence, that the defendant's residence

673 was Alexandria. *If that was not the fact, this case is a striking example of the abuse which may grow out of demurrers to evidence. For a single question to the witness, would have put at rest that point, one way or the other, if the least intimation had been given of the objection. It was manifestly taken for granted by all parties, that the defendant lived at Alexandria. And if a party will at the trial remain silent and not suggest an enquiry, which was obviously a mere omission on the part of the plaintiff, a jury would be authorized to draw all inferences from the testimony given that would not be against reason and probability; and the court, upon a demurrer to the evidence, will draw the same conclusions that the jury might have drawn."

That case, if it correctly expounds the law, is conclusive of this. It is sustained by the strongest reason, and is a unanimous decision of a court composed of the ablest judges, including in their number Chief Justice Marshall and Justice Story. It is upon a subject of pervading interest, involving a question of commercial law which ought to be uniform throughout the United States; and the decisions of the supreme court upon such a subject are of great weight, and are entitled to peculiar respect. There are, no doubt, to be found in some of the state reports decisions which may seem to conflict with the case in 11th Wheaton; and one or two of such cases were referred to in the argument. Perhaps about an equal number of such cases might be found on each side of the question. But we deem it unnecessary to examine those cases, as we are perfectly satisfied that the law on the subject is correctly expounded in the decision of the supreme court of the United States before referred to. There has been certainly no decision by this court to the contrary of that case. The case

674 of *Raine v. Rice &c., 2 Patton & Heath 529, was referred to in the ar-

gument, and has been considered as a decision of the former special court of appeals of the state to the contrary. Such, however, will be found on examination not to be the fact. It is true the reporters state, in the syllabus of the case, that "on a demurrer to evidence, the court will not infer, in the absence of any evidence on the subject, that the post-office of the endorser of a negotiable note was at the place to which the protest states notice of the dishonor of the note was sent." But the case itself shows that it decided no such question, and no such question was involved in it. It involved the question of the liability of the maker, under the circumstances of that case, and not of the endorser.

There is a great difference between a special verdict and a demurrer to evidence in the rule in regard to the decision of questions arising thereon. In the case of a special verdict, all facts which are necessary to enable the court to determine whether or no the plaintiff is entitled to recover must be found with certainty. It is an inflexible rule, that the court upon a special verdict cannot infer other facts from those found by the jury. There are cases in which the court may infer the intent of a party from the facts found in a special verdict, although the intent be not proved. But in such cases the inference is one of law from the facts, and not an inference of one of fact from other facts. 1 Rob. Pr., old ed., pp. 372-'3. Whereas, in the case of a demurrer to evidence, as we have seen, everything which the jury could reasonably infer from the evidence demurred to is to be considered as admitted. If this had been a case of a special verdict, and the facts had been found in the very words of the certificate of protest, the court could not, in

675 giving judgment *on the special verdict, have inferred from the facts thus found the further fact that the post-office to which the notices were sent was the post-office of the endorsers. Possibly in such a case, as it might appear probable from the circumstances disclosed in the special verdict that the jury might have found that the said post-office was the post-office of the endorsers, or at least that it appeared to the notary to be such after making due enquiry, it might be proper to award a venire de novo. Id. and the cases cited. But it is unnecessary to decide that question, as it does not arise in this case. But this is a case of a demurrer to evidence, in which it was the duty of the court to infer all that could reasonably have been inferred by a jury against a demurrant from the facts set out in the demurrer, had not those facts been taken by the demurrant away from the jury to which their decision properly belonged.

Upon the whole, we think the judgment of the circuit court is erroneous, and ought to be reversed and annulled, and that of the county court affirmed.

Judgment of the circuit court reversed, and judgment of the county court affirmed.

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Harman v. Howe.

June Term, 1876, Wytheville.

Absent, STAPLES, J.†

I. **Mistake—Omission of Words.**—A bond is given upon an injunction to a judgment for money, and in the penalty it is said "in the just and full sum of seven hundred and seventy-six, lawful money of Virginia." The word "dollars" is obviously left out by mistake, and the bond will be treated as if the word was in it.

II. **Same—Same—Correction by Court.**—Words omitted in an instrument, and also in a record or statute, which can be clearly ascertained by the context, will be supplied by the court, and the instrument, record or statute, will be read and treated as if the words were in it.

III. **Clerks of Court.**—The clerk states, at the foot of an injunction bond, that it was signed, sealed and delivered in the presence of the court, and it is dated and endorsed as filed, on the 23 October; on which day it appears from the records of the court that it was not then in session. **Held:**

1. **Same—Authority by Statute.**—The statute does not require the bond to be executed in the presence of the court, but before the clerk of the court in which the judgment was. Code, p. 1128, § 10. Though its being given before the court, if it was, cannot vitiate it.

2. **Same—Same—Certification of Bonds.**—Even if it was not in fact taken before the court, though certified by the clerk at the foot of it, so to have been, the bond would not be thereby vitiated if in fact given before the clerk; as it was.

3. **Same—Same—Same.**—That the court did not sit on the day of the date of the bond, does not show that it was not executed in the presence of the court, especially when the clerk has certified that it was so *executed. It may have been misdated, or executed on a day different from that on which it bears date.

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IV. **Injunctions—Terms—Injunction Bond.**—The judge granting an injunction to a judgment for money, endorses on the bill:—"Injunction granted on the usual terms," without stating on what terms it was to become operative. The injunction bond given is in a penalty about double the amount of the judgment, and is in other respects as directed by the statute.

1. **Same—Same—Same—Penalty.**—The penalty being about double the amount of the judgment, and that being the amount of the penalty generally prescribed in such cases, this would seem to be a compliance with the order, and the order a compliance with the law, which directs that the judge shall prescribe the amount of the penalty.

2. **Same—Same—Same—Same—Obligors.**†—But however that may be, the obligors to the bond are estopped from denying that the penalty of the bond conformed to the direction of the judge who awarded the injunction.

3. **Same—Same—Same—Same.**—In this case it appears that the bond was executed in the presence of the court, which thereby received and sanctioned the bond, including the penalty. And this

*For monographic note on Continuances, see end of case.

†He had been counsel in the cause.

‡**Injunction Bonds—Obligors Estopped to Set Up Irregularities.**—In Wray v. Davenport, 79 Va. 28, the court cited the principal case for the proposition that the

had at least as much effect in fixing the penalty of the bond as if the amount had been prescribed in the order awarding the injunction.

V. Motions for Continuance—Discretion of Court—Appellate Supervision.*—A motion for a continuance is addressed to the sound discretion of the court, under all the circumstances of the case; and although an appellate court will supervise the action of an inferior court on such a motion, it will not reverse a judgment on that ground, unless such action was plainly erroneous.

VI. Same—Same—When the Continuance Should Be Refused.—Where the circumstances satisfy the court that the real purpose in moving for a continuance is to delay or evade a trial, and not to prepare for it, then, though the witnesses have been summoned, and the party has sworn to their materiality, and that he cannot go safely to trial without them, the continuance should be refused.

VII. Same—Same—Conditions in Granting Continuance.—Where the circumstances are such as to induce the court to doubt the motives of the party in moving for a continuance, the court may require him to state what he expects to prove by the absent witness; and if the facts which he states he expects to prove by the witness would not affect the result, the motion should be overruled.

VIII. Injunction Bonds—Sureties—Estoppel.—An injunction bond is executed by the obligors before the clerk of the court, and in the presence of the court; and it having been accepted and acted on as their bond, the surety is estopped from setting up the defence, that by express agreement with his principal he signed said bond upon the express condition that another person named should sign it, and that this fact was announced to the clerk at the time the said surety signed it; but the obligee knew nothing of such agreement.

This was an action of debt in the circuit court of Giles county, brought in March 1872 by William H. Howe against James W. Harman and William N. Harman, but which was abated as to James W. Harman upon the return of the sheriff that he was not an inhabitant of the county. The action was founded upon a bond executed by the defendants, upon James W. Harman's obtaining an injunction to a judgment which Howe had recovered against him. The declaration contained three counts. At the May term of the court, 1872, the defendant demurred to the whole declaration and to each count thereof, in which the plaintiff

obligors of an injunction bond "are estopped to deny that the bond was proper in form or substance; they took the injunction, and they cannot now disclaim their bond."

***Motions for a Continuance—Discretion of Court.**—For the rules governing the court on motions for a continuance, see collection of cases, in *Walton v. Com.*, 32 Gratt. 855, and *note*; also, *Welch v. Com.*, 90 Va. 321, 18 S. E. Rep. 273, where the principal case is cited among numerous others; *Phillips v. Com.*, 90 Va. 403, 18 S. E. Rep. 841; *Myers v. Trice*, 86 Va. 838, 11 S. E. Rep. 428, citing the principal case; *State v. Betsall*, 11 W. Va. 727, where the principal case is again cited; *Davis v. Walker*, 7 W. Va. 447; 4 Enc. Pl. & Pr. 828; *Barton's Law Pr.* (2d Ed.) p. 499; 4 Min. Inst. (2d Ed.) 909; 3 Am. & Eng. Enc. Law 804.

joined; and the court sustained the demurrer to the first count, but overruled it as to the second and third counts and the whole declaration. The grounds of the demurrer are not stated and do not appear, unless it is that the second and third counts, in describing the bond sued on, says, "the defendants acknowledged themselves to be held and firmly bound unto the said plaintiff in the just and full sum of seven hundred and seventy-six lawful money of Virginia (seven hundred and seventy-six dollars lawful money of Virginia being meant by the parties as well defendant as plaintiff avers)." And the condition of the bond shows that it was given upon an injunction to a judgment for \$740.92, with interest from the 16th of August 1857, subject to a credit of \$388, paid on the 10th of August 1858.

At the same term of the court the defendant William N. Harman craved over 679 of the bond and pleaded **non est factum*. The cause seems then to have been continued generally until the May term 1873, when it was continued on the motion of the defendant; and a rule was made upon James W. Harman, who had been summoned as a witness for William N. Harman, to show cause at the next term why he should not be fined, &c.

The cause came on for trial in September, when, neither party demanding a jury, but agreeing to submit all matters of law and fact to the court, the plaintiff offered in evidence the bond declared on; when it was objected by the defendant by his counsel, because no evidence had been introduced to explain what was meant by the words "seven hundred and seventy-six" contained in the bond, also because said bond purports to have been taken, signed, sealed and acknowledged on the 23d of October 1860 in the presence of the court, when the records of the court show that there was no court in session on that day; and also because the taking of said bond was not authorized by the order of the court awarding the injunction in the case of James W. Harman against Howe, which said order is as follows: Injunction granted on the usual terms. And. S. Fulton, 4th August 1860. C. C. C. Giles.

The bond was in the usual form, with four seals to it; and seven hundred and seventy-six, if read as dollars, was about double the amount of the judgment enjoined. At the bottom of it was the following entry:

"Signed, sealed and acknowledged in the presence of the court.

J. W. English, Clerk."

And it was endorsed:

680 **James W. Harman*

v.

Injunction bond.

Wm. H. Howe.

1860, Oct. 23, filed."

It was proved that English was the clerk of the court at the date of the bond, that the signature of James W. English was his genuine signature, and that he was dead.

The court overruled the objections and

admitted the evidence; and the defendant excepted.

The court, having heard all the evidence offered, on the 18th of September rendered a judgment for the plaintiff for the \$840.41 (that being the amount of the original judgment with interest and damages) and interest from the 17th of September 1873.

It appears by an entry at the foot of the judgment that it was rendered on the 17th of the month, in the absence of the defendant; and that he having arrived after the court adjourned on that day, but before the order of the day was entered by the clerk, it was directed by the judge not to be entered until the next day, to give the defendant an opportunity to be heard before the judgment should be entered.

On the 18th the defendant moved the court to set aside the judgment and to continue the trial of the cause until the next term, on account of the absence of James W. Harman, to whose materiality as a witness the defendant made oath, and that he could not safely go to trial without him; and his absence was reasonably accounted for. And thereupon the court required the defendant to disclose the facts he expected to prove by said James W. Harman.

The said William N. Harman then stated, that James W. Harman was a material witness, because he *expected the said witness would prove that when the defendant, William N. Harman, signed the said injunction bond, it was understood between said William N. Harman and James W. Harman that John Henderson would also sign said bond as one of the securities; and that defendant, William N. Harman, signed said bond upon the express condition and understanding that said Henderson would sign it; and this fact was announced to the clerk, James W. English, at the time it was signed by the said William N. Harman, the defendant; but William H. Howe, the plaintiff, knew nothing of such agreement or understanding.

The court overruled the motion; and William N. Harman excepted. And he applied to a judge of this court for a writ of error and supersedeas; which was awarded.

Kent and Williams, for the appellant.

Crockett and Blair, for the appellee.

Moncure, P., delivered the opinion of the court.

The court is of opinion that the circuit court did not err in overruling the demurrer to the second and third counts of the declaration. The court ought, also, to have overruled the demurrer to the whole declaration and the first count thereof. But the error of the court in that respect is not an error to the prejudice of the plaintiff in error; of which, therefore, he cannot complain. The supposed error in the second and third counts of the declaration consists, in treating the bond therein mentioned, in which no denomination of money is specifically mentioned, as being a bond for so

many dollars; upon the ground that the word *'dollars," was intended by the parties to be, and ought to have been, inserted in the bond, after the number "seven hundred and seventy-six," but was omitted therein; and that the true and proper legal construction of the bond is, that it is a bond for so many dollars. We think that the court was right in that construction, and it is a bond in the penal sum of \$776. It was certainly intended to be, and was, a bond for so much money of some kind? Now, of what kind? Can there be a doubt on that subject? Does not the whole bond, including both the penal part and the condition, conclusively show that "dollars," and only "dollars" was the denomination of the money for which it was given? The bond was given for "lawful money of Virginia." What is the plain meaning of the description, even standing by itself? Certainly "dollars." The Code, ch. 137, §§ 1 and 2, p. 976, declares that: § 1. "The money of account of this state shall be, the dollar, cent, and mill; all accounts by public officers shall be so kept;" and, § 2. "No writing shall be invalid, nor the force of any account or entry be impaired, because a sum of money is expressed therein otherwise than in the said money of account." The condition is expressly for dollars, which conclusively shows, in the absence of evidence to the contrary, that the penal part is for dollars; the amount being, as is usual, about double the amount mentioned in the condition. Nothing is more common than the omission of words, and even most important words, in drawing written instruments; and yet those words can, generally, be as well understood from the context of the instrument as if they were expressed in it, and the instrument is construed accordingly. It would be a great defect in the law if this were not so.

683 It will *hardly be contended, and perhaps in the argument was not contended, that the law is not so in regard to the construction of ordinary contracts in writing between man and man. But it seemed to be supposed that a different rule of construction applies to records; in which it seemed to be contended that an omitted word, however plainly implied by the context of the instrument, cannot be supplied by construction. In this we think the learned counsel were plainly in error; and that a record, and even a statute, is governed by the same rule of construction in this respect as other written instruments. All are liable to mistakes; as well courts and legislatures as men of business; and in construing the written instruments of all, the business of a court of construction is, to ascertain from the instrument the intention of its framers. A court or a legislature is more deliberate in framing its acts than men engaged in business, and it is therefore supposed to make fewer mistakes in its language. But it sometimes makes them; and then its acts must be subjected to the legal rules of construction for the purpose of ascertaining the intention, if that can be done. It is

not admitted that the bond in question in this case was a record, or anything more than a contract inter partes. We do not intend to decide that question, because we do not deem it material. For whether it be a record, or in the nature of a record, or not, the word dollars must be understood and applied as aforesaid, in its construction.

The court is further of opinion that the circuit court did not err in overruling the motion of the defendant to exclude the said bond from being read as evidence on the trial of the cause, because of the supposed variance between the bond offered in evidence and the bond described in the declaration.

684 *There was, in fact, no such variance. The bond offered in evidence was the same in legal construction and effect as the bond described in the declaration, as has already been fully shown. There was no necessity, even if it were competent, to offer testimony as to what was meant thereby. The meaning sufficiently, and indeed conclusively, appears from the bond itself. The bond was not required by law to be executed in the presence of the court, but to be given before the clerk of the court in which the judgment was. Code, p. 1128, § 10. Though its being given before the court, if it so was, cannot vitiate it. And even if it were not in fact taken before the court, though certified by the clerk at the foot of it so to have been, the bond would not thereby be vitiated, if in fact given before the clerk; as it was. But that the court did not sit on the day of the date of the bond, does not show that it was not executed in the presence of the court, especially when the clerk has certified that it was so executed. It may have been misdated; or executed on a day different from that on which it bears date.

The bond was not taken without authority of law. It was argued that it was, because the endorsement made by the judge, granting the injunction directed to the clerk, says: "Injunction granted on the usual terms," without stating upon what terms it was to become operative. The statute does not require that the terms upon which the injunction is granted shall be stated in the order directed to the clerk. It certainly does not require that all the terms shall be stated in the order; but only, if any, that the penalty of the bond shall be stated in the order. All the other terms and conditions of the bond are prescribed by the statute, and need not be, and rarely

685 ever are, repeated *in the order. To grant an injunction to a judgment "on the usual terms," is to grant it on the terms of giving a bond with condition as prescribed by law. The bond in this case is conditioned according to law, and so in that respect conforms to the usual terms. But the amount of the penalty was not fixed by the direction of the judge who awarded it, and it seems to be therefore supposed by the learned counsel that the bond is void. Now is that so? We think not. The penalty of an injunction bond, where the in-

junction is to a judgment, is generally about double the amount of the judgment; and independently of any direction to the court in the statute to fix the penalty, a grant of an injunction on the usual terms would be understood to contemplate a bond in a penalty about double the amount of the judgment. Formerly nothing was said in the statute about the amount of the penalty of the injunction bond. And probably nothing would ever have been said in the statute about the amount of such penalty if judgments alone had been the subject of an injunction. But as the statute embraces many other subjects of injunction, which, in themselves, afford no guide to the clerk in fixing the penalty of the bond, it therefore provides that the bond, in cases of injunction, all of which are embraced in the same section, shall be in such penalty as the court or judge awarding it may direct. In this case the injunction was to a judgment, and was granted on the usual terms, and a bond was taken in a penalty about double the amount of the judgment. Was not this a compliance with the order? and did not the order comply with the law? Without deciding that question, we are of opinion that the obligors to the bond are estopped from denying that the penalty of the bond conformed to the direction of the judge who awarded the injunction.

686 *But it appears that the bond was executed in the presence of the court, which thereby received and sanctioned the bond, including the penalty. And this had at least as much effect in fixing the penalty of the bond as if the amount of it had been prescribed in the order awarding the injunction.

The court is further of opinion, that the circuit court did not err "on the motion of the defendant," in the words of the third assignment of error, "to continue the cause, after having proved the absence of a material witness and his inability to go to trial in such absence. The court had no power to compel him to disclose what he expected to prove by such witness, and then to determine that what was proven was inadmissible and irrelevant, and the witness incompetent."

In Hewitt's case, 17 Gratt. 627, cited by the counsel for the defendant in error, it was held by this court that "a motion for a continuance is addressed to the sound discretion of the court under all the circumstances of the case; and although an appellate court will supervise the action of an inferior court on such a motion, it will not reverse a judgment on that ground, unless such action was plainly erroneous;" and that "where the circumstances satisfy the court that the real purpose in moving for a continuance is to delay or evade a trial, and not to prepare for it, then though the witnesses have been summoned, and the party has sworn to their materiality, and that he cannot safely go to trial without them, the continuance should be refused."

On the principles above mentioned, we certainly cannot say that the action of the

court in regard to the motion for a continuance was plainly erroneous. It was a case in which the court might very properly, as it did, require the defendant, William 687 N. Harman, to *disclose the facts he expected to prove by James W. Harman. The witness, who was the principal debtor, had been summoned as a witness for the defendant at the previous term of the court, when the case was continued on the motion of the defendant on account of the absence of the said witness, against whom a rule was awarded, returnable to the next court, when he was again absent, though his absence was then accounted for by the testimony of a witness that there was a dangerous disease prevailing in his family a few days before. The defendant disclosed the following as the facts which he expected to prove by said witness, viz: "that when the defendant, Wm. N. Harman, signed the said injunction bond, it was understood between said Wm. N. Harman and James W. Harman that John Henderson would also sign the said bond as one of the securities, and that defendant, Wm. N. Harman, signed said bond upon the express condition and understanding that said Henderson would sign it, and this fact was announced to the clerk, James W. English, at the time it was signed by said Wm. N. Harman, the defendant; but William H. Howe, the plaintiff, knew nothing of such agreement or understanding." If James W. Harman would have been an inadmissible witness in the case to that transaction, being one of the parties to the bond, and said English, the clerk, before whom it was acknowledged being dead, then of course it would have been improper to continue the cause on account of the absence of said witness. But we deem it unnecessary to decide whether said witness would have been admissible or not for that purpose, as we are of opinion that even if the fact which the defendant stated he expected to prove by the witness had been before the court on the trial of the cause, it would 688 not have affected the result. *The bond is an official bond, executed before the clerk of the court and in the presence of the court. The obligors having signed, sealed and acknowledged it in the presence of the court, and it having been accepted and acted on as their bond, they are now estopped from denying it. The mere fact that it has two blank seals annexed to it does not invalidate the bond. Nothing is more common in the execution of a bond of that kind that blank seals are left to it. They are generally put there in order that sufficient names may be gotten to them to satisfy the court or officer taking the bond that the security is sufficient; and when it is sufficient, the parties signing it acknowledge it before such court or officer by whom it is accepted, and the obligors are then estopped from denying it. Whatever understanding there may be between the obligors to the bond or any of them as to its being signed by others, that cannot affect the validity of the bond, if neither the

obligee nor the court in which it was executed consents to such an understanding or has any notice of it. The obligors know, or are presumed to know, that the bond is intended to be acted on as their bond so soon as it is acknowledged and accepted as aforesaid, and that the court or officer before which it is executed and acknowledged cannot be expected or bound to become the agents of any of the persons who have executed or acknowledged it, in procuring it to be executed and acknowledged by other persons. It is not pretended that there was, in this case, any understanding with the plaintiff or the court, even if we can suppose that there could have been such an understanding under any circumstances, that the obligation of the surety to the bond was to be conditional only, and to depend upon another person's becoming surety. It 689 is stated by the defendant that "this fact was announced to the clerk, James W. English, at the time the bond was signed by William N. Harman, the defendant;" but it is further stated that "Wm. H. Howe, the plaintiff, knew nothing of such agreement or understanding." Without referring again to the authorities cited by the counsel for the plaintiff in error, to show that, according to the statement of what the said plaintiff expected to prove by the witness, he was not bound by the said bond, it is enough for us to say that we do not hold that any or all of them sustain that proposition.

We are therefore of opinion that there is no error in the judgment, at least to the prejudice of the plaintiff in error, and that it ought to be affirmed.

Judgment affirmed.

CONTINUANCES.

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I. IN GENERAL.

A. Continuance Is Usually a Matter for the Sound Discretion of the Court.—"A motion for a continuance is addressed to the sound discretion of the court under all the circumstances of the case." *Harman v. Howe*, 27 Gratt. 676; *Carter v. Wharton*, 82 Va. 264-267; *Norfolk, etc., R. Co. v. Shott*, 92 Va. 35-45, 22 S. E. Rep. 811; *Clinch River Mineral Co. v. Harrison*, 91 Va. 122-28, 21 S. E. Rep. 600; *Goodell's Ex'ors v. Gibbons*, 91 Va. 608, 22 S. E. Rep. 504; *Hite v. Com.*, 96 Va. 489, 31 S. E. Rep. 895; *Ross v. Norvell*, 3 Munf. 170; *Bledsoe v. Com.*, 6 Rand. 674; *State v. Betsall*, 11 W. Va. 708-27; *Davis & Moore v. Walker*, 7 W. Va. 447; *Riddle v. McGinnis*, 22 W. Va. 258-68; *Smith & Atkinson v. Knight*, 14 W. Va. 749-59; *Marmet Co. v. Archibald*, 37 W. Va. 778, 17 S. E. Rep. 301.

Where notices are given to any particular day in the district court, the practice has invariably been considered as requiring that the defendant should be called before any continuance is made. *Wilkinson v. Hendrick*, 5 Call 12. And this calling should appear by the record. *Parker v. Pitts*, 1 H. & M. 8.

On indictment for felony, if continuance is granted, it should appear by the record that the prisoner was present at the time of the granting of the continuance. *Shelton v. Com.*, 89 Va. 450, 16 S. E. Rep. 855.

B. This Discretion Is Judicial and Subject to Review.—But this discretion is judicial and a superior court will supervise the action of an inferior court on a motion for continuance, and will reverse its judgment when the allowance or refusal of the motion was plainly erroneous. *Hewitt v. Com.*, 17 Gratt. 628-29; *B. & O. R. Co. v. Wightman's Adm'r*, 29 Gratt. 481-47; *Pairo v. Bethell*, 75 Va. 825-28; *Roussell v. Com.*, 28 Gratt. 930; *The Bland & Giles Co. Judge Case*, 83 Gratt. 443; *Keesee, Clark & als. v. Border Grange Bank*, 77 Va. 129; *Com. v. Mister*, 79 Va. 5; *Phillips v. Com.*, 90 Va. 401, 18 S. E. Rep. 841; *Welsh v. Com.*, 90 Va. 321, 18 S. E. Rep. 278; *Early v. Com.*, 86 Va. 921, 11 S. E. Rep. 795; *Gaines v. Wilson et al. (Va.)*, 24 S. E. Rep. 823; *Flott et als. v. Com.*, 12 Gratt. 564-76; *Buster & Beard v. Holland et als.*, 27 W. Va. 510-34; *State v. Maier*, 36 W. Va. 757, 15 S. E. Rep. 991; *Shelton v. Com.*, 89 Va. 450-53, 16 S. E. Rep. 855.

C. What Court Relieves against Refusal to Continue.—The relief for a defendant at law, in case of improper refusal to continue the cause, is at law and not in chancery. *Syme et als. v. Montague*, 4 H. & M. 180.

D. Must Be Cause for Continuance.—In *Com. v. Mister*, 79 Va. 5-11, it was said: "In this case the action of the court in overruling the motion for a continuance was plainly right, as the motion was unsupported by any sufficient ground whatever."

In *Clements v. Powell*, 9 Leigh 1, it is said: "There being then no cause shewn for a continuance, the

county court acted rightly, in the exercise of a sound discretion, to refuse it."

"It is not to be supposed that his counsel did not know that the plaintiff was entitled to have his case tried at that term, unless the defendant showed good cause for a continuance." *Riddle v. McGinnis*, 22 W. Va. 258-67.

"In the circumstances of this case, as disclosed in the certificate of facts, we can discover no reasonable ground for the application, and it was, therefore properly refused." *Keesee, Clark & als. v. Border Grange Bank*, 77 Va. 129-32; *Bledsoe v. Com.*, 6 Rand. 673.

This Is Especially True of Criminal Cases.—"When the accused is ready for and demands trial by a court wherein he stands indicted, and may be lawfully tried, he is entitled to trial without delay, unless the prosecution shall show good cause for a continuance." *Benton v. Com.*, 90 Va. 828, 18 S. E. Rep. 32.

The continuance in this case was granted solely upon the ground suggested by the commonwealth's attorney, that he could not convict the prisoner without the testimony of a convict accomplice who would soon be released. The case was reversed for improper continuance. See *Const. Va.*, art. 1, § 10; *Code W. Va.*, ch. 181, § 6; *Acts W. Va. 1882*, ch. 129, § 6; *Anderson v. Com.*, 84 Va. 77, 8 S. E. Rep. 808; *Keesee & als. v. Border Grange Bank*, 77 Va. 129; *State v. Maier*, 36 W. Va. 757, 15 S. E. Rep. 991; *Code of Va. 1887*, § 491.

E. There Must Be a Motion for Continuance and Exception Taken.—There must be a motion for a continuance and an exception taken to the action of the court in refusing to allow it, or the higher court can take no cognizance of such refusal: and this is true though the party be entitled to continuance as a matter of right. The maxim *omnia rite esse acta presumuntur* applies in such case. *Southall's Adm'r v. The Exchange Bank of Va.*, 12 Gratt. 312-16; *Early v. Com.*, 86 Va. 925, 11 S. E. Rep. 795.

If there was any ground to believe that other testimony could have been procured, the plaintiff should have moved the district court for a continuance of the cause; and not have waited until verdict was rendered against him: and then bring it forward as a ground for a new trial, after having taken his chance with the jury. *Gordon v. Harvey*, 4 Call 48; *Hook v. Nanny et als.*, 4 H. & M. 157.

In *R. & M. R. Co. v. Humphreys*, 90 Va. 425, 18 S. E. Rep. 901, it was held no ground of continuance could be taken advantage of in the higher court unless properly put on the record by a bill of exceptions.

Affidavit to Support Motion Not Part of Record unless Exception Taken.—In the case of *Garland v. Buzz*, 1 H. & M. 374, JUDGE TUCKER said: "It would be a dangerous precedent to allow affidavits to be a part of the record; unless made so by an exception."

In *Ross v. Norvell*, 3 Munf. 170-182, the higher court refused to reverse the lower because the bill of exceptions did not show error.

In *Early v. Com.*, 86 Va. 921-25, 11 S. E. Rep. 795, it is said: "The circumstances under which the motion was made are not set out in the bill of exceptions with sufficient fullness as to enable us to do otherwise than to disregard the exception. Certainly the error, if any was committed, is not apparent, and nothing is better settled than that everything is to be presumed in favor of the correctness of the rulings of a court of competent jurisdiction, when brought under review in an appellate tribunal, until the contrary is shown."

F. No Order of Continuance Is Necessary.—Omission to continue cause on record when there has been

a verdict is no discontinuance of the prosecution for a misdemeanor. *Hill v. Com.*, 2 Va. Cas. 61. (1810.)

When there is a general order of continuance of cases an omission to direct *venire facias*, or *capias* to be issued is no discontinuance of prosecution for misdemeanor. *Com. v. Gourd*, 2 Va. Cas. 470. (1824.)

Adjournment of court after verdict without an order of continuance does not discontinue cause and prevent judgment on the verdict at the next term. *Cleek v. Com.*, 21 Gratt. 777. (1871.)

In *Amls v. Koger*, 7 Leigh 221, the court without consent of defendant continued the case over a period of two terms. *Held*, this was a discontinuance of the cause. (1820.)

In *Hale v. Burwell and Wife*, 2 Pat. & H. 608, the cause was continued regularly from term to term except that at the April term it was continued to the June term, and at the November term to the March term and at the July term no notice was taken of it, either by continuance or otherwise. It was held, that the cause was not discontinued by reason of the failure to note on record its continuance, and this more especially as after the several miscontinuances or failure to continue, the cause was regularly continued subsequently by consent of the parties. See Va. Code 1860, § 16, p. 627; Va. Code 1887, §§ 3124 and 4013. But §§ 3123 and 3124, would not authorize the court to continue the cause for two terms passing over an intervening one without consent of accused. See *Bolanz et al. v. Com.*, 24 Gratt. 39, which is decided under Va. Code 1860, ch. 161, §§ 15 and 16 which are identical with the sections *supra*.

In *Bolanz et al. v. Com.*, 24 Gratt. 31, the case was continued from the August term to the October term passing over the September term. But the continuance was on motion of the accused. *Held*, no error. *Harrison v. Com.*, 81 Va. 491, construes § 26, ch. 201 and § 16, ch. 161, of Va. Code 1873, which correspond to §§ 4013 and 3124 of Code 1887. *Held*, a failure to enter an order of continuance does not operate as a discontinuance of the prosecution.

N. B.—If the case is called for trial during the term, a party wishing a continuance must make a motion for it. *Southall's Adm'r v. The Exchange Bank of Va.*, 12 Gratt. 312-316.

G. Where Several Continuances Have Been Granted the Rule Is Stricter.—Where several continuances have been granted to a party the rule as to allowing further continuance is more strict and much latitude is given to the discretion of the court. *Logie v. Black*, 24 W. Va. 1.

In *Milstead v. Redman*, 3 Munf. 219, one continuance was granted defendant, and after a new trial another continuance was allowed him. *Held*, not error to refuse a motion for third continuance though absent witness had been summoned and was material.

In *Brooks v. Calloway*, 12 Leigh 466, there had been three successive continuances granted to defendant and leave to take depositions. *Held*, not error to refuse another.

In *Wilson v. Kochnelein*, 1 W. Va. 145, after three successive continuances no deposition having been taken and no summons returned, executed, the motion for a fourth continuance was denied properly.

In *Holt v. Com.*, 2 Va. Cas. 156, a motion for a second continuance was overruled, principally on the ground that due diligence had not been used by the prisoner in summoning his witness, particularly as a continuance had been already granted him.

In *Spengler v. Davy*, 15 Gratt. 381-5, it is said: "When we take into consideration the further fact that the plaintiff in error had already been indulged

with two continuances of the cause, the fair conclusion is that if he has lost the benefit of any important fact on the trial of his case, such loss is due, not to any injustice or harshness in the ruling of the court, but to his own culpable negligence."

In *Davis & Moore v. Walker*, 7 W. Va. 447, after two continuances had been granted on motion of defendant, it was held no error to refuse a third, especially as no deposition had been taken though there was ample time.

In *Schonberger v. Com.*, 86 Va. 499, 10 S. E. Rep. 713, it was held no error to refuse another continuance after several had been granted to accused and that the court exercised only a sound discretion in denying the motion for a further continuance when the accused had not brought himself within the rule of due diligence.

H. A Motion for Continuance May Be Made before Arraignment.—*Joyce v. Com.*, 78 Va. 287, decides it competent for the prisoner to move for a continuance before his formal arraignment. See Va. Code, § 4016.

On indictment for capital felony it was held error not to entertain a motion for continuance before arraignment. The court says, "As well might it be contended that a motion for a continuance cannot be made until after trial, as that it cannot be entertained before arraignment." Such refusal in this case was held to deprive the prisoner of his statutory right to elect the forum in which he should be tried. *Anderson v. Com.*, 84 Va. 77, 3 S. E. Rep. 303. See Va. Code, § 4016.

In *Boswell v. Com.*, 20 Gratt. 860, the case was thrice continued before arraignment.

On indictment for a capital offence the prisoner in exercise of his statutory privileges, elected to be tried in the circuit court. Though it appeared by the certified record that the county court had erroneously refused to entertain a motion for continuance before arraignment yet it was held the circuit court had no power to correct this error. *Howell v. Com.*, 86 Va. 817, 11 S. E. Rep. 238.

An amendment to Va. Code, § 4016 now provides that "a prisoner charged with a capital offence on trial in a county court shall make his election whether he will be tried in the said court or the circuit court before making a motion for a continuance." See *Pollard's Supp.* 1900, § 4016a.

I. Motion after Trial Begun Usually Denied.—In *Gordon v. Harvey*, 4 Call 450, it was said that the plaintiff should not have waited until verdict was rendered against him before making a motion for continuance.

In *Thompson v. Com.*, 88 Va. 45-48, 13 S. E. Rep. 304, defendant made a motion to adjourn the court until the next day to secure the attendance of a material witness who was then ill. The motion was properly overruled partly because the trial had progressed so far.

In case of *Barbour v. Melendy*, 88 Va. 595, 14 S. E. Rep. 323, the motion for continuance was held properly overruled partly because the cause had been set for the argument by consent and also because the evidence was irrelevant. See also, *Pollard's Supp.* 1900, § 4016a.

After a case is set for trial by consent of defendant, he is not entitled to a continuance on the ground that the sheriff's return did not show, before amendment, a valid service of the writ. *Atlantic & Danville R. R. Co. v. Peake*, 87 Va. 130, 12 S. E. Rep. 348.

II. CONTINUANCE AS MATTER OF RIGHT.

In *Stearns' Ex'or v. Richmond Paper Mfg. Co.*, 86 Va. 1084, 11 S. E. Rep. 1057, construing Va. Code, §§ 8308, and 8309, it was held that on motion for continuance it should be allowed as a matter of right when an order was entered during term reviving a proceeding on *scire facias* against a new party provided the continuance was asked at the term at which the order was entered. But this right was not allowed when the proceeding was revived at rules.

In *Southall's Adm'r v. The Exchange Bank of Va.*, 12 Gratt. 312, it was held, that though the court had by statute the authority to correct errors at rules, the defendant in such case would have been entitled to a continuance as a matter of right provided he demanded it.

On an indictment, when accused asks a continuance on the ground that another case involving the same question is pending in the court of appeals on writ of error, it is error for the court to deny a continuance. *White v. Com.*, 79 Va. 611.

When plaintiff, a nonresident, fails to give security for costs on suggestion by defendant, and as a consequence defendant does not prepare his case, it is error, costs being secured later, to rule defendant into trial without a continuance, if he demands it. *Jacobs v. Sale*, *Gilmer* 123. See Va. Code, 1887, § 8286, and 1 Bart. Law Pr. (2d Ed.) § 119.

In *Mullinax v. Waybright*, 33 W. Va. 84, 10 S. E. Rep. 25, construing W. Va. Code, ch. 50, § 58, it was held that defendant was entitled to a continuance as of right only when he makes oath that he has a just defense to the action.

In *Chisholm v. Anthony*, 1 H. & M. 27, it was held error for court to refuse to allow defendant to amend his plea of payment and put in plea of "fully administered." There was also a motion for continuance.

In *Clements v. Powell*, 9 Leigh 1, it was held no error to refuse a continuance on the ground "that the administrators desired to defend themselves by shewing there were no assets in their hands to which plaintiff was entitled in due course of administration," but the defendants tendered no such plea as was pleaded in *Chisholm v. Anthony*, 1 H. & M. 27, or any other defence; they did not file affidavit nor even suggest that there were no assets to satisfy the claim. There was, therefore, no good cause for continuance.

III. CONTINUANCE DISCRETIONARY.

A. Absent Witness.

1. *Evidence Material.*—On motion for continuance because of absence of a witness the affidavit should show that his evidence is material. *Wilson v. Kochnelein*, 1 W. Va. 145; *Williams v. Freeland*, 2 W. Va. 306; *Tompkins v. Burgess*, 2 W. Va. 187; *McDonald v. Peacemaker*, 5 W. Va. 439; *Williams v. B. & O. R. R. Co.*, 9 W. Va. 33; *Deford v. Hayes*, 6 Munf. 390; *Bledsoe v. Com.*, 6 Rand. 673; *Harris v. Harris*, 2 Leigh 584; *Moore v. Com.*, 9 Leigh 639-45; *Clements v. Powell*, 9 Leigh 1; *Nash v. Upper Appomattox Co.*, 5 Gratt. 332; *Myers v. Com.*, 90 Va. 705, 19 S. E. Rep. 981; *Logie v. Black*, 24 W. Va. 1.

2. *Evidence Immaterial.*—When the question is one of interest to the whole community, such as the right to hold the office of judge, the question should be speedily and promptly adjudicated and it is proper to refuse a continuance when the sole ground is that counsel had not time to consult the authorities and prepare his defense, especially when the precise question raised by the pleadings had been recently

adjudicated by the supreme court of the state. *Bland & Giles Co. Judge Case*, 33 Gratt. 442.

A continuance will not be granted to procure the evidence of an absent witness when the evidence to be shown by him is only cumulative, unless it be shown there will be a conflict of evidence. *State v. Harrison*, 36 W. Va. 729, 15 S. E. Rep. 982.

In the case of *Mfg. & Farmers' Bank v. Mathews*, 1 W. Va. 26, defendant filed an affidavit denying partnership and plaintiff moved for continuance to get proof of it. Defendant then withdrew his affidavit and court refused a continuance. The judgment was overruled for refusal to continue. *Quære?*

A commissioner's report usually lies over until the next term after that to which it is returned. But it was held there was no necessity for it to lie over when neither party intended to except to it. *Chew v. Beverly et al.*, 4 H. & M. 409.

3. *Witness Necessary.*—Not only should the evidence be material but the affidavit should show that the party cannot safely go to trial in the absence of such witness, i. e., that he cannot prove the same facts by another witness. *Wilson v. Kochnelein*, 1 W. Va. 145; *Tompkins v. Burgess*, 2 W. Va. 187; *Mull's Case*, 5 Gratt. 695; *Gwatkin v. Com.*, 10 Leigh 690; *Roussel v. Com.*, 28 Gratt. 930-937.

4. Due Diligence Exercised.

a. *When Witness Is Resident of State.*—As a general rule, where a witness for a party fails to appear at the time appointed for the trial, if such party show that a subpoena for the witness has been returned executed, or if not so returned, was delivered to the proper officer of the county or corporation in which the witness resides, a reasonable time before the trial, and shall swear that the witness is material, and that he cannot safely go to trial without his testimony, a continuance ought to be granted. The party thus shows, *prima facie* that he is not ready for trial though he used due diligence to be so; and in the absence of anything to the contrary the court should credit him with honesty of intention. *Hewitt v. Com.*, 17 Gratt. 627; *Carter v. Wharton*, 82 Va. 25; *Phillips v. Com.*, 90 Va. 401, 18 S. E. Rep. 841.

In *Higginbotham v. Chamberlayne*, 4 Munf. 36, it was held, that in absence of material witnesses for whom a summons had been delivered to sheriff in due time, a continuance should have been allowed though the cause had been continued before, and though an order for taking depositions *de bene esse* had not been complied with by taking the deposition of said witness.

It was held due diligence that parties had summoned witness who was material and was thought to be in attendance. *Held*, error to refuse continuance on account of his absence. *Anthony v. Lawhorne*, 1 Leigh 1.

Though one continuance had been granted, yet since a material witness was absent who had been duly summoned, the summons being returned executed, the cause of the absence of the witness being shown to be that he was sick in bed, it was held error to refuse another continuance. *Gwatkin v. Com.*, 10 Leigh 687.

The absence of a material witness duly summoned is good ground for continuance especially, as in this case there was an agreement to allow her to remain away only in case she allow an agreement to be produced in evidence, which she refused to do. *Taylor v. Peck*, 21 Gratt. 11.

In *Roussel v. Com.*, 28 Gratt. 937, it was held no error after two continuances to refuse another when the sole excuse for not properly summoning

the witness was that it was the habit of clerks of other courts, when a subpoena for a witness had been ordered in a case, to continue to issue it afterwards from term to term until trial, without further directions. It appeared that summons had been sent but was twice returned with the endorsement, "not time to execute."

In the case of *Walton v. Com.*, 32 Gratt. 855. It was held error to refuse a continuance when the officer instead of duly executing the process, improperly returns it, "not executed for want of fees," when the witness was material and there is apparent no intention to delay or evade the trial.

A delivery of a memorandum to the clerk to issue a subpoena for a material witness was held due diligence though there was no proof of receipt of the summons by the sheriff. The clerk deposed that he believed the summons was issued in the case according to the custom practised by him of leaving summons at a store for the sheriff as he had been requested to do. *Deford v. Hayes*, 6 Munf. 390.

In the absence of suspicion of a purpose to delay or evade the trial by any unfair play, a mistake in summoning a material witness is excusable and a continuance should be granted. *Myers v. Trice*, 86 Va. 840, 11 S. E. Rep. 428.

Where no lack of diligence is shown, a continuance should be granted to obtain the attendance of a material witness. *Walker v. State*, 4 W. Va. 749-52.

An honest mistake in summoning the wrong man, he being a brother of the witness wanted, does not show a want of due diligence, and in the absence of any suspicion of a purpose to delay or evade trial the court should grant a continuance if the absent witness is material. *Myers v. Trice*, 86 Va. 835-840, 11 S. E. Rep. 428.

In *Flott v. Com.*, 12 Gratt. 564, it was held that though a mistake had been made in the taking of depositions, yet since it did not appear that the commonwealth could be subjected to any inconvenience by a delay of a term, a continuance should have been granted to obtain material evidence.

Sickness of Defendant—Due Diligence.—It was held error for the county court, at the term next after the cause had been transferred to that court, to rule the defendant into trial overruling his motion for continuance on the ground that he had been and was still too ill to prepare his case. *M'Alexander v. Hairston's Ex'or*, 10 Leigh 486; *Radford v. Fowikes*, 85 Va. 826, 8 S. E. Rep. 817.

The absence of leading counsel on account of sickness is a good cause for continuance. *Myers v. Trice*, 86 Va. 840, 11 S. E. Rep. 428.

Sickness of Witness.—The absence of a material witness on account of sickness when the accused makes affidavit that he believes said witness will be able to attend at the term to which he moved the case to be continued, is a ground for continuance in the absence of any intention to delay or evade the trial. *Phillips v. Com.*, 90 Va. 401, 18 S. E. Rep. 841; *Gwatkin v. Com.*, 10 Leigh 687.

Absence of Counsel.—In *Rossett v. Gardner*, 8 W. Va. 531, it was held error to refuse a continuance since it appeared the defendant had used due diligence to prepare his case but one of his counsel was unavoidably absent and the other absent at the hearing though present on the preceding day of the term. *MAXWELL, J.*, dissented.

The absence of counsel because of quarantine reg-

ulations is a sufficient cause for continuance. *Radford v. Fowikes*, 85 Va. 820, 8 S. E. Rep. 817.

In *Hook v. Nanny*, 4 H. & M. 157, one of the grounds for continuance was that defendant stated on oath that one of his counsel, in whose assistance he materially relied, was absent. He also stated as a ground for continuance absence of a material witness to whom summons was sent but clerk failed to deliver letter. *Held*, continuance should have been allowed.

b. When Witness a Nonresident.—To entitle a party to a continuance on the ground of the absence of a witness, it must be shown that the party has used due diligence to procure the attendance of the witness—that he is a material witness—that the same fact cannot be proved by any other witness in attendance—and that the party making the application cannot safely go to trial in the absence of such witness. *Wilson v. City of Wheeling*, 19 W. Va. 323; *Dimmey v. R. Co.*, 27 W. Va. 32-48; *Marmet Co. v. Archibald*, 37 W. Va. 778, 17 S. E. Rep. 299.

Where an absent witness is a nonresident, the affidavit should state, not only the party's belief that his attendance can be secured, but also the grounds of such belief. *State v. Harrison*, 36 W. Va. 729, 15 S. E. Rep. 982.

5. Due Diligence Not Exercised.

a. When Witness is Resident of State.—After several continuances it was held no error to refuse a continuance because of absence of an unsummoned witness when accused did not swear to the materiality of the witness. *Schonberger v. Com.*, 86 Va. 489.

It was held no error to refuse a continuance to get material evidence when the witness though summoned and in attendance had not been informed what he was expected to prove and had not been instructed to bring the books without which he could not show the dates desired especially since two continuances had already been granted him. *Spengler v. Davy*, 15 Gratt. 381.

Mere failure to examine the papers in the cause when counsel, called in, had erroneously supposed the cause was removed from county to circuit court, is no cause for a continuance especially when the original counsel was in court and alleged no want of preparation. *Hogshead et al. v. Baylor*, 16 Gratt. 99.

In *Trevelyan's Adm'r v. Loftt*, 83 Va. 141, 1 S. E. Rep. 901, a motion for a continuance was held properly overruled, because ample time and opportunity had been given for a settlement of the accounts, and because to grant the motion would be to reward negligence, and to unreasonably delay the cause which was then ready for hearing.

In *Mullinax v. Waybright*, 83 W. Va. 84, 10 S. E. Rep. 25, a motion was made for a continuance on the grounds of being without counsel and the absence of a witness. It was held no error to refuse continuance since it appeared that no effort had been made to obtain counsel and no summons had been issued for the witness.

After two continuances had been granted to defendant on account of the absence of a witness, it was held no error to refuse further continuance when it appeared that the summons had been sent to the witness and not to an officer for service on him and when no deposition had been taken though the witness was more than one hundred miles distant and there had been ample time to take such deposition. The court says, "He must, generally, have exercised such diligence in the use of the process of the court, as will authorize the court, if the witness is not in attendance when the cause is called for trial, to take the legal course to compel

the attendance of the witness. * * * He must not simply rely upon the witness as to his attendance. * * * but he can only safely rely upon the diligent and proper use of the process of the court in proper time." *Davis v. Walker*, 7 W. Va. 447, 451; *Dimmey v. R. Co.*, 27 W. Va. 32-48. See Va. Code 1897, § 3305; *R. & M. R. Co. v. Humphreys*, 90 Va. 425-433, 18 S. E. Rep. 901.

In *Norfolk, etc., R. Co. v. Shott*, 92 Va. 34-45, 22 S. E. Rep. 811, though the absent witness was in the employ of the company and only lived eight or ten miles from the courthouse where the trial took place, yet no subpoena was put in the hands of an officer for him but the plaintiff in error undertook to have him present at the trial. *Held*, this was not due diligence, a continuance was properly refused.

In *Mull's case*, 8 Gratt. 695, it was held no error to refuse a continuance when the ground of motion was absence of a brother of the prisoner, alleged to be a material witness. No summons had been served though he had ample time and some delay had already been made to await the return of the witness.

In *Moore v. Com.*, 9 Leigh 639, the motion for continuance was held to have been properly overruled because the evidence to be proved by the witness was immaterial and also because though summons had issued it did not appear what had become of it. See also, *Wilson v. Kochnelein*, 1 W. Va. 145.

In *Holt v. Com.*, 2 Va. Cas. 155, the court was held to have properly overruled a motion for a continuance principally because due diligence had not been used in summoning the witness.

In *Ross v. Norvell*, 3 Munf. 182, there was newly discovered evidence a few days before trial and a motion was made for a continuance. It was held that since the bill of exceptions did not show that this evidence was recently discovered, it would be presumed that appellant knew of it when the trial began, and knowing of it, he was negligent in not bringing it forward sooner.

In *Mendum v. Com.*, 6 Rand. 704, the motion for a continuance was overruled because there had been several continuances and though prisoner had had ample time to do so, he had not taken the depositions of the absent witness.

b. When Witness is a Nonresident.—An affidavit by accused that he has four material witnesses whose testimony is necessary in order to his having a fair trial, is not sufficient to support a continuance. Where he also shows they are nonresidents and does not name them nor show that he has made any effort to procure their attendance or that he expected to be able to procure their attendance if a continuance should be granted him. *Hurd v. Com.*, 5 Leigh 715.

In *Deanes v. Scriba et als.*, 2 Call 415, it was held that since the commissioner had indulged the appellants from 1792 to 1797, and during that time they had taken no steps to secure the depositions of the absent witness who was a seafaring man, though they had ample opportunity by his return from time to time, the continuance was properly denied.

In *Fire Association v. Hogwood*, 82 Va. 342, the absence of a material witness who was in the employ of the company and was a nonresident of the state and therefore not subject to the process of the state court, was held to be no ground for continuances; especially as the court had continued the case a sufficient time to allow the plaintiff in error to procure his attendance.

The absence of a material nonresident witness who is in the service of defendant, is no ground for

a continuance when the suit has been pending for a considerable time and no effort has been made to obtain his deposition, defendant relying merely on the promise of the witness to attend. *B. & O. R. Co. v. Wightman's Adm'r*, 29 Gratt. 431-47.

6. Motion Should State Name of Witness.—In *Hurd v. Com.*, 5 Leigh 715, it was held that, though the affidavit stated the witnesses were material yet since it did not state their names or show any effort to procure attendance or that he would be able to procure their attendance, they being nonresidents it was no error to refuse a continuance.

In *Buster v. Holland*, 27 W. Va. 510, 535, it was held proper to refuse a continuance since no due diligence had been shown and the names of the absent witnesses were not stated.

B. Amendments.—In *Anderson v. Kanawha Coal Co.*, 12 W. Va. 525, in construing Code W. Va., ch. 3, § 12, p. 601, it was held the provision that, "if such amendment be made after appearance of the defendant, the court may impose such terms upon the plaintiff as to a continuance of the cause as it may deem just," did not give the defendant a continuance as a matter of right, but still left it to the discretion of the court, and since in this case it was obvious that the amendment operated no surprise to the defendant, a continuance was properly denied.

In *Harvey v. Parkersburg Ins. Co.*, 37 W. Va. 52, 53 S. E. Rep. 580, it was held since the amendment allowed in that case operated as no surprise, the defendant was not injured by a refusal to continue the cause, and a continuance was properly refused.

In *Atlantic & Danville R. Co. v. Peake*, 37 Va. 102, 12 S. E. Rep. 348, it was held that the amendment of return on summons, though before such amendment there was nothing to show a valid service of the writ, was no ground for a continuance, especially in view of the fact that the case, by consent, had been previously set for trial on the same day on which the order permitting the amendment was made.

In *Danville & Western R. Co. v. Brown*, 90 Va. 391, 53 S. E. Rep. 278, it was held no error to refuse a continuance when the sole ground that the court had allowed defendant to make an amendment which was wholly immaterial and unnecessary.

C. Prejudice Not a Ground for Continuance.—In *Smith v. Com.*, 2 Va. Cas. 6, it was decided that a motion for continuance on the sole ground of prejudice against the prisoner, was properly refused. There did not appear any proof of undue means used to prejudice the public mind.

In *Joyce v. Com.*, 78 Va. 287, it was held that though a motion for continuance could be made before arraignment, yet affidavit of general prejudice is not sufficient ground to sustain such motion.

D. When the Object of the Motion is Delay, a Continuance Is Refused.—Though the affidavit state that the witness is material and that due diligence has been used to obtain his continuance, yet if it appear on examination that the continuance was moved for not that he might have the benefit of the evidence of an absent witness, but merely to delay the trial the motion should be denied. *Mendum v. Com.*, 6 Rand. 704-716.

In *Wormeley v. Com.*, 10 Gratt. 658, it appeared that the absent witness alleged to be material was the plaintiff's daughter and absent with his connivance, and the motion for a continuance was accordingly held to have been properly refused. *Wormeley v. Com.*, 10 Gratt. 658-682; *Com. v. Wormeley*, 8 Gratt. 712.

In *Harman v. Howe*, 27 Gratt. 676-686, citing *Hewitt v. Com.*, 17 Gratt. 627, it was said: "Where the circumstances satisfy the court that the real purpose in moving for a continuance is to delay or evade a trial, and not to prepare for it, then though the witnesses have been summoned, and the party has sworn to their materiality, and that he cannot safely go to trial without them, the continuance should be refused." *Marmet Co. v. Archibald*, 87 W. Va. 778, 17 S. E. Rep. 301; *Riddle v. McGinnis*, 22 W. Va. 209; *Buster v. Holland*, 27 W. Va. 510-535. See *Earley v. Com.*, 86 Va. 921-5, 11 S. E. Rep. 795.

In *Dillard's Adm'r v. Dillard et al.*, 77 Va. 820-25, 21 S. E. Rep. 669, it was said: "At that time he, the appellant, was represented by counsel, and it does not appear that his rights were prejudiced on account of his absence, or, that if a continuance had been granted, he would have been able to attend before the commissioner within a reasonable time thereafter. The motion appears to have been prompted rather by a desire for unreasonable delay than for any other purpose, and was rightly overruled."

1. **No Presumption That Delay Is the Object.**—When there is no lack of diligence on the part of accused and the motion does not appear to be for the purpose of evading or unnecessarily delaying the trial, the court should give the prisoner credit for honesty of intention and continue the case in his motion because of the absence of a material witness. *Welsh v. Com.*, 90 Va. 318, 18 S. E. Rep. 278; *Phillips v. Com.*, 90 Va. 408, 18 S. E. Rep. 841.

2. **If Delay Is the Object Court May Require Evidence to Be Stated.**—After one continuance has been granted, and when there are many witnesses so that every probability is against a future attendance of many of said witnesses, the court may require the affidavit of the witness, on account of whose absence the motion was made, to be produced, that the court might judge of the materiality of the witness. *Mendum v. Com.*, 6 Rand. 704.

In *Rosset v. Greer et al.*, 3 W. Va. 1, it was held no error, in a chancery case, to refuse a continuance when the affidavit did not show that the newly discovered evidence which furnished the ground of the motion could not have been discovered before by due diligence and also because it did not disclose the nature of the evidence so that it might be seen whether it was material or not.

In *Harris v. Harris*, 2 Leigh 584, it was held that if the judge believes the party moving for a continuance on the ground of absence of a material witness is mistaken as to the materiality of the evidence he expects to prove by such witness, or that the motion was made to delay the trial, he may require the party making the motion to state what he expects to prove by such witness.

The fact that the absent witness, if material, who has been duly summoned to appear at the trial, is a party plaintiff or defendant in the suit, cannot prejudicially affect the motion for continuance, unless the court has good grounds to doubt the fairness of the motives of the party moving for the continuance, and to suspect that the object of the motion is mere delay. And in such event, the court may enquire further into the materiality of the witness, require the party to state what he expects to prove by the absent witness, and even send an officer with a rule, or an attachment, if a rule has been previously served, for the absent witness, whether he be a party, who has been summoned as a witness, or any other witness. *Carter v. Wharton*, 82 Va. 207.

E. Continuance of Motion to Dissolve an Injunction.

a. **When Continuance Denied.**—In *Radford's Ex'ors v. Innes's Ex'x*, 1 H. & M. 8, it is said: "The reasons assigned for a continuance are not sufficient to induce the court to depart from the general rule; and that is, never to continue a motion for the dissolution of an injunction, unless from some very great necessity, because the court is always open to grant, and, of course, to reinstate an injunction, whenever it shall appear proper to do so, and because too the plaintiff should always be ready to prove his bill."

In *Johnson v. White's Ex'ors*, 1 H. & M. 201, it was held that no continuance will be granted because of exceptions to a commissioner's report unless they be filed as required by a rule of court and good cause shown; but they will be received at any time provided they do not delay the hearing of the cause.

In *Tiffany v. Kent et al.*, 2 Gratt. 281-86, on a motion to dissolve an injunction against a sale of real estate, it appearing that the bill without amendment did not disclose a ground for injunction, a motion for continuance was held properly refused.

In *B. & O. R. Co. v. City of Wheeling*, 13 Gratt. 40, 50, 77, a motion to dissolve an injunction was continued because a foreign corporation had not filed an answer, because the exceptions taken to appellant's answer were still pending, and because the appellant's answer was not verified by affidavit. It was held error to continue the motion because sufficient grounds had not been stated and because the bill of injunction had been improvidently granted.

In *Ingles v. Straus*, 91 Va. 200-224, 21 S. E. Rep. 490, it was said: "When a motion is made to dissolve an injunction, the court of chancery never continues it unless from some great necessity, because the court is always open to grant, and of course to reinstate an injunction wherever it shall appear proper to do so." And "where a motion to dissolve is heard upon the bill, answer, and depositions used as affidavits, and the evidence does not show probable cause from which it may reasonably be inferred that plaintiff will be able to make out his case upon final hearing, the injunction will be dissolved." No such probable cause was shown in this case and the motion for continuance was held properly refused.

In *Taylor v. Com.*, 29 Gratt. 780, on an indictment for obstructing the street it was held, the fact that an injunction suit was pending in the same court was no ground for continuing the prosecution under the indictment, especially as the questions to be decided in the injunction suit must be decided in the trial under the indictment.

b. **When Continuance Allowed.**—In *Nelson's Adm'r v. Armstrong*, 5 Gratt. 354, on a motion to dissolve an injunction which had been granted against a judgment on drafts alleged to be for a gaming consideration, since the evidence did not disclose what the consideration of the debt was, and whether the debtor had not fraudulently induced the creditor to purchase, the injunction should have been continued until these questions were tried by a jury. See also, *Beale v. Digges et al.*, 6 Gratt. 582-591.

In *Jenkins & Cutchin v. Waller & Jordan*, 80 Va. 608, it is held that, it rests in the sound discretion of the court to dissolve an interlocutory injunction upon the coming in of the answer denying the equities of the bill, or to continue it to a final hearing on the merits: especially is this true where fraud is the gravamen of the bill, or where it is apparent to the court that a dissolution of the injunction would result in greater injury and hardship than

its continuance to the hearing. The continuance was held properly granted.

As a general rule when a motion to dissolve an injunction comes on to be heard upon the bill and answer and the answer denies all the equity of the bill, the injunction is dissolved: but when the injunction is against the sale of personal property alleged to be fraudulent, since the retention of the property by the vendor after an absolute sale is *prima facie* fraudulent and the burden of proof is on the vendee to show the sale fair and *bona fide* it is proper to continue the motion and to refuse to dissolve the injunction where only one of the several vendees answers the bill. *RICHARDSON, J.*, dissenting. *Kahn v. Kerngood*, 80 Va. 342-346.

On motion to dissolve an injunction granted against the sale of land because of defective notice of sale and because the deed of trust was alleged to be tainted with usury, it appeared that there was no usury in the transaction. It was held error to refuse a continuance to allow complainant to obtain evidence of the defective sale, which evidence he could not have obtained before by use of due diligence. *Vaught v. Rider, Trustee*, 88 Va. 659, 3 S. E. Rep. 293.

Refusal to continue in the examining court is no ground for motion in arrest of judgment in the circuit court, for it suggests matter making no part of the record. If such error can be taken advantage of in the circuit court it is only by a motion to quash or a plea in abatement. *Morris v. Com.*, 9 Leigh 686.

See, as to Continuances, Va. Code 1887, §§ 8124, 3284, 3308, 3312, 4013, and 4047.

690 *Brown, Adm'r &c. v. Dickenson.

June Term, 1876. Wytheville.

Bonds—Joint Obligees—Assignments by Each.—Three bonds are executed to A and G, and are left in the possession of G. A sold the bonds to E; but they being in the possession of G, were not delivered to E. G sold and delivered the bonds to D. In a suit by E against D to recover the bonds, the deposition of A was taken to prove that G owed him, and had agreed that he should have the bonds; but at the time of taking the deposition of A, G was dead. **Held:**

1. **Same—Same—Same—Notice.**—The bonds having been executed to A and G, their joint interest appeared upon the face of the bonds; and the possession of them by G could not mislead a purchaser from him.
2. **Same—Same—Same—Rights of Obligees.**—Though each might sell his own interest, neither could dispose of the interest of the other without his consent.
3. **Same—Same—Same—Rights of Assignees.**—Though the bonds were sold by G and assigned to D, D only acquired the interest of G in the bonds; and E is entitled to the interest of A in them.
4. **Same—Same—Same—Liability of Assignors—Evidence.**—A is liable to E, on his sale of the bonds to E, if he does not recover them; and as G is dead, A is not a competent witness, either at common law or under the statute, to prove that G had agreed with him that the bonds should belong to A, though A is not a party in the suit.

The case is sufficiently stated by Judge Staples in his opinion.

Kent, for the appellant.

Crockett and Richardson, for the appellee.

Staples, J., delivered the opinion of the court.

691 *This is an appeal from a decree of the circuit court of Grayson county, in a cause wherein the administrator of Eli Davis was plaintiff, and John Dickenson and others were defendants. The record shows the following state of facts: Alexander S. Matthews and Granville H. Matthews, being the joint owners of a tract of land lying in Grayson county, executed a deed of trust thereon in the year 1858. A sale was afterwards made by the trustee; and the land having sold for more than was sufficient to satisfy the debts secured by the deed, the purchaser executed his three bonds for the surplus of the purchase money, to the said Alexander S. Matthews and Granville H. Matthews, jointly.

These bonds, it seems, were handed over by the trustee to Granville H. Matthews, who then lived in Grayson county; A. S. Matthews being at that time a resident of Wythe county. Shortly thereafter Granville H. Matthews assigned and delivered the bonds to the defendant Dickenson, for a valuable consideration, paid in money and in bonds and notes upon third persons. Before this assignment to Dickenson, however, A. S. Matthews had sold the bonds to Eli Davis. Being then in the possession of G. H. Matthews, they were of course not delivered to Davis. The controversy here is between Davis' administrator and Dickenson: each claiming title to the whole amount of the bonds under the respective assignments aforesaid. The question before us is as to the nature and extent of the interest acquired under these assignments. The learned judge of the circuit court was of opinion that if the deposition of A. S. Matthews is read, the implied authority in such case of each to act for the other, is strengthened by the repeated acts of G. H. Matthews in respect to the several

692 transaction which *gave rise to the bonds in controversy, which were approved by A. S. Matthews, and also by the fact of G. H. Matthews continuing in possession of the bonds. What were these repeated acts of G. H. Matthews approved by A. S. Matthews does not appear. A careful examination of the record wholly fails to disclose them. It is not proved that A. S. Matthews knew at the time of the execution of the bonds or of their delivery to G. H. Matthews. When he acquired this knowledge does not appear. If his deposition is competent evidence it would seem that the sale and assignment to Davis were made with the consent of G. H. Matthews, who promised to surrender the bonds to Davis, but in violation of that promise transferred them to Dickenson.

But if the bonds were put in the possession of G. H. Matthews with the consent of A. S. Matthews, that of itself would scarcely be sufficient to divest his interest even in

favor of a bona fide purchaser. They must necessarily have remained in the possession of one or the other of the obligees; they could not be held by both. It is impossible that a purchaser could be misled, because the joint ownership, the joint interest, appeared on the face of the instruments for which he was negotiating. In the case of a joint tenancy of personal property, the parties have equal rights as between themselves during the joint ownership. If one of them sells his interest, the purchaser becomes tenant in common with the other. But neither has any authority by virtue of that relation to dispose of the common property, unless indeed there be something in the nature of the commodity creating a presumption of a complete power of sale, as, for example, is sometimes the case of an article manufactured expressly for sale.

These principles apply as well to
693 things in action as *in possession, to bonds and other evidences of debt, as well as to chattels. Bills of exchange and promissory notes, payable to two or more, are subject to a like rule, and cannot be transferred by any less number than the whole. In Story on Bills, sec. 197, it is said: If a note is made payable to several persons, not partners, there the transfer can only be by a joint indorsement of all of them. See also Freeman on Co-tenancy and Partition, sec. 183, 194-5. If this be the rule with respect to negotiable paper, the legal title to which passes by mere indorsement and delivery, with how much greater show of reason does the principle apply to ordinary obligations not negotiable?

The law merchant encourages the free circulation of negotiable instruments, unaffected by secret liens and equities. The common law, on the other hand, never recognized the assignment of choses in action. Our statute, it is true, now authorizes the assignee of a bond or note, for the payment of money, to bring suit in his own name; but the legal title still remains in the assignor, the assignee acquiring a mere equity standing in the shoes of the assignor, entitled to all his rights, remedies and securities, and, as a general rule, subject to all his duties and obligations. When, therefore, one of two obligees undertakes to transfer the bond, the extent of the transfer will depend upon the nature of his interest. Such interest, whatever it is, passes to the assignee; but nothing beyond that as against his co-obligee, unless, indeed, there be some other element in the transaction in the nature of fraud, agency, or other circumstance, modifying the rights of the parties.

The cases cited by the learned counsel for the appellee are cases of assignments or pledges made by one of several copartners.
694 The doctrine is well settled *that each partner occupies the position both of principal and agent. Each has the complete *jus disponendi* of the whole partnership interests, and is considered to be the authorized agent of the firm during the existence of the partnership. This distinction between partners, and mere part owners

of goods and chattels, in respect to the power of disposing of the entire interest, is recognized by all the authorities, and controverted by none I have seen. See Story on Partnerships, sec. 89; Reid v. Hollingshead, 10 Eng. Com. L. R. 439; 2 Matthew's Digest—Partnerships.

Tried by these principles, the sale and assignment made by A. S. Matthews to Eli Davis carried with it his interest in the bonds, which was one moiety of the purchase money, and the assignment by G. H. Matthews to the defendant Dickenson operated as a transfer of the other moiety to the latter.

It is however claimed by the administrator of Davis that the bonds belonged solely to A. S. Matthews; that the latter having paid the whole amount of the purchase money for the land upon which the trust deed was given and on which these bonds originated, he has an equitable claim to the whole, as well against G. H. Matthews as against his assignee. The only evidence in support of this claim is the deposition of A. S. Matthews himself. At the time this deposition was taken, G. H. Matthews was dead; the only person who could throw any light upon the transaction. The question is therefore presented as to the competency of A. S. Matthews to testify as to the matters to which his deposition relates. He is certainly incompetent according to the rules of the common law. The effect of his evidence, if it is to be believed, is to vest in Davis' estate a valid title to the whole amount of the bonds. If the estate of
695 Davis fails to recover *the whole, it will have recourse direct and immediate upon A. S. Matthews. The latter is therefore directly interested in the result of this suit. Is he rendered competent by the statute? It is very true he is not a party to the contract between Dickenson and G. H. Matthews. But if Davis' estate succeeds, A. S. Matthews in effect establishes, as against G. H. Matthews, his claim to the subject matter of controversy. While the contest is nominally between the contending assignees, it involves directly the respective obligations and pretensions of the two assignors. They are the parties to the original transaction, and one of these being dead, both the spirit and the letter of the statute exclude the other as a witness.

The deposition of A. S. Matthews being out of the case, there is no evidence in support of the claim asserted by Davis' estate to the whole amount of the bonds under the assignment of A. S. Matthews.

It is therefore unnecessary to consider a question somewhat discussed by the counsel here, and that is, whether Alexander S. Matthews having remitted his co-obligee, G. H. Matthews, to retain possession of the bonds, he or his assignee will be permitted to assert an equitable right to the whole amount due as against Dickenson, an innocent purchaser. No such question is before us, because the record contains no proof of the claim to the whole. Our decision must be upon the case appearing upon the face

of the bonds, and the facts conceded on both sides. Upon these, as already stated, the parties are each entitled to one moiety of the bonds as would their assignors if suing. The decree of the circuit court must therefore be reversed, and a decree entered in conformity with the views herein expressed.

696 *The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the said decree is erroneous. It is therefore decreed and ordered that the same be reversed and annulled, and that the appellee, John Dickenson, pay to the appellant his costs by him about the prosecution of his appeal here expended. And this court proceeding to render such decree in the premises as the said circuit court ought to have rendered, is of opinion, for the reasons aforesaid, that as to one-half of the three bonds in the proceedings mentioned, executed by Wright Wingate and Emanuel Long to Alexander S. Matthews and Granville H. Matthews, each for the sum of two hundred and sixty-six dollars and sixty-six and two thirds cents, with interest thereon from the 23rd day of August 1858, the assignment of said bonds in the proceedings mentioned made by Granville H. Matthews to John Dickenson was without effect to pass any title to the said John Dickenson; but that the title to the said half passed by the assignment of said bonds in the proceedings mentioned made by Alexander S. Matthews to Eli Davis, appellant's intestate, whilst, so far as duly appears, the title to the other half of said three bonds did pass by the assignment first mentioned to John Dickenson. It is, therefore, decreed and ordered that the injunction originally awarded in this cause be perpetuated, and that said John Dickenson credit to said Wingate & Long on the two bonds not yet sued on so much as together with the amount of the judgment enjoined as aforesaid will equal one-half of the money due by said three bonds, and, as to the amount so directed to be credited, be perpetually enjoined

697 *from collecting said bonds, and that the said John Dickenson pay to the appellant, Rufus Brown, administrator of Eli Davis, deceased, the costs by him expended, and by his said intestate expended, about the prosecution of this cause in said circuit court, &c.

Decree reversed.

698 *Maury v. Chesapeake & Ohio R. R. Co.

September Term, 1876, Staunton.

Contracts for Services.—A railroad company, for the purpose of extending their road, determine to issue their bonds for \$10,000,000, to be secured by a deed on all their property to three trustees, one to reside in Virginia and two in New York, and they agree to pay to the trustees each \$5,000. M is selected in Virginia, informed of the terms, and consents to

act. The company determine to issue bonds for \$15,000,000, and to have a fourth trustee, and pay to the four the \$15,000. The deed is prepared, and is executed by the trustees, M having been informed of the reduction of the compensation. The trustees execute about 2,000 of the bonds, and M performs all the service demanded of him, until the company, without the knowledge of M, makes another deed to two of the trustees, omitting M; and under this last deed the company proceeds to effect the loan on this last deed. **HOLD:**

1. **Same—Breach by Employer—Compensation.**—M having been appointed a trustee upon a specific compensation, and having been discharged by the company without his knowledge, he is entitled to have the compensation agreed upon.

2. **Same—Same—Acquiescence of Employee.**—M having executed the deed with the knowledge that the compensation was to be reduced by the payment to the four what was first agreed to be paid to the three, and having acted under the deed, he is entitled to recover from the company one-fourth of the \$15,000; but not more.

Prior to the year 1868, the Virginia Central railroad company owned the railroad extending from Richmond to Covington in Alleghany county, except about sixteen miles extending from the eastern to western base of the Blue Ridge mountains, which had been constructed and was owned by the state of Virginia. Of this company **699** Colonel Edmund Fontaine *was the president. Before the late war the state of Virginia had commenced to construct a railroad from Covington to the Ohio river, and for this purpose had constituted a corporation under the name of the Covington & Ohio railroad company. On this work the state had expended between two and three millions of dollars.

Under acts passed by the legislatures of Virginia and West Virginia, the Virginia Central railroad company was authorized to purchase the Blue Ridge railroad and the Covington & Ohio railroad upon certain terms, among which were that the company should raise a certain additional amount of stock, and should complete the road to the Ohio river; and the company was authorized to change its name to that of the Chesapeake and Ohio railroad company.

In August 1868 the Central railroad company appear to have raised the additional amount of stock required; and to enable the company to carry on the work it was determined to raise \$10,000,000, to be secured by a mortgage on its whole road and all the property of the company, and a contract was made with McGinnis, Brothers & Smith, brokers, of the city of New York, who were to be the agents of the company to raise the money by a sale of the bonds. In carrying out this agreement a mortgage of the property was to be executed to three trustees, two in the city of New York to be selected by the said brokers, and one in Virginia to be selected by the company; and though the fact is not stated in the agreement, it was proved to the satisfaction of this court, that the compensation to these trustees was to be \$5,000 to each of them.

To fill these offices, Philo C. Calhoun and William Butler Duncan, of New York, were selected by Messrs. McGinnis, Brothers & Smith, and *Matthew F. Maury, of Virginia, was selected by Col. Fontaine, the president of the company; and Mr. Maury was informed of his selection and of the compensation he was to receive, and he consented to act.

Before the bonds had been prepared under this agreement, the parties in New York determined to have four trustees, and the name of William Orton was suggested in addition to the three before selected.

On the 30th of September 1868 the directors of the company adopted a resolution which, among other things, provided that the president and treasurer of the company should execute to four trustees, three of whom should reside in the city of New York and one in Virginia to be chosen by the president, whose aggregate pay should be \$15,000, that being the sum expected to be paid to three trustees. And by deed bearing date the 1st of October 1868, the whole property of the company was conveyed to the four persons named. This deed was executed by the trustees, of whom M. F. Maury was one, who acknowledged it on the 24th of October. It appears that Mr. Maury was informed of the resolution of the 30th of September before he executed the deed; but the only evidence of his acquiescence in the reduction of the compensation which had been before promised him, was his execution of the deed and his acting under it. And it should be stated that the deed provided for all expenses attending the execution of the trust and a sale of the property to be paid out of the profits or proceeds of sale.

The company, and its agents in New York, proceeded to have the bonds of the company prepared and put upon the market, and it appears that Mr. Maury performed all the duties of a trustee which he was called upon to perform, and as such he executed about *two thousand of the bonds which were proposed to be issued and secured by the mortgage. The effort to sell the bonds seems, however, to have failed to a great extent; and in January 1870 the company executed a deed by which they conveyed all their property to William Butler Duncan and Philo C. Calhoun, in trust to secure a loan of \$15,000,000, to be raised by a sale of the bonds of the company. This deed is executed on behalf of the company, by C. P. Huntington as president, and James A. Tracy as treasurer.

Mr. Maury having been omitted in this last deed as trustee, the parties disagreed as to the compensation which should be made him; the company insisting that he should only receive compensation for the services actually performed by him, and that the trustee, Orton, had been content to receive \$1,000, which they were willing to pay to Mr. Maury; and Mr. Maury insisting that he had consented to act, and had acted under an express agreement that he should receive a specific amount; and that he had rendered every service which he was called

upon to perform, until the company had, of their own motion and without his knowledge, executed the second deed, in effect discharging him from the trust.

The parties being thus at issue, Mr. Maury instituted a suit in equity in the circuit court of the county of Rockbridge against the Chesapeake & Ohio railroad company; and upon the pleadings and evidence omitting what is irrelevant to the question, the case was as hereinbefore stated.

The cause came on to be finally heard on the 24th of April 1872, when the court held that the contract between the plaintiff and the defendant was only partly performed, and that the plaintiff was entitled to a fair and reasonable compensation for the 702 services rendered, *and decreed to him the sum of \$1,000, with interest from the 1st of October 1868. And Mr. Maury thereupon applied to a judge of this court for an appeal; which was allowed.

Governor Letcher, Wm. A. Maury, Tucker & Christian, for the appellant.

Thomas D. Ranson and H. T. Wickham, for the appellee.

Moncure, P., delivered the opinion of the court.

The court is of opinion, that in August 1868 it was agreed between the Chesapeake & Ohio railroad company and M. F. Maury, that the latter, residing in Virginia, should be one of the trustees, Philo C. Calhoun, and William B. Duncan, of the city of New York, being the other two, in a deed of trust to be executed by the said company, conveying their road and its appurtenances to secure the payment of their bonds, which they contemplated executing to the amount of ten millions of dollars, payable at Richmond, New York or London, at the option of the respective holders on the 1st day of October 1898, and bearing interest at the rate of seven per cent. per annum, free of all government tax, payable semi-annually, either in Richmond, New York or London as aforesaid, on the first days of April and October in each year; the object of which arrangement was to obtain the necessary funds to complete the line of the Chesapeake & Ohio railroad from Covington, Virginia, to the Ohio river, in the state of West Virginia, as well as to straiten the line between Richmond and Charlottesville, in the state of Virginia; and that the said M. F. Maury should receive as his compensation, 703 for acting as such trustee, *the sum of five thousand dollars, it being agreed that each of the other two trustees aforesaid should also receive a like sum of five thousand dollars for his compensation for so acting, making the aggregate sum of fifteen thousand dollars to be paid to the three trustees.

The court is further of opinion, that after the said agreement was made, to wit: on the 30th day of September 1868 a resolution was adopted by the board of directors of

the Chesapeake & Ohio railroad company, that for the purpose of obtaining the necessary funds aforesaid, the president and treasurer of the said company be "directed to make and execute unto four trustees, three of whom shall reside in New York city, and one in Virginia (whose aggregate pay shall be fifteen thousand dollars, that being the sum expected to be paid to three trustees), to be chosen by the president of the company, a mortgage to bear date October 1st, 1868," conveying the property and franchises of the company to secure the payment of the said bonds; which mortgage was accordingly afterwards duly executed by all the parties and duly recorded; the same having been executed by the said company by their president and treasurer, and by the said four trustees, to wit: P. C. Calhoun, W. Butler Duncan, William Orton and M. F. Maury. And the said M. F. Maury, after the execution of the said mortgage, promptly proceeded to act as trustee under the same, and faithfully to discharge all his duties thereunder, until the further performance of his said duties was arrested and prevented by another deed of trust or mortgage bearing date the 15th day of January 1870, and duly recorded, which was executed as a substitute for the said mortgage of the 1st of October 1868. By the said deed of the 15th day of January 1870,

704 the said company "conveyed their said road and its appurtenances and franchises to two of the said four trustees only, to wit: William Butler Duncan and Philo C. Calhoun, in trust to secure a loan of fifteen millions of dollars, which the said company contemplated negotiating, for the purpose of completing the construction and equipment of their road as aforesaid.

The court is further of opinion, that although the said M. F. Maury might have been entitled under his first mentioned agreement with the said company to demand and have of them the sum of five thousand dollars, as his stipulated compensation for acting as trustee as aforesaid (though whether he would or not, is a question not necessary and not intended now to be decided), yet having accepted and executed the said deed of the 1st day of October 1868, he thereby, in effect, consented to accept one-fourth of the sum of fifteen thousand dollars, to wit: three thousand seven hundred and fifty dollars in lieu and instead of the said sum of five thousand dollars as compensation for acting as trustee aforesaid, he having, prior to the execution of the said deed, been informed of the adoption by the board of the said resolution of the 30th day of September 1868, which expressly stated that the aggregate compensation to be paid to the four trustees in the deed should be fifteen thousand dollars, instead of the same sum being paid to three trustees, as was formerly expected; and he cannot therefore now claim the said sum of five thousand dollars, and cannot claim more than the said sum of three thousand seven hundred and fifty dollars as such compensation.

The court is further of opinion: that the

said M. F. Maury, or his personal representative, he being dead, is entitled to the said sum of three thousand seven and fifty dollars, with interest from the — day

705 of August *1870, the day on which this suit was commenced, as compensation aforesaid; and the circuit court erred in not rendering a decree for that sum and interest, instead of for the sum of one thousand dollars with interest from the 1st day of October 1868. No objection was made to the validity of the agreement, and no ground appears for any such objection. The occasion was a most important one. The purpose being to borrow ten millions of dollars for the completion of a railroad extending nearly through the center of the state, and to obtain the loan upon the security of a deed of trust on the road and its appurtenances. The loan was expected to be obtained partly in England and partly in the United States. It was all-important, therefore, that trustees should be selected for the execution of the trust of known good character in both countries. It was deemed advisable by the company that one of the trustees should reside in Virginia, where and in West Virginia, the road is located; and the rest in the city of New York, where it was supposed that the money, or most of it, might be obtained. Or at least it was no doubt supposed, that through the influence of commercial men residing in that city, the money, or most of it, could be obtained, there and elsewhere, at home and abroad. M. F. Maury was naturally selected by the company or its agents as the most suitable person to be selected as that one of the trustees who was to be a resident of Virginia. And he consented to act as such for the compensation which was offered him, to wit: five thousand dollars; which he afterwards, by implication as aforesaid, agreed to reduce to three thousand seven hundred and fifty dollars. He did not seek the office, but was sought by those whose duty it was to make the selection. Nobody will doubt the wisdom of the *selection under the 706 circumstances. No person was more generally or more favorably known, at home or abroad, than M. F. Maury. And there was no person in existence residing in Virginia, if anywhere else, who was likely to be able to do more than he to further the object in view, which was to obtain a loan of ten millions of dollars on the security of the road. His fitness for the trust is not denied; nor his readiness at all times to perform its duties. He executed and acknowledged the deed, and thereby assumed its obligations. He promptly entered upon the duties of his office, and continued to perform them, and to do all that devolved upon him, or was required of him in that respect, until he was prevented from further action by the company; and he was superseded as trustee by the deed of the 15th day of January 1870, in which the said Duncan and Calhoun were alone named as trustees as aforesaid. This was done without the consent of M. F. Maury.

and so far as appears from the record, without even informing him of what was intended or desired by the company. They had a right to reduce the number of the trustees in the deed if they thought fit to do so; but they were bound to pay the stipulated compensation of the one who was removed if he was prompt and faithful in performing his duties, and capable of doing so—as he certainly was. What right had the company to discharge from the trust, without the stipulated compensation, the trustee residing in Virginia, any more than those residing in New York? The trustee residing in Virginia might, if he had been consulted on the subject, have consented to remit a portion of the stipulated compensation, and to retire from the trust. But he was not consulted on the subject. He was discharged from the trust, and then it was proposed to compensate *him for what he had done upon the rule of a quantum meruit.

And it is argued that because Orton, whose name was first added to and then taken from the number of the trustees, accepted one thousand dollars in satisfaction of his claim to compensation, M. F. Maury should therefore accept a like amount in satisfaction of his. We cannot undertake in this case to say what were Orton's claims to compensation, nor whether he was reasonable or not in the settlement he made of them, nor to compare his claims with those of M. F. Maury. They may have been very different in merit and degree. We have now only to do with those of M. F. Maury. And the question is, had the company a right by their own ex parte act to discharge themselves from liability to him for his stipulated compensation as trustee, he being entirely without fault in the matter, and the occasion for the agency of trustees therein not having ceased? In other words, had the company a right, after having stipulated with three trustees for a certain compensation to each for their services, to relieve themselves from liability, in whole or in part, to one of them, by confining the residue of the trust to the other two, when there was no just cause of complaint against the third, and he had actually entered upon and discharged in part, and as far as he could, the duties of the trust? We know of no authority for any such right.

Beyond all question, the stipulated sum was not to be paid to the trustees for nothing, but as compensation for services; that is, for acting as trustees. Had they died without acting, or had all occasion for their acting ceased before any such action, then they would have had no claim to compensation; or had such death occurred, or such occasion ceased after partial and before *complete action in the matter, then there would have been ground for claiming an apportionment of the compensation. But here the trustee, M. F. Maury, did not die without acting, or before complete action, and there was no just ground for an apportionment, at least without the consent of M. F. Maury, which was never given, nor indeed applied for, at least

until after he was discharged from the trust as aforesaid.

The services for which the stipulated compensation was to be made to the trustees were services to be rendered in endeavoring to negotiate the desired loan of ten millions of dollars, and not services to be rendered in the event of a necessity for a sale of the trust subject to satisfy the loan in the event of its being made, and of default being made in the payment of the money and interest, or any part thereof. Compensation for any services which might be required of the trustees, in the event of any such default, was provided by law, and the terms of the deed, and was to consist of a commission upon the amount of any sales which might be made under the deed in case of any such default. No precise time was named in the agreement for the payment of the stipulated compensation. It was payable by implication, either at the date of the agreement, or in a reasonable time thereafter, or, at all events, so soon as the contemplated loan was obtained, or failed of being obtained without any default on the part of the trustees. If the contemplated loan was not obtained through the agency in part of M. F. Maury, the failure so to obtain it was not by means of any default on his part. He promptly executed the deed of trust, entered upon his duties as trustee, and performed them as far as he possibly could. Why then is he not entitled to the full amount which was stipulated to be paid to him? Upon

709 what principle can the just measure *of his compensation be reduced to less than one-third of the stipulated amount? Upon the principle of a quantum meruit? He did not contract to render his services upon that principle, but for a certain sum, as he had a right to do; and he has performed, and been ready, and offered to perform, his part of the contract fully. He did not warrant the success of his efforts, nor was his compensation to be conditional, or in proportion to such success, but it was to be an unconditional and certain sum. If that sum exceeds the actual value of his services to his employer, or appears to be a high compensation for the services actually rendered, or agreed to be rendered, still he is entitled to receive it; he being in no default in rendering them. His contract being unobjectionable, and he being in no default in regard to it, he is entitled to the full benefit of it according to its terms. It cannot be said that there was a failure of consideration in whole or in part. It does not appear, and is not probable, that M. F. Maury engaged, or could have engaged, in any other employment which afforded, or would have afforded, him any pecuniary benefit by reason of his not having to complete the execution of his duties as trustee, or, that if he had been permitted to complete the execution of those duties, he would thereby have been prevented from attending to any other business which he would have done if he had not been trustee. What reason then can there be for any abatement or apportionment of the stipu-

lated compensation? and what rule can be adopted for such an apportionment? Who can value the character of the trustee and his peculiar qualifications which fitted him for the office, and recommended him to the choice of the parties who selected him for that office? How can we know to what extent his business and his plans of 710 life have been affected *by his acceptance of this office? He was willing to accept it for the consideration which was offered him. With what propriety can it be now said that one thousand dollars, instead of the sum offered, more than three times that amount, would be adequate compensation for the services engaged?

We deem it unnecessary to examine in detail the cases referred to in the argument of the learned counsel in the case, as the opinion we have delivered seems to be founded on well settled principles of law. There is nothing in conflict with it in the cases referred to in the notes to *Cutter v. Powell*, 2 Smith's Leading Cases, 6th American edition, p. 39 marg., 44 top, and 2 Rob. new Pr., p. 405; nor in any of the other cases referred to in the argument; as we think will appear by an examination of those cases.

We therefore think that the decree of the circuit court is erroneous, and ought to be reversed, and a decree rendered in conformity with the foregoing opinion.

The decree was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the appellant, M. F. Maury, is entitled to receive of the appellees, the Chesapeake & Ohio railroad company, the sum of three thousand, seven hundred and fifty dollars (\$3,750.00), instead of the sum of one thousand dollars, as compensation for his services as trustee as mentioned in the bill; and that the circuit court erred in rendering

a decree for the latter sum and interest 711 est *as therein mentioned, instead of for the former sum with interest as hereinafter mentioned. Therefore, it is decreed and ordered that so much of the said decree of the said circuit court as is above declared to be erroneous, be reversed and annulled, and the residue thereof affirmed; and that the said appellant recover of the said appellees his costs by him expended in the prosecution of his appeal aforesaid here. And this court, proceeding to render such decree as ought to have been rendered by the said circuit court, in lieu of so much of the decree of said court as is reversed as aforesaid, it is further decreed and ordered, that the said appellant recover of the said appellees, the Chesapeake & Ohio railroad company, the said sum of three thousand seven hundred and fifty dollars, with interest thereon at the rate of six per centum per annum from the first day of August 1870 (that being the day of the institution of this suit) till paid, and his

costs by him about his suit in the said circuit court expended. And leave is given to sue out execution therefor; and if the said execution shall prove unavailing, then the court will proceed to enforce the payment of the sum of money and interest herein decreed, under the terms of the trust deed.

Which is ordered to be certified to the said circuit court of Rockbridge county.

And at another day, to wit: on the 2d day of October, 1876—The court is of opinion that the lien of the decree appealed from being the decree of the said court in this case, of the 24th day of April 1872, ought to be preserved by an affirmation of so much of the said decree as may be necessary for that purpose; and therefore it is decreed and ordered that the decree entered in this cause at the present term of the court,

to wit: on the 21st day of September 712 1876, be amended, *by making the following addition thereto, to have the same force and effect as if it had been inserted in the said last mentioned decree, viz: It is decreed and ordered that so much of the said decree appealed from as declares that it is "adjudged, ordered and decreed that the plaintiff receive of the said defendant, the Chesapeake and Ohio railroad company, the sum of one thousand dollar, with interest thereon at the rate of six per centum per annum from the first day of October 1868 till paid, and his costs about his suit in this behalf expended, and leave is given to sue out execution therefor; and if the said execution shall prove unavailing, then the court will proceed to enforce the payment of the sum herein decreed under the terms of the trust deed," be and the same is hereby affirmed; and that the amount of the said decree so affirmed, including interest to the first day of August 1870, and costs, be credited as of that day on the amount for which the said decree of this court was entered, which decree of this court is to remain and continue in full force for the recovery of the said amount, subject to the said credit; and leave is also given to sue out execution therefor; and if the said execution shall prove unavailing, then the court will also proceed to enforce the payment of the said amount subject to the said credit under the terms of the trust deed. But this court does not mean to decide in this cause that the amount due to the appellant, for which the said decree of the circuit court or this decree is rendered, is in fact provided for and secured by said deed of trust, that question not being before this court, and other persons than the parties to this suit being interested in the same. And it is decreed and ordered that the said former decree of this court be and the same is hereby so modified and altered as to 713 make it conform to and be *consistent with this decree, which is to be read and considered as a part thereof.

Which is ordered to be certified to the said circuit court of Rockbridge county, together with and as a part of the said decree of the 21st day of September 1876.

Decree reversed.

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*Newman v. Newman.

September Term, 1876, Staunton.

1. **Joint Tenants—Share of Profits.**—B and C are joint tenants of a furnace, forge, and a large quantity of land derived from their father, and B who had conducted the business for some years in the lifetime of his father, continues to carry it on with the assent of his sister C, without any contract with C. He must account to C for her share of the profits.
2. **Same—Same—Accounts.**—Though there were efforts between B and C to agree upon a rent which should be paid by B to C for her half of the property, and B seems to have thought that his proposition was acquiesced in, and did not keep such accounts as he should have kept to enable him to render the account of profits to her, yet C is entitled to have the account taken, and to have her share of the profits.
3. **Same—Same—Compensation.**—B having been allowed all his expenses in carrying on the business, including \$1,500 a year for his services, and interest on his capital employed in it until it became self-sustaining, and then being allowed by the decree three-fifths of the net profits, he at least cannot complain of the decree.

Walter Newman, of Shenandoah county, died in November 1868. His will, which was made in June 1847, was admitted to probate in the county court of Shenandoah in March 1869, and his son, Benjamin P. Newman, qualified as his executor. By his will, after giving certain personal property and the income of one-third of his real estate to his wife for her life, he gave all the rest of his personal property, including all debts due to him, to his son Benjamin P. Newman, who was to pay his debts out of it, and he gave the third of his real estate to his said son, subject to his wife's interest for her life, and the other two

715 thirds to *his two daughters, Ann R. and Henrietta C. Newman; and he authorized his executor to sell all the real estate. At the time of his death his wife and his daughter Ann R. Newman were dead; so that his whole real estate became the property of his son Benjamin P. and his daughter Henrietta C. Newman.

The real estate of Walter Newman at his death consisted of a large quantity of land, on which were a furnace—called Liberty furnace, a forge, dwelling house and other buildings. For years before his death, his son Benjamin P. Newman had carried on the business of manufacturing iron at the furnace and forge; he being allowed all the profits after supporting the family. On the death of Walter Newman, Benjamin P. and Henrietta C. Newman appear to have wished to sell the property; but in order to keep the same in repair, it was agreed that Benjamin P. should carry on the business of manufacturing iron until a sale should be made; and he continued to carry it on

until this suit was brought, in December 1873, by Henrietta C. Newman, for a settlement of his account and for a sale of the property. The only disputed question of importance in the cause, is whether Benjamin P. Newman carried on the business under a contract, by which he was to pay to Henrietta C. a certain agreed sum for the rent of her interest, or whether he should account for profits. In the bill the plaintiff claimed that Benjamin P. Newman had carried on the business without any express agreement, for the joint benefit of himself and the plaintiff, whilst in his answer he avers that he had rented her interest at the price of \$200 a month whilst the furnace was in blast, and \$100 a year for the other real estate. It is certain that the business was carried on at first upon his capital alone, and that Henrietta C.

716 Newman did *not furnish any means for carrying it on; and it seems that his payments to her during the continuance of the business were upon the basis of the agreement stated in his answer. But it also appears, that he reduced the terms of this agreement, as he claimed it to be, to writing, which he presented to her to execute, and that she declined to execute it. And upon the whole evidence in the cause, this court is of opinion that no contract was proved. Such, too, was the opinion of the circuit court; and when the cause came on to be heard in that court, in April 1874, the following decree was made:

The court is of opinion that there was no contract of renting, express or implied by the complainant to the defendant of her undivided share of the iron property held by them jointly; and that the defendant has occupied and been engaged upon said property in the manufacture of iron through a period of near six years to the exclusion of his co-tenant, and received the rents, issues and profits thereof, and that he is liable to the complainant for receiving more than came to his joint share or proportion of said rents, issues and profits of said property.

And it appearing that whilst there was no contract of renting between these parties, there were negotiations between them with a view to such renting, which though not consummated, gave rise in the mind of the defendant, to the erroneous impression, that he was the tenant of his sister, the complainant, upon the terms stated by him in his answer and deposition, and that, in consequence of his misapprehension, the defendant kept no exact account of his receipts, disbursements or profits of said joint property, and that his failure to keep such accounts was in no sense willful;

717 and it further *appearing that the complainant never offered or consented to become a partner in the manufacture of iron upon said property, the court is of opinion that a fair rent for said property is the best measure of the amount received by the defendant from said joint property over and above his just share thereof. It is therefore adjudged, ordered and decreed that

*Joint Tenants—Share of Profits.—See, citing the principal case, Paxton v. Gamewell, 82 Va. 710, 1 S. E. Rep. 92; also, Graham v. Pierce, 19 Gratt. 28; Ruffners v. Lewis, 7 Leigh 720; Early v. Friend, 16 Gratt. 58; Va. Code, § 3294; 2 Min. Inst. 475, 476.

this cause be referred to Phillip W. Magruder, a master commissioner of this court, who shall, after giving the parties to this suit ten days' notice by a personal service thereof, proceed to ascertain a fair rent for said property during the exclusive occupancy thereof by the defendant. And in ascertaining said rent the master commissioner shall act in the light of any and all competent evidence that may be produced before him, showing the character of said joint property and of the business of the manufacture of iron thereon, as to the profits or losses thereof up to the institution of this suit; and to this end the defendant may be recalled and re-examined at his own instance, or upon the summons of the complainant.

And inasmuch as the ore and wood taken from said property in the manufacture of iron are not of the annual products of said property, the master commissioner is directed to state an account of the quantities of wood and ore consumed during the occupancy of said property by the defendant, and the value thereof.

And the court being further of opinion from the evidence, that in the estimation and desire of the parties to this suit, from the date of their joint ownership, a sale of the property was the object of paramount importance, and that a working of said property to its utmost capacity might, and probably would, have been seriously detrimental to the prospects of a sale, and that

the course of the defendant, in not working said property to its utmost extent, was judicious, directs that the commissioner shall limit any charge he may determine proper as rent to the time said furnace was actually in blast, and to such time as was necessary to prepare for said blast.

And the said commissioner is ordered to make report of his proceedings herein to this court.

And it appearing to the court that both parties desire a sale of the real estate in the bill mentioned, and partition of the proceeds of sale between them, it is adjudged, ordered and decreed that Giles Cook, Mark Bird, Moses Walton, and H. C. Allen, who are hereby appointed special commissioners for that purpose, do make sale of said real estate upon the following terms: one-fourth of the purchase money to be paid at the time of the confirmation of the sale by the court, and the residue in three equal instalments, at one, two and three years respectively, from the date of the confirmation of sale, and bearing interest from that date, and to be secured by a deed of trust or other lien upon the property, and such other additional security as the said special commissioners may deem judicious and proper, subject to the approval of the court. The said sale to be made at public auction after reasonable advertisement of the time and place of sale, or the said special commissioners may make a private sale of the said property if in their judgment it will be for the interest of both parties to do so;

and they shall make report of their proceedings to the court. But before collecting the purchase money, or any part thereof, the said special commissioners, or such of them as shall collect the same, shall execute a bond, and file it in the papers of this suit, with good security, in a penalty of double the sum to be received, with condition according to law.

719. *And it being alleged by the defendant, that since he and the plaintiff became the joint owners of the said real estate he has paid the taxes and made permanent improvements thereon at his own expense, it is ordered and decreed that said commissioner in chancery of this court do take an account of the taxes so paid, and of any permanent improvements on the said real estate made by the defendant, showing the nature and description of the said improvements, and the costs of making the same, and make a report thereof to the court, stating such matters as he may deem pertinent, or which either party may require to be specially stated.

The real estate was sold by the commissioners and purchased by Henrietta C. Newman, at the price of \$64,600. But no question is made in relation to the said sale, and it will not be further mentioned.

The commissioner directed to take the accounts returned his report, in which he made various statements,—showing in No. 1, the number of blasts, the length of each blast, and the amount of metal made at Liberty furnace from September 1, 1868, to May 1874—forty-four months, fifteen days, twenty-two hours, 4,162 tons of metal: No. 2, showing the number of tons of metal sold, and also the amount unaccounted for from September 1868 to May 1874—whole amount made 4,162 tons, lost fifty-seven tons: No. 3, showing the amount received for metal sold between same dates—sales \$209,002.44, at the average price of \$52.58 per ton; No. 4, showing the number of cords of wood and tons of ore consumed from Liberty furnace lands in same time—of wood value \$1,418.62½, of ore value \$6,243.00; No. 5, taxes paid by Benjamin P. Newman in same time, \$1,013.87; No. 6, permanent improvements made by B. P. Newman.

720 \$7,006; *No. 7, showing expenses in running Liberty furnace, \$179,579.76; No. 8, B. P. Newman in account with B. P. and H. C. Newman. This gives alternate statements: the first makes the half of the profits due H. C. Newman \$33,722.44, and after deducting payments made to her of \$8,506.49, and adding two years interest on balance, made the amount due to her \$28,241.85. The second, deducting payments and adding interest, as before, made due to her \$21,549.68. There were other statements which it is not necessary to give. Both plaintiff and defendant excepted to the report; and the defendant excepted especially because the commissioner had not, as directed by the decree, ascertained a fair rent for the property.

The cause came on to be heard on the 17th of December 1874, when the court made first

a statement A of the metal sold, excluding so much as had been lost, fifty-six tons, and that still on hand four hundred and fifty-nine and a half tons, and charging B. P. Newman with the proceeds of three thousand six hundred and forty-six and a half tons, at \$191,732.97, and crediting him with expenses, \$145,451.66, and also bad debts, \$3,230, made a balance to be divided between the two of \$43,051.31. Of this sum H. C. Newman is allowed \$17,220.45, or two-fifths thereof; and on this last sum is credited the amount of payments made by B. C. Newman to the plaintiff of \$8,506.49, leaving due to her \$8,714.03. By statement B, Benjamin P. Newman is charged with the three thousand six hundred and forty-six and a half tons of metal, at \$4.73% rent per ton, and crediting him with the payments made to H. C. Newman at the end of each year, the balance due her is ascertained to be \$8,714.03. And the court sustaining the exceptions to the report, so far as it was consistent with the decree and the

721 said statements, *and sustaining it so far as it was consistent with the same, decreed that Henrietta C. Newman recover from the defendant, Benjamin P. Newman, the said sum of \$8,714.03, with interest on the balances due at the end of each year from that date. And it appearing there was still on hand unsold of pig iron four hundred and forty-seven and a half tons, and four hundred and seventy pounds in the county of Shenandoah, and that twenty thousand pounds of blooms had been sent to a firm in Baltimore, for which there had been no return, it was decreed that the defendant render an account of the sales of said blooms when made; and the pig iron was directed to be divided on the basis of the decree, giving to the defendant three-fifths, and to the complainants two-fifths of the same. And the costs were to be paid equally by the parties. From this decree Benjamin P. Newman applied to a judge of this court for an appeal; which was allowed.

Walton and Cook, for the appellant.

H. C. Allen, for the appellee.

Moncure, P., delivered the opinion of the court.

The court is of opinion that the contract alleged in the answer of the appellant, Benjamin P. Newman, to have been made between him and his sister, the appellee, Henrietta C. Newman, that the former should use and occupy certain real estate in the county of Shenandoah, owned by them as joint tenants, derived by them as such from their father, Walter Newman, under his will, on which estate are located a furnace, called "Liberty Furnace," a forge, dwelling house, and other buildings, in consideration of a certain rent to be paid to her for her undivided interest in the 722 said estate and *its appurtenances until the same should be sold (as was intended to be done by the parties), was never in fact made by the parties; but the

said Benjamin P. Newman, who had used and occupied the said property before and until the time of his father's death, under an arrangement with him, continued to use and occupy it after his death, with the knowledge and acquiescence of the said Henrietta C. Newman, and with an understanding between her and her brother, the said Benjamin P. Newman, that he would duly account to her for the use and occupation of her interest in the said property; and although it was expected and intended by them to agree together upon the terms of such accounting; and although efforts were used by and between them for that purpose, yet those efforts were wholly unsuccessful, and no such agreement ever was made.

The court is further of opinion that no such agreement having ever been made, the said Benjamin P. Newman was bound to account with his sister, the said Henrietta C. Newman, for her interest in the said property, while he occupied the same, after their father's death, on such terms as may be prescribed by law in the case of the absence of such an agreement. And the court is of opinion that the principle which applies to this case is that of the case of *Graham &c. v. Pierce*, 19 Gratt. 28, and not that of the case of *Early & wife v. Friend &c.*, 16 Gratt. 21. In the latter case, it was held to be a general rule, that where a tenant in common uses the common property to the exclusion of his co-tenants, or occupies and uses more than his just share and proportion, the best measure of his accountability to his co-tenants is their shares of a fair rent of the property so occupied and used by him. And although it was said in that case "that there may be peculiar

723 *circumstances in a case making it proper to resort to an account of issues, profits, &c., as a mode of adjustment between the tenants in common," yet it was further said that such case would be an exception to the general rule; and it was held that *Early & wife v. Friend &c.*, came within the general rule, and not within the exception. On the other hand, it was held in *Graham &c. v. Pierce*, supra, that that case came within the exception and not the general rule. "Under the circumstances of this case," said the court, "it was proper to resort to an account of issues, profits, &c., as a mode of adjustment between the tenants in common. It is not a case of land used for agricultural purposes only, in which there is no difficulty in ascertaining a fair rent for use and occupation; nor is it such a case as that of *Early & wife v. Friend &c.*, where the property consisted of salt works, the yearly value of which might be ascertained with reasonable certainty, and where a money rent had been contracted for, and paid to some of the tenants in common, which furnished a standard for ascertaining the amount due to others; but it is the case of a lead mine, the yearly value of which, and more especially of an undivided and uncertain portion of which is incapable of ascertainment." "The best

mode of settling such an account, and one which is perfectly just, supposing the tenant to have been capable and faithful, is to charge him with all his receipts, and credit him with all his expenses on account of the operation of the mine." *Id.*, 19 Gratt. 28, 39. That was the case of a lead mine, while this is the case of an iron mine; and there seems to be no difference in principle between them on the subject we are now considering. A tenant of such property necessarily uses a part of the subject itself,

and may by such uses render the residue of the subject *of little or no value. It may be discovered by explorations and operations that the property is of great value, or the contrary. To rent it for a certain sum, is to make a bargain of speculation and hazard, which is always objectionable in such cases, as it is almost sure to operate unequally on the parties. Whereas to carry on operations upon it for the joint and equal benefit of all the owners in proportion to their respective interests in the subject, and by the agency of persons (whether they have an interest therein or not) who may be amply compensated for their trouble, complete justice will be done to all parties concerned. It may be said that to carry on the business required a capital, which one of the parties did not have. But that matter may be adjusted by allowing interest to the party who advances the capital. In this case the property was of known and established value, and there would probably have been no difficulty in finding a suitable agent and borrowing the necessary capital to carry on the operations, even if both had not been readily furnished by one of the parties. But that party had long and successfully conducted the business, and had become joint and equal owner of the property with the other party. It was his manifest interest to continue to use and occupy it, and carry on the business until a sale of the property could be effected to advantage, which was desired by both parties, he being of course entitled to ample compensation for his services as superintendent, and for the use of his capital employed in the business. Accordingly he did so continue, without having made any contract with his co-tenant as to the terms of such use and occupation. Those terms are therefore prescribed by law, and by the principle of the case of *Graham & c. v. Pierce*, before cited.

The court is further of opinion that the said Benjamin *P. Newman being bound to account to the said Henrietta C. Newman for her share of the issues and profits of the said property while the same remained in his possession as joint tenant as aforesaid, and knowing that he would or might be so accountable, as he had made no contract with her for settling on any other terms, it was his duty to keep proper accounts, and to be at all times ready to make such a settlement; and whatever difficulty may have occurred in making such a settlement, has arisen from his neglect of his said duty to keep proper accounts as aforesaid.

The court is further of opinion that the appellee was entitled to have the said account of issues and profits settled as correctly as it might be under the circumstances of the case, and that such a settlement has been made accordingly by the decree of the court below; that in said settlement, every credit which seems to be just has been allowed to him, including an allowance of fifteen hundred dollars per annum for his services as superintendent of the said property during a period of six years and four and a half months, while the blasts in the furnace on the said property, while under the charge of said superintendent, were in operation during periods amounting in all to only about forty-four months and a half; and including also an allowance for the use of his capital for two years, and until it appears that the business had become self-sustaining; and that if he is really entitled to any more credits than have been allowed him, they are more than covered by the deduction of one-fifth of a moiety of the said issues and profits which was made from the same before a decree was rendered in her favor for the balance of said moiety by the court below.

The court is therefore of opinion that there is no error in the decree of the court below, at least to the *prejudice of the appellant, and that the said decree ought to be affirmed.

In concluding our opinion in this controversy between a brother and sister, we deem it an act of justice to both parties to say—which we do with a great deal of pleasure—that after a full consideration of the long record in the case, we are satisfied that they have been perfectly conscientious in their dealings with and claims against each other, and desired to have and receive nothing more than they considered themselves to be justly entitled to. Whatever errors there may have been on either side have been errors of judgment and not of the heart.

Decree affirmed.

727 **Thurmond v. Woods' Ex'or.*

September Term, 1876. Staunton.

Deeds of Trust.—In August 1858 B conveyed to T land and slaves, in trust to secure a debt due by two bonds to R. The land was the land of B's wife S, and he had but a life estate in it; and in September 1858 B and wife conveyed the land to T in trust that B and wife should hold the land until the personal property conveyed by the first deed was sold to satisfy the debt; and if the sale of that property should not raise a sufficient sum to pay the debt, then T, upon the request of R or his assigns should sell, &c. R transferred the debt to M, and, on the request of M, T advertised the sale of the slaves and land to be made in February 1860. On the day of the sale, T, on the request of B and his wife S, induced W, the uncle of S, to pay the debt; and T gave him a receipt, in which he stated that as receipt of the money M would assign the debts and deeds of trust to W. B died in 1862, and W died in

1860, having the bonds and deeds of trust in his possession, but not having obtained the assignment from M. His executor, G, afterwards obtained it, and on his request T sold the land, the slaves having been freed by the results of the war. HELD:

1. **Same—Sale under.**—By the assignment, G, the executor of W, had the right to require that the trust should be enforced by a sale of the property.
2. **Same—Same.**—The land is liable for the debt, though the slaves had been freed, and therefore could not be first sold.
3. **Same—Same.**—The failure to sell the slaves having been at the request and for the benefit of S, she cannot set up the loss of the slaves as security for the debt, to prevent the sale of the land.
4. **Same—Sureties.**—As against the creditor of B, S cannot be regarded as the surety of her husband, or as a mere guarantor for the payment of the debt; and as against the creditor she can claim none of the rights of mere surety or guarantor.
5. **Same.**—The proofs in the cause do not show that W paid the debt intending to secure the property for S and her child.

728 *By deed bearing date the 23rd day of August 1858, Maurice A. Brown conveyed to Thomas H. Tutwiler two tracts of land lying in the county of Nelson, and eight slaves, in trust, to secure the payment of \$6,600, due by two bonds payable on demand to Robert Richardson. In September 1858, Brown, and Sarah, his wife, conveyed the same lands to Tutwiler to secure the same debt. These lands were in fact the property of the wife, and Brown had but a life estate in them; and the second deed was upon the trust that Brown and wife should hold the lands until all the personal property conveyed by the first deed was sold to satisfy the debt; and that if the sale of the personal property conveyed in the first deed should not raise a sufficient sum to pay the debt, then Tutwiler, upon the request of Richardson, or his assignee, in writing, should sell, &c.

Richardson transferred the two bonds secured by the said deeds to S. O. Moon; and Brown having sold three of the slaves, and paid \$4,000 of the debt, by the direction of Moon, Tutwiler advertised the sale of the slaves and the land, to be sold on the 19th of December 1859, and at the request of the parties postponed the sale until the 20th of February 1860.

On the day fixed for the sale of the slaves and land, at the request of Brown and his wife, Tutwiler urged Mr. James Woods, the uncle of Mrs. Brown, a man of wealth, and without wife or children, to pay the debt, and take an assignment of the bonds and deeds of trust. This Woods refused at first to do; but upon the assurance of Tutwiler that Moon would make the assignment, he consented to do it, and gave to Tutwiler a draft for the amount, including the trustee's commission and expenses, and received from him a receipt for the draft, which

729 when paid was to be payment *in full for transfer and assignment of the two bonds executed by Brown to Richardson, and by him assigned to Moon; the balance due on them being \$3,335.40; and as soon

as said draft was paid Moon was to assign the said bonds, and the deeds to secure them, to the said James Woods, but without any recourse whatever against him.

Maurice Brown died insolvent in May 1862; and in February 1863 Mrs. Brown married Elisha G. Thurmond; and previous to the marriage she conveyed her property in trust for her separate use.

James Woods lived until 1869, and then died, having the bonds and deeds of trust in his possession; but not having obtained an assignment of them from Moon. In 1870 Garrett W. Martin, his executor, obtained from Moon the assignment of them to himself, as executor of Woods; and in October 1873, at his instance, the trustee, Tutwiler, sold the land conveyed by the deeds, for the purpose of discharging this debt.

In December 1873, Mrs. Thurmond, suing by her next friend, instituted her suit in equity in the circuit court of Nelson county against James Woods' executor, Tutwiler, Bryant, the purchaser of the land, Moon's executor and others, for the purpose of vacating the sale of the land, and having the assignment vacated and the debts declared satisfied. She insisted, first, that Woods paid the debt to Moon for the purpose of relieving her land for the benefit of herself and her children, and it was never his purpose to enforce the trust; second, that her land was by the terms of the second deed only to be sold after the slaves had been sold, and had proved insufficient to pay the debt; that she and her land stood only in the position of a surety or guarantor of the debt, and Woods having permitted the slaves to be lost to the trust by their

730 *emancipation, he had lost his remedy against her land.

Woods' executor answered, denying that Woods intended by paying the debt, to release it or settle it upon the plaintiff; and he insisted that he had postponed the enforcement of the trust upon the slaves for her benefit and with her concurrence.

A number of witnesses were examined by both the plaintiff and the defendants, and the evidence appears sufficiently from the opinion of the court. And the cause came on to be heard upon the 19th of December 1874, when the court held, that the land was subject to pay the debts to secure which it had been conveyed in trust; but not for the trustee's commissions on a sale which he did not make. The bill was therefore dismissed so far as it sought to cancel said deeds and set aside the sale to Bryant; but there was a decree against Bryant for the balance of the purchase money after satisfying Woods' estate the amount he had paid to Tutwiler, the trustee, after deducting the commissions, with interest from the date of payment. And thereupon Mrs. Thurmond applied to a judge of this court for an appeal; which was allowed.

Whitehead, for the appellant.

Wm. J. Robertson and Southall, for the appellees.

Christian, J., delivered the opinion of the court.

The court is of opinion that the contract of assignment made between Thomas H. Tutwiler, trustee, and James Woods in his lifetime, and the more formal assignment of O. S. Moon, after the death of James Woods, to Garrett W. Martin, his executor, transferring to him certain bonds executed by M. A. Brown *and his interest in two deeds of trust securing the payment of said bond, conferred upon the executor, Garrett W. Martin, the right to require of the trustee an execution of the trust, by making sale of the real estate conveyed by said deed of the — day of September 1858.

The court is further of opinion, that the loss of the slaves by the emancipation by the government of the United States, ought not to fall upon the estate of the said James Woods. The security for the said debt was both the land conveyed by said deed and the slaves conveyed by the deed of August 1858. The provisions of the deed of September 1858, requiring the personal estate conveyed by the deed of August 1858 to be sold, and the proceeds to be applied before the real estate should be offered for sale, was not a stipulation that the land should in no event be sold until the slaves had first been disposed of. Such a construction would be to hold that if the slaves had died or had run away, or been sold by the grantor in whose possession they were left, the real estate could never be sold and the trust never executed. The loss of the slaves by emancipation is precisely the same thing to the creditor as their loss by death. It must fall on the grantor, in whose possession they became free, and not on the creditor. They were in part, and in part only, security for the debt, and as such security they have perished. But the debt remains unextinguished, and the land remains as security for its payment. The provision of the deed relied upon is not a stipulation that binds the trustee at all events to sell the personal property before he could sell the land; but the plain meaning of the provision is that whenever the trust was executed (which by the terms of the deed was to be done on the written request of 732 the creditor or his *assignee), then the trustee should sell the personal estate first, that is, the personal estate in existence at the time of the sale. If, when the trustee proceeded to execute the trust, he found the slaves were dead, or had run away, or had been sold by the grantor, or had been emancipated by the government, he could not of course execute the trust as to them; because it was simply impossible.

But this impossibility of selling the slaves certainly does not interpose any reason why the land should not be sold, because the deed required him to sell the slaves before he should sell the land. This would be to declare in effect that the slaves alone were pledged as security for the debt, when by the solemn deed of the parties the land

is also dedicated to its payment. The very object of giving the second deed was to give a better security for the debt than the property conveyed in the first deed, which only conveyed the slaves and the life estate of Brown in the land. It is manifest that it was the dissatisfaction of the debtor with the security of the first deed that prompted the execution of the second. The construction insisted upon by the appellant's counsel would defeat the manifest intention of the parties.

The court is further of opinion that the loss of the slaves, as a part of the security, was not occasioned by the postponement of the sale by the trustee. The sale advertised to take place on the 20th February 1860 was not prevented by any action of the creditor or of his assignee, but was postponed on account of the action of the appellant herself. It was done at her earnest and persistent request. It was done in her interest and for her benefit.

The trustee was present to make the sale at the time duly advertised. A crowd 733 was then present, drawn *to the sale by the advertisement. The slaves were then present, and they were then slaves. They would undoubtedly then have been sold but for the earnest and active interference of the appellant and friends interceding in her interest.

She was greatly and naturally distressed that the debt had not been paid, and that the property must be sold. She made earnest and tearful appeals to her uncle, the appellee's testator, to prevent the sale. He yielded to those appeals, and paid the debt secured by the deed, and thus the sale was prevented. The appellant ought not now to allege in a court of equity that the loss of the slaves was caused by a postponement of the sale, and that this loss should fall upon the estate of her uncle, who yielded to her earnest solicitation, and in her interest and for her benefit put an end to the sale. Nor should his failure to order an execution of the trust deed before his death, and before the emancipation of the slaves, now be urged as a reason why his estate should lose this debt so justly due him. Surely his benevolence to her, and his indulgence to her husband for many years, ought not to avail as a reason for casting the loss of the slaves upon his estate.

The court is further of opinion that there is no sufficient proof in the cause to show that James Woods, the uncle of the appellant, had ever made to her a gift of this debt due from her husband, or that he ever promised, with or without any consideration, that the trust created by the deeds, which were assigned to him with the debt, should never be executed. On the contrary, the court is of opinion that it is clearly proved that Woods did not voluntarily and without solicitation pay this debt, but that he hesitated long before he agreed to 734 do so; at first positively refused, *and did not consent to do so until it was stipulated that the creditor should assign and transfer to him both the bond and the

deed securing it. It was only upon this express condition, stated in writing in the body of the receipt for the money paid to the trustee, that he consented to take the place of the creditor and to stop the sale of the property. This paper was carefully filed away among his papers, and passed into the hands of his executor upon his death, who obtained from Moon, the creditor, a more formal assignment. Whatever may have been his intention at the time he paid the debt, with reference to settling this property upon his niece, that intention was never carried out. And at his death this debt with its securities was part of his estate, which, upon his death, passed to his executor; and it was the duty of that executor to collect the debt by enforcing the execution of the trust.

The court is further of opinion that in this controversy between her and the creditors of her husband the appellant cannot be regarded as the surety of her husband, or as a mere guarantor for the payment of the debt; and that as against them she can claim none of the rights of mere surety or guarantor. She united with her husband in conveying her land to a trustee for the payment of this debt. The deed was executed in the mode prescribed by the statute. There is no pretence that any fraud was practiced upon her, or that she did not know her rights, and fully understand the consequences of her act and deed.

The deed must now be held to be what it purports to be, and what the parties intended it to be, and the trust must be enforced as the terms of the deed and the law require.

Decree affirmed.

735

*Gage v. Crockett.

September Term, 1876, Staunton.

Court of Appeals—Jurisdictional Amount.*—To give the court of appeals jurisdiction of a cause, except in certain cases specified, the judgment or decree must amount to \$500, principal and interest, at the date of the judgment or decree, except where the claim of the plaintiff is more than that amount, and he applies for the appeal.

This case was argued at Wytheville, but was decided at Staunton. It was a case in which S. S. Crockett recovered a judgment in the circuit court of Wythe county against Aaron D. Gage, garnishee of Edward Shelley, on the 22d of September 1875, for an amount, principal and interest at the date of the judgment, a little less than \$500; but when the supersedeas was applied for and obtained by Gage, it amounted to more than that sum. The appellee, Crockett, moved

the court to dismiss the appeal, on the ground that the matter in controversy was not sufficient to give this court jurisdiction.

Bolling, for the motion.

Gilmore, against the motion.

Staples, J., delivered the opinion of the court.

At the time the judgment was recovered against the appellant in the court below it amounted to a fraction less than five hundred dollars. When, however, the appeal was applied for and obtained, the 736 amount due, *including principal and interest, exceeded that sum.

The question is, whether this court has jurisdiction. In considering applications for appeals and writs of error, this court has uniformly acted upon the idea that the date of the judgment or decree is to be looked to in order to determine the amount in controversy. The learned counsel insists that this practice is erroneous, that in ascertaining the amount in controversy reference should be had to the date of the appeal, so that if the sum then due, including principal and interest, is five hundred dollars or upwards, this court has jurisdiction, although the judgment was in fact rendered for a less sum.

We have given the subject a careful consideration, and we see no reason for any change in the rule adopted by the court. The constitution declares that the supreme court shall not have jurisdiction in civil cases where the matter in controversy, exclusive of costs, is less in value or amount than five hundred dollars, except in certain enumerated cases not necessary now to mention. What then is the construction to be placed upon this provision? Does it refer to the matter in controversy in this court or in the lower court?

According to the decisions of the supreme court of the United States, in order to determine "the matter in controversy," recurrence must be had to the subject for which the suit is brought, and on which issue is joined. Where the plaintiff sues for money, and claims in his declaration more than two thousand dollars, but by the ruling of the court obtains a judgment for less, he is entitled to an appeal, because as to him the matter in controversy is the sum claimed, and upon a new trial he may obtain a recovery for that sum or more.

But if the plaintiff is satisfied with 737 a judgment for *less than two thousand dollars, the defendant cannot appeal, because as to him the only matter in controversy is the judgment, and that being for a less sum than two thousand dollars, the jurisdiction of the court does not attach. While, therefore, the amount actually in controversy is the criterion of jurisdiction in all cases, so far as the defendant is concerned, the sum for which the judgment was rendered at its date is alone looked to in order to determine the amount or subject matter. This is the well

***Court of Appeals—Jurisdictional Amount.**—See *Herman v. City of Lynchburg*, 33 Gratt. 37, and extensive notes; *Tebbs v. Lee*, 76 Va. 747; *Hicks v. Roanoke Brick Co.*, 94 Va. 742, 27 S. E. Rep. 596; *Arnold v. Lewis Co. Ct.*, 38 W. Va. 146, 18 S. E. Rep. 477; *Marion Machine Works v. Craig*, 18 W. Va. 562; 4 Min. Inst. (2d Ed.) 966; *Barton's Law Pr.* (2d Ed.) 42.

settled doctrine of the supreme court of the United States. 1 Brightley's Digest, page 288, note.

This court has uniformly adopted substantially the same rule. It also looks to the amount actually in dispute between the parties. If the plaintiff claims in his declaration or bill money or property of greater value than five hundred dollars, he is entitled to his appeal or writ of error, although the judgment may be for less. On the other hand, the defendant in the very same case is denied an appeal for the reason already given, and that is, the plaintiff being satisfied, the only matter of controversy is the judgment, which being for less than five hundred dollars, there is no ground for the jurisdiction of this court.

The learned counsel argues that an affirmance by the supreme court of the United States does not change the judgment or decree appealed from, whereas an affirmance by this court has that effect; and he argues, the rule in regard to appeals ought therefore to be different. Upon an affirmance by the supreme court of the United States, interest is calculated from the date of the judgment below till paid, at the same rate that similar judgments bear interest in the courts of the state where the judgment is rendered.

When the writ of error is sued out merely for delay, damages at the rate of ten per centum are awarded on the judgment from its date. Upon an affirmance by this court, interest is computed upon the whole amount of the recovery, including interest and costs. In both courts interest is given by way of compensation for the delay occasioned by the appeal. In neither court is any change effected by an affirmance of the judgment.

In the courts of this state judgments (as also decrees) usually bear interest from their date. But it has never been supposed that the defendant by his own default in paying the judgment could obtain for himself a right of appeal, which he did not possess, without such default. According to the rule insisted on by the learned counsel, the defendant has only to postpone his application for an appeal until the accumulation of interest is sufficient to give the jurisdiction. The plaintiff may do the same thing. If his claim is for less than five hundred dollars, and there is a judgment against him, he can also delay his appeal until the necessary amount is obtained, and thus by his delay confer upon this court cognizance of a case it did not have when the erroneous decision was made. The jurisdiction of this court ought to be governed by certain fixed rules and principles of law, and not made to depend upon the pleasure or caprice of parties. In ascertaining the amount in controversy therefore within the meaning of the constitution, recurrence must be had to the date of the judgment below, and not to the sum due at some subsequent period by the accumulation of interest. For these reasons the appeal must be dismissed, as improvidently allowed.

The judgment was as follows:

This cause, which is pending in this 739 court at its *place of session at Wytheville, having been partly heard but not determined at said place of session, this day came here the parties by their counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid, and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the amount of the judgment at its date being under \$500, this court has no jurisdiction. It is therefore considered that the supersedeas aforesaid be dismissed as improvidently awarded, and the defendant in error recover against the plaintiff in error his costs by him about his defense in this behalf expended. And it is further ordered that this judgment be entered on the order book here, and forthwith certified to the clerk of the court where the cause is pending, who shall enter the same on his order book, and certify it to the said circuit court of Wythe county.

Appeal dismissed.

740 *Clevinger & als. v. Miller.

September Term, 1876, Staunton.

Subrogation—Officer Paying Execution in His Hands for Collection.—A sheriff or other officer who pays an execution in his hands for collection, without an assignment at the time, of the judgment or which it is founded on the debt, is not entitled to be subrogated to the lien of the creditor whose debt he has paid, as against other creditors having liens by judgment or otherwise.

Quinn & Ritter filed their bill in the circuit court of Frederick county, claiming to be creditors by judgment of Harrison Bowers, and seeking to subject his estate real and personal to satisfy their debt. They stated that there were liens by deed upon the land and also judgments which were liens upon it. A commissioner was directed to take an account of the liens upon the land of Bowers; and he made a report in April 1873. The report showed that the debts exceeded the estimated value of the property; but it is only necessary to refer to one matter. It appears from the report, that of the executions against Bowers that went into the hands of L. A. Miller, either as sheriff or deputy sheriff, five, amounting

***Subrogation—Officer Paying Execution in His Hands for Collection.**—As sustaining the rule that subrogation will not be enforced on behalf of a mere volunteer, see *Fidelity, etc., Co. v. S. V. R. R. Co.*, 88 Va. 17; 9 S. E. Rep. 759; *Norris v. Woods*, 89 Va. 878; 17 S. E. Rep. 552; *Burton v. Mill*, 78 Va. 480; *Barkedale v. Fitzgerald*, 76 Va. 896; *Sherman v. Shaver*, 75 Va. 1; *Gatewood v. Gatewood*, 75 Va. 414; *Rhea v. Preston*, 75 Va. 771; *Neely v. Jones*, 16 W. Va. 642; *Feamster v. Withrow*, 12 W. Va. 654, 659; *McNeill v. Miller*, 9 W. Va. 483, 2 S. E. Rep. 337; *Myers v. Miller*, 6 W. Va. 618, 31 S. E. Rep. 984. All the above cite the principal case with approval. See further, *Chart v. Moore*, 76 Va. 202; *Enders v. Brune*, 4 Rand. 421.

principal and interest to upwards of \$1,700, were paid by him to the plaintiffs or their attorney; he not returning the executions satisfied, but holding the judgments as his own, though without assignment, and without request from Bowers to pay them. One judgment in favor of Y. P. Watkins, was assigned by Watkins to J. G. Miller, who had paid the execution. The commissioner

reported these judgments as subsisting
741 ing liens upon the lands of *Bowers; and A. Clevinger, J. F. Keckley and the National Bank of Martinsburg being creditors of Bowers by subsequent deeds of trust, excepted to the report in this respect.

The cause came on to be heard on the 13th of November 1874, when the court overruled this and all other exceptions to the report, and made a decree directing the debts reported by the commissioner to be paid according to their priorities. And thereupon Clevinger and Keckley applied to a judge of this court for an appeal; which was allowed.

Barton and Boyd, for the appellants.

Parker, for the appellee.

Staples, J., delivered the opinion of the court.

At common law payment utterly extinguishes the debt and every security given for it. A surety who makes such payment becomes thereby only a simple contract creditor of the principal debtor. Courts of equity, however, interpose to keep alive the debt for the benefit of the surety. In these courts he is subrogated to all the rights and remedies of the creditor, and entitled to enforce all his liens, priorities and means of payment. The doctrine of subrogation does not stand upon contract, express or implied, but upon principles of natural justice. As it is purely a creature of equity it is only enforced in those cases where its application is just, and sanctioned by the obligations of good faith and sound policy.
1 Lead. Cases in Equity 88.

And further, it is only enforced in behalf of sureties and others who are required
742 quired to pay in order to protect *their own interests, and never in favor of mere volunteers. In the Bank of the United States v. Winston, 2 Brock. R. 254, Judge Marshall said, "there was no case in which the doctrine of subrogation has been enforced in favor of one not bound by the original contract who discharged it as a volunteer. He would not say it might not be done; but if it may, equity will consider all the circumstances and impose equitable terms."

We are now to consider whether consistently with these principles a sheriff having executions in his hands and paying them to the creditor is entitled, without an assignment of the debt, to be subrogated to the lien of such creditor upon the real estate of the debtor, as against other subsequent judgment creditors. The question is one of the first impression in this state. It has

never been passed upon by this court, and the books show but few cases upon the subject in other states. It must therefore be determined exclusively upon principle.

In the first place, it is the duty of a sheriff having an execution in his hands, to collect the money, or to levy and sell, and pay the proceeds into court or to the plaintiff; and further, to make prompt return of the execution. If the defendant has no effects upon which a levy can be made, the officer should return the process with a statement of the facts. This is the precept of the writ, and the command of the law. If the sheriff fails to levy in a proper case, or having levied, fails to sell without a sufficient cause, he is liable to a fine, and to make good to the creditor the amount of the debt. This liability, however, does not arise out of any supposed relation of principal and surety between the sheriff and the debtor in the execution.

It is the mere consequence of official
743 misconduct. *It is the penalty imposed by the law for a plain breach of duty.

It has been held in a number of cases, that an officer charged with the collection of moneys due individuals or the government, who pays the taxes or debt of another person, cannot maintain an action to recover the same in the absence of a prior request or a subsequent promise. *Kidder v. Townsend*, 3 John. R. 430; *Beach v. Vandenburg*, 10 John. R. 369; *Overseers of Wallkill v. Overseers of Manmakating*, 14 John. R. 87.

In *Lipscomb's adm'r v. Winston*, adm'r of Littlepage, 1 Hen. & Mun. 453, this court held, that a sheriff having indulged a man for his taxes, on paying the same into the treasury in his behalf, might recover the amount with interest; but this was upon an express promise of indemnity. This decision was made by two judges in a court of three; and not without a vehement protest from Judge Tucker, who declared that a contract more flagrantly in maleficio never was brought to the view of the court.

It is very clear, that if the sheriff stands in the relation of surety to the delinquent debtor, it is perfectly competent for him to pay the money to the creditor, and without a prior request or subsequent promise, to maintain an action against the person for whom the payment is made. A surety may, at any time, voluntarily pay the debt after it is due; and he is at once entitled to his action. These considerations are sufficient to show the wide distinction between one who assumes a liability for another by contract, and him whose liability flows from a breach of official duty.

It has already been seen that the failure to levy and sell in a proper case is a violation of the official bond, as well as of the precept of writ. It is a wrong to the plaintiff

in the execution, to other creditors of
744 *the debtor, and to the public who are interested in the just and proper discharge of official trusts. Such indulgence to the debtor is often not only an injury to him and his creditors, but its tendency is

to involve the sureties of the sheriff in expensive and sometimes ruinous litigation. It leads to the diversion of funds in the hands of the officer from their proper destination, for the purpose of dispensing favors and indulgencies to those whom he desires to befriend or conciliate.

Whilst the debtor's property is ostensibly subject to the lien of the execution held by the sheriff, it is permitted to remain in the possession of the debtor, subject to his control, and thus effectually protected against the claims of other creditors. When the debtor's personal effects are properly applied to the satisfaction of the older judgments, the subsequent judgment creditor may successfully assert his lien upon the land. But if the debtor is permitted through the indulgence or the connivance of the sheriff, to consume or dispose of his goods and chattels, and the sheriff is then allowed to stand in the shoes of the prior creditor and enforce his liens upon the land, it is obvious that in a large majority of cases the junior creditor will be the sufferer.

When an execution is satisfied, it is the duty of the officer to make return according to the fact. Parties dealing with the debtor upon the faith of such return, may justly conclude that the lien of the judgment and execution has been fully discharged. To permit the sheriff at any future period to enforce such lien in the face of his own return, against other creditors, is to encourage official delinquency by according to it a superior equity.

Such are but a small part of the evils resulting from the doctrine of subrogation when applied to sheriffs and other officers charged with the collection of debts. So far as my investigation has extended, it has met with but little favor by the courts. In *The People v. Onondaga*, 19 Wend. R. 79, the sheriff levied upon personal property sufficient to satisfy the execution, but left it in the possession of the defendant. The latter having eluded the property, the sheriff was compelled to pay the debt. He thereupon procured an assignment of the judgment. The supreme court of New York was of opinion that the sheriff was entitled to be subrogated in the place of the creditor as against the debtor, but not as against purchasers of his real estate on subsequent judgments and executions. (It seems that these creditors were the purchasers at the sales made for their benefit.) The court says that although the debtor subtracted the property before the subsequent judgment creditors got their judgments, the levy by the sheriff might well have induced them to suppose the first judgment was satisfied, and led them on in their own suits to expense and trouble. All this was very likely in consequence of the neglect of Luther the sheriff."

It will be perceived that the supreme court of New York denied to the sheriff the right of subrogation as against creditors and purchasers, although he had obtained an assignment of the judgment. Without controverting the justice of this decision in

the particular case, it would seem very clear that the sheriff by obtaining from the creditor an assignment of his judgment, would necessarily be entitled, as assignee, to all his liens and priorities. The sheriff has the same right of purchasing the debt that others have; and such purchase necessarily carries with it all the remedies for its enforcement to which the assignor was entitled. When, therefore, the officer becomes assignee of the judgment, and makes a true and perfect return of the execution, he is entitled to the lien, and no injustice is done to creditors or purchasers.

The learned counsel for the appellee concedes, that where the sheriff is compelled to satisfy the debt in consequence of his own default in levying and selling, he cannot maintain an action for the recovery of the money; nor is he entitled to a right of subrogation. He insists, however, that in this case there was no such default, because the debtor owned no personal property out of which the executions could have been made. If such was the fact—if the debtor had no effects upon which a levy could be made, it was the officer's duty to return the executions. He was certainly under no obligation to pay them. It is incredible that a sheriff under such circumstances, would voluntarily assume the payment of debts to the amount of a thousand dollars or more, for which he was in no manner liable. The just inference is, that he made the payments because he well knew he had by his default become responsible to the creditors. Both the sheriff and the execution debtor were examined in this case, and neither of them intimated that the executions could not have been made out of the debtor's property. On the contrary, it may be fairly inferred from the testimony, that the failure to do so proceeded either from negligence on the part of the sheriff, or an indisposition to levy and sell. We do not mean to intimate that the result would be different even if the facts were as stated by the learned counsel. It is sufficient to say, that his suggestions are not sustained by the evidence.

In considering this case we have not deemed it necessary to notice particularly the testimony adduced by the parties. There are but two witnesses, the appellee and the debtor. Their testimony is so conflicting that no safe conclusion can be drawn from it. We have thought it best to rest our decision upon certain well-defined principles, with a view to some general rule for the adjudication of future controversies of a like character. The result is that the decree of the circuit court must be reversed, and a decree entered in conformity with the views herein expressed.

The decree was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid, and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that a

sheriff or other officer who pays an execution in his hands for collection, without an assignment at the time of such judgment or the debt, is not entitled to be subrogated to the lien of the creditor whose debt he has paid, as against other creditors having liens by judgment or otherwise. The circuit court therefore erred in holding, that the appellee had a right of subrogation in this case to the lien of the judgment creditors whose executions had been paid by him without having obtained an assignment or transfer of the judgments or the debts secured thereby. It is therefore decreed and ordered that for this error the decree of the circuit court be reversed and annulled; and that the appellee pay to the appellants their costs by them expended in the prosecution of their appeal aforesaid here. And this court proceeding to pronounce such decree as the said circuit court ought to have pronounced, it is decreed and ordered, that 748 the first exception taken by the *creditors Clevinger, Keckley, and the National Bank of Martinsburg to the report of commissioner Huck, be sustained, except as to the judgment in favor of Y. P. Watkins, of which the appellee being an assignee, is entitled to subrogation to the judgment lien of said Watkins. It is further decreed and ordered that this cause be remanded to the circuit court to be proceeded with in conformity with the principles herein declared.

Which is ordered to be certified to the said circuit court of Frederick county.

Decree reversed.

749 *Richardson v. Insurance Company of Valley of Va.

September Term, 1876, Staunton.

I. Pleading—Action of Debt—Plea of Setoff.*—R. borrowed in 1861, \$1,050 from an Insurance Company, for which he gave his note under seal, payable on demand; and he deposited with the company sixty shares of its stock, as security for the debt; and by endorsement on the note he authorized a sale of the same by the company if the note was not paid when required by the company. The dividends on this stock were credited on the note up to July 1864, reducing the note to \$1,050. To an action of debt on the note R. craves oyer of these endorsements and then says: "that the sixty shares of stock pledged by him to plaintiff, as set forth in the endorsement, remained in the exclusive management, custody and control of the plaintiff, from the date of said obligation hitherto, and that during this period, the plaintiff had so carelessly and improvidently managed and controlled said stock as that the same had become utterly worthless, unavailing and lost to defendant as property. And thereby defendant has sustained loss to the amount in value of \$1,500; and this amount he now offers to set off against plaintiff's demand." **HOLD:**

*Special Plea of Setoff.—See Huff v. Broyles, 26 Gratt. 288, and *note*; Keckley v. Bank, 79 Va. 458; Burtner v. Keran, 24 Gratt. 42; Watkins v. Hopkins, 18 Gratt. 743; Barton's Law Pr. (2d Ed.) p. 514.

1. **Same—Same—Same.**—The plea is bad, because it does not set forth and show what acts the plaintiff had done, or omitted to do, in regard to the stock; which acts were intended to be complained of in the plea. It does not therefore sufficiently appear whether such acts or omissions constitute a good defence to the action.

2. **Same—Same—Same.**—If the plea had said, that the plaintiff did not sell the stock, or have it sold, but retained possession of it until it perished in consequence of the war, it would not have been a legal bar to the action. The stock being a mere pledge as collateral security for the debt, the plaintiff might have sold it, but was not bound to do so; at least without being required by the defendant.

This was an action of debt in the circuit court of Clarke county, brought in 750 May 1873, by The Insurance *Company of the Valley of Virginia, suing for the use of William Bird, receiver, against John D. Richardson, upon a note under seal for \$1,650, bearing date June 1st, 1861 payable on demand, with interest from the 1st of July 1860. The defendant appeared and filed the pleas of "payment," "set-off," and "the statute of limitations," on which issues were joined; and he also filed a special plea to which the plaintiff demurred; and the court sustained the demurrer. The parties waived a jury, and the court rendered a judgment in favor of the plaintiff for the amount of the note, subject to credits which reduced it to \$1,050, with interest from the 1st of July 1864. Richardson thereupon applied to a judge of this court for a writ of error and supersedeas; which was allowed. The only question in the case was upon the special plea, and that is given in the opinion of the court.

Holmes Conrad, for the appellant.

Parker, for the appellee.

Moncure, P., delivered the opinion of the court.

This is a supersedeas to a judgment of the circuit court of Clarke county, recovered by, or in the name of The Insurance Company of the Valley of Virginia against John D. Richardson, on a single bill obligatory for sixteen hundred and fifty dollars, dated the first day of June 1861, payable on demand, with interest from the first day of July 1860, payable annually. The defendant plead payment, setoff, and the statute of limitations, to which the plaintiff replied 751 generally, and issues were thereupon joined. Afterwards a special *plea was filed by leave of the court, first craving oyer of the endorsements on the said obligation, which are set out in the plea, and consist of a pledge in these words: "I hereby pledge sixty shares of stock in 'The Insurance company of the Valley of Virginia,' and authorize sale of the same by the secretary, in the event of the non-payment of this note, whenever required by the board of directors."

J. D. Richardson."

Also of a statement showing that interest on the obligation to January 1st 1863, was cancelled, that the semi-annual dividends on the sixty shares of stock were regularly credited on the said obligation from January 1, 1863, to July 1, 1864, inclusive, each of said credits amounting to \$150; that interest on said obligation at the same dates was regularly cancelled, and that the balance remaining due thereon was \$1,050 with interest from July 1, 1864. The special plea then proceeded in these words: "Whereupon defendant says, that the sixty shares of stock pledged by him to plaintiff as set forth in the endorsement, remained under the exclusive management, custody and control of plaintiff from date of said obligation hitherto, and that during this period, the plaintiff had so carelessly and improvidently managed and controlled said stock, as that the same had, before the commencement of this suit, become utterly valueless, unavailing and lost to defendant as property. And thereby defendant has sustained loss to the amount of \$1,500; and this amount he now offers to set-off against plaintiff's demand." The special plea was sworn to by the defendant. The plaintiff demurred to it, and the defendant joined in the demurrer; which upon argument was

752 *sustained by the court. Afterwards to-wit: on the 2nd day of March 1875; the case came on to be tried on the issues which had been made up on the other pleas as aforesaid, and neither party demanding a jury, it was considered by the court that the plaintiff recover against the defendant \$1,650, the debt in the declaration mentioned, with six per centum per annum interest thereon from July 1, 1860, reduced by credits to \$1,050 with six per centum per annum interest from July 1, 1864, until paid, and his costs by him about his suit in that behalf expended. To this judgment the defendant applied to a judge of this court for a writ of error and supersedeas; which were accordingly awarded. And that is the case we have now to dispose of.

The only question in the case is as to the sufficiency of the special plea. Does it present a bar to the action? We are decidedly of opinion that it does not. Every plea in bar to be a good defence to the action must aver with sufficient certainty such facts as amount to a legal bar. The facts must be set out with such particularity in the plea as to inform the plaintiff of the nature of the defence intended to be relied on, and thus to enable him to reply to it, to make up the issue thereon, and prepare for trial.

Now the special plea in this case certainly does not come up to the terms of this legal requisition. It avers that "the plaintiff had so carelessly and improvidently managed and controlled said stock, as that the same had, before the commencement of this suit, become utterly valueless and unavailing and lost to the defendant as property." But it does not set forth and show what acts the plaintiff had done or omitted to do in regard to the stock, which acts or omissions were intended to be complained of

in the plea. It does not therefore sufficiently appear whether such acts or omissions constitute a good defence to the action. We may conjecture that what the defendant meant by the careless and improvident management and control of the stock referred to in the plea, was that the plaintiff did not sell the stock, or have it sold, but retained possession of it until it perished in consequence of the war. This can only be a conjecture and cannot be assumed as the real intention of the defendant in framing his special plea. But even if it could be, or even if the plea had expressly charged the fact, "that the plaintiff did not sell the stock, or have it sold, but retained possession of it until it perished in consequence of the war," yet that fact, assuming it to be a fact, would not constitute a legal bar to the action. The stock was a mere pledge as collateral security of the payment of the obligation. The plaintiff might have sold it, or had it sold for the payment of the obligation, but was not bound to do so; at least without being required by the defendant; and it is not averred in the plea nor is it pretended as matter of fact, that any such requisition ever was made, or that the defendant ever said anything to the plaintiff on the subject of such a sale. The defendant no doubt expected when he pledged the stock to the plaintiff, that there never would be any occasion for the sale of it, but that the plaintiff would hold possession of it and receive the dividends and apply them to the debt until it suited the defendant's convenience to pay the debt and thus redeem the stock; or until the plaintiff chose to demand payment of the debt, and it was not otherwise convenient for the defendant to make such payment than by a sale of the stock. It was competent for the defendant to pay the debt and redeem the stock, and he ought to have proceeded in that way, or at least

have notified or requested the plaintiff to sell the stock *if he wished to have it sold for the payment of the debt. And not having pursued this plain course which he had a right to pursue, he cannot justly complain of the plaintiff for not doing or having had done what he, the defendant, might himself have done, and ought to have done if he desired it to be done.

It can hardly be necessary to refer to authority in support of the foregoing views. It can be found in abundance in the cases referred to in the petition for a writ of error—*Pain v. Packard and King v. Baldwin*, 2 American Leading Cases, 5th edition, pp. 362-418. As to the rights and duties of a creditor to whom property is pledged by his debtor in such cases, see *Rosenbaums v. Weedon*, *Johnson & Co. v. Gratt*, 785, and the cases cited therein. See also *Burners v. Keran*, 24 Gratt. C. in which the opinion delivered by Staples L. was concurred in by the other judges. It was there held that "where a deed is procured by fraudulent misrepresentations, the defence can only be made at law, in the mode provided by the statute; Code of

1860, ch. 172, § 5; and the defendant should file a special plea, averring the fraud or special circumstances which entitle him to relief in equity. And the facts should be set forth with sufficient precision and certainty to apprise the plaintiff of the character of the defence intended to be made; and to enable the court to decide whether the matter relied on constitutes a valid claim to equitable relief." Such is the statement contained in the syllabus, and it seems truly to report the decision of the point. The principle there announced directly applies to this case and is conclusive of it.

We are of opinion that there is no error in the judgment, and that it ought to be affirmed.

Judgment affirmed.

755 *Perry & Co. v. Shenandoah National Bank & als.

September Term, 1876, Staunton.

Deeds of Trust—When Fraudulent.—In November 1873, N conveyed to C, certain real and personal estate, and "all his stock in trade with all accretions to and replenishments of said stock," in trust to secure and indemnify certain endorsers upon negotiable notes due by said N. And if the said notes were not paid on demand, C, upon the written request of either of the parties secured, should sell the said property according to law. But C was not to be responsible for any of said property until he was ordered to sell the same as aforesaid. N continued in possession and carried on his store for two years, and until all the goods in the store at the time of the deed were sold, and other goods bought with the proceeds. In November 1876, under an execution of P against N, the goods then in store were levied on. **Held:** The deed is fraudulent *per se*, and P is entitled to the proceeds of the sale of said goods under his execution.

This was a creditor's bill in the circuit court of Frederick county, brought by Joshua Persinger and others, creditors of

***Deeds of Trust—Fraudulent.**—In *McCormick v. Atkinson*, 78 Va. 9, the court said: "A deed of conveyance, professedly for the indemnity of creditors, in which the grantor expressly or impliedly retains a power inconsistent with, and adequate to the defeat of, the avowed object of the deed, is void as against creditors and purchasers. This is a well-settled principle repeatedly recognized by this court. *Lang v. Lee*, 3 Rand. 410; *Sheppards v. Turpin*, 3 Gratt. 373; *Addington v. Etheridge*, 12 Gratt. 438; *Perry & Co. v. Shen. Valley Nat. Bank*, 27 Gratt. 755." The principal case is also cited in the following decisions: *Hughes v. Epling*, 98 Va. 426, 25 S. E. Rep. 105; *Norris v. Lake*, 89 Va. 517, 16 S. E. Rep. 663; *Wray v. Davenport*, 79 Va. 23, 24; *Brockenbrough v. Brockenbrough*, 31 Gratt. 590; *Harden v. Wagner*, 22 W. Va. 364; *Claflin v. Foley*, 22 W. Va. 441. See further on the same subject, *Paul v. Baugh*, 85 Va. 955, 9 S. E. Rep. 329; *Saunders v. Waggoner*, 82 Va. 316; *Young v. Willis*, 82 Va. 291.

James A. Nulton, to have the property mentioned in a number of deeds of trust disposed of under the direction of the court. The facts in relation to the only question involved in this appeal, are stated by Judge Christian in his opinion.

Barton & Boyd, for the appellants.

Williams & Williams and Holmes Conrad, for the appellees.

Christian, J., delivered the opinion of the court.

756 *The controversy in this case arises between creditors secured by a trust deed, and execution creditors whose claims are not provided for in said deed. By a deed of trust executed the 1st November 1873, and recorded on the 4th November 1873, the debtor Nulton conveyed to Holmes Conrad, trustee, certain real estate and other property named therein, "and also all of his stock in trade, with all accretions to, and replenishments of said stock," in trust to secure and indemnify against loss certain endorsers upon negotiable notes drawn by Nulton, and payable at the Shenandoah Valley National Bank at Winchester, and also to secure the payment of certain debts to other creditors therein named. The deed contained the following provision: "Should said endorsers, or either of them, suffer any loss or damage by reason of said endorsement, or should either of the debts herein secured not be paid on demand, then it shall be the duty of the trustee upon the written directions of either of the parties secured, to sell the property herein conveyed as provided by law. But the trustee herein named shall not be held responsible for any of the property mentioned herein until he is ordered to sell the same as herein provided." This trust was never enforced; nor does it appear that any of the endorsers or creditors secured, ever directed the enforcement of the trust as prescribed by the deed. But the grantor remained in possession of this stock and carried on business as before, selling off the stock and replacing it as he chose with other like stock, purchased with the proceeds of that conveyed in the deed, and which was sold by him. No account of these sales was ever rendered to the trustee, nor does it appear that he exercised any supervision whatever over Nulton (the debtor) in these transactions.

This state of things continued until **757** the 17th November *1875, when Perry & Co., (the appellants) who had not been secured on the deed of trust, levied their execution upon the stock in trade, then in the possession of Nulton in his storehouse. By an agreement, of all the parties interested, which appears in the record, signed by their respective counsel, it was agreed that the property levied on under this execution should be sold by the sheriff, and the proceeds distributed as the court should determine, according to the rights of the parties. The sale was accordingly made by the sheriff, and the

proceeds amounting to \$548.95, returned by him to the court.

The sheriff returned also a list of the property sold by him. Of this property only four items, consisting of two wagons and two sets of harness, were in the possession or ownership of Nulton when the deed of trust of November 1st, 1873, was executed. All the rest were purchased after that date by Nulton, though as he says, by the proceeds of the sale of articles owned by him on that day.

The court below held that all the property levied on was liable first to pay the endorers secured by the deed of trust, upon notes negotiated by the Shenandoah Valley National Bank; and accordingly so decreed. It was from this decree that an appeal was allowed by one of the judges of this court.

The court is of opinion that said decree is erroneous.

It was held by this court in *Lang v. Lee*, 3 Rand. 410, "that a deed of trust made by the debtor professedly for the indemnity of certain preferred creditors, reserving to the grantor a power over the property conveyed, inconsistent with the avowed purposes of the trust, and adequate to the defeat thereof, was, because of such reservation, void as to any creditor thereby postponed."

758 This case, and the doctrines it established was affirmed and approved in the cases of *Sheppards v. Turpin*, 3 Gratt. 357, 373; *Addington v. Etheridge*, 12 Gratt. 400; and *Marks v. Hill*, 15 Gratt. 430; and may now be held as the settled law of this state.

Now it is true, that in the deed under consideration, there is no express provision that the grantor should retain possession of the goods (the stock in trade) and carry on the business, selling and receiving the proceeds as before; but the power to do so, though not conferred in express terms, arises by clear and irresistible implication. The trustee by the terms of the deed can only sell "upon the written direction of either of the parties secured;" and it is provided that "the trustee shall not be held responsible for any of the property conveyed until he is ordered to sell the same." If the written direction is never given, the property is never to be sold by the trustee. The trustee has no control of it, and no accountability with respect to it. Where then does the possession remain? who alone has the control over and disposition of these goods? Plainly the grantor, until a sale is directed in writing by one of the parties secured. Under this deed the grantor might, for an unlimited time, go on and sell and buy and conduct his trade just as before, without accounting to the trustee or any one else, if the parties to the deed did not choose to give written directions to the trustee to sell. By clear implication from the face of the deed, this power is conferred upon the grantor. And the record shows that he acted under this implied authority for two years; and but for the action of the appellants in levying their execution, might have gone on for years longer. Up to the

date of the levy of the execution the grantor carried on his business just as he did before the execution of the deed, selling the goods, receiving the money, buying other goods, rendering no account, but conducting his business as if no deed had been executed. Such a power as this, whether it arises from express provisions of the deed or from clear implication, is entirely inconsistent with the avowed purposes of the trust; and upon the authority of the cases above cited, must be declared fraudulent per se, and therefore null and void.

The court is, therefore, of opinion that the appellants, Perry & Co., by the levy of their execution on the 17th November 1875, acquired a lien which is superior to all the other creditors of said Nulton, and that the fund in the hands of the court so far as it arose from the sale of the stock in trade in the storehouse of said Nulton, made by the sheriff under the agreement aforesaid, ought to have been decreed to the said Perry & Co., instead of to any of the parties secured by said trust deed. The court is therefore of opinion that the decree of the said circuit court be reversed.

The decree was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid and the arguments of the counsel, is of opinion for reasons stated in writing and filed with the record, that the said decree is erroneous. It is therefore decreed and ordered that the same be reversed and annulled, and that the appellants recover of the appellees here, to-wit: The Shenandoah Valley National Bank, Joseph A. Nulton, T. Arthur Latham, and T. V. Purcell, their costs by them expended in the prosecution of their appeal and writ of supersedeas here. And this court

760 *proceeding to pronounce such decree as the said circuit court ought to have pronounced: It is decreed and ordered that the fund in the hands of the said circuit court, arising from a sale made by the sheriff of the personal estate of said Nulton (except the two wagons and two sets of harness proved to have been in the possession of the said Nulton at the time of the execution of the deed of trust to Holmes Conrad, trustee), be paid over to the said appellants, Perry & Company, or their counsel, together with their costs by them expended in said circuit court.

Which is ordered to be certified to the said circuit court of Frederick county.

Decree reversed.

761 **Young & Wife & als. v. Cabell's Ex'or & als.*

September Term, 1876, Staunton.

Decrees of Court of Appeals.—In a bill by *Executors of C* in 1868, to have a construction of the will of *C*, and direction of the court in his administration, an account was taken showing collections by the

executor of ante-war debts in confederate money, and this invested under an order of the court in confederate bonds. The contest in the circuit court was between legatees, and legatees and next of kin. The court by its decree settled the questions between the legatees, and holding that C died intestate as to one moiety of the residuum, held that the amount invested in confederate bonds should be treated as a part of the residuum, and the loss borne equally by all the parties interested in the residuum. Upon appeal by the legatees of the moiety of the residuum, and of other legatees, the court of appeals reversed the decree as to some of the legacies, and affirmed it as to others, and affirmed the decree in all other respects. And on the motion of the next of kin it was added that this decree should not prevent the next of kin from asserting by proper proceedings, any claim they may be advised to assert against H, executor of C, on account of his transactions as such executor. **Held:**

1. **Same—Effect as to Future Enquiry into Fiduciaries' Transactions.**—The decree of the court of appeals does not conclude enquiry as to the moneys collected and invested in confederate bonds; but under the reservation in the decree this may be done.
2. **Same—Same—Mode of Raising the Question.**—To make this enquiry the next of kin should file a cross-bill, raising the question of the executor's liability for the money so collected and invested by him.
3. **Same—Same.**—As to another claim of C which was lost, that having been passed upon by the court, cannot be enquired into again.

This is a sequel of the cases of Skipwith & als. v. Cabell's ex'or & als. and Lee & als. v. Cabell's ex'or & als., reported in 19 Grattan 758. When the cases went **762** *back to the circuit court, that court directed a commissioner to take an account of the transactions of the executor; and in March 1871 the commissioner returned his report. To this report the next of kin of Mrs. Cabell filed a number of exceptions, but it is only necessary to notice the fifth and twelfth, as these alone refer to the questions involved in the decision of this court. The twelfth exception, among other objections to the report, objects that certain debts mentioned, which were collected during the war in confederate money, were not charged to the executor. It appears that these were debts due before the war, and were secured by liens on real estate; and during the war they were paid to the executor in confederate money; and by an order in the cause the proceeds were invested in confederate bonds. The amount of these debts constitute the sum of \$47,600 mentioned in the decree of the 10th of October 1867, which the circuit court then held should be embraced in the residuum of the estate, and all the parties interested in that residuum should bear the loss ratably.

The question under the fifth exception was as to the liability of the executor for the \$34,600 of state stock lent by Mrs. Cabell to the Howardsville Bank. The facts in relation to this stock are stated in

the former report, and referred to by Judge Staples in his opinion.

The cause came on to be heard on the 25th of March 1872, when the court held that the reservation in the decree of the court of appeals of the 24th of June 1870 to the next of kin of Mrs. Cabell, to proceed against D. J. Hartsook the executor, for any claim or demand that they might be advised to assert against him, on account of his transactions as executor, was not intended to permit them to re-open and to enquire into the accounts and trans- **763** actions of said executor as *to any questions now raised by the exceptions, so far as the same were before raised, passed upon and decided by that decree, and the decrees of the circuit and district courts, to the extent that they were approved and affirmed by said decree, of the court of appeals. But that under said reservation only the accounts and transactions of the executor which were not passed upon and decided by the court of appeals, could be reopened and investigated. And the court being of opinion that the said bonds mentioned in the twelfth exception, and the investment of the said \$47,600 in confederate bonds, were theretofore brought into consideration, and their propriety approved and sustained by the said decrees, and the loss of them was thereby decided to be the loss of the estate, the said twelfth exception was overruled so far as it seeks to charge the executor with the amount of said collections and investment.

The court was further of opinion that the question, whether the \$34,600 in the Howardsville Bank should be regarded as state stock, and pass to the legatees of the state stock of the testatrix, or as a debt due from the bank to her estate, had been settled and determined by the decrees before made in the cause; but that the question as to the conduct and transactions of the said executor in respect to the collection of the said debt of \$34,600 on the said bank, or the diligence used by him to secure or collect the same, had never before been raised, passed upon or settled by any decree in this cause; and therefore under the said reservation the parties had a right to enquire into the conduct and diligence of the executor in relation to said debt, and to hold him accountable for negligence or want of proper care and diligence in relation to the collection of the same; therefore the said fifth excep- **764** tion *in this respect was so far sustained as to allow this enquiry to be made, and proof to be taken by any party in relation thereto. And the report of the commissioner was re-committed with instructions &c.

The commissioner made his report, exonerating Hartsook, the executor, from liability for the debt of the bank; and to this report the next of kin of Mrs. Cabell excepted. The facts are sufficiently stated by Judge Staples in his opinion.

The cause came on again to be heard on the 7th of September 1872, when the court overruled the exception as to the debt of

the bank, and confirmed the report. And thereupon John B. Young and wife, and the other next of kin of Mrs. Cabell, applied to a judge of this court for an appeal; which was allowed.

James Alfred Jones, for the appellants.

Fitzpatrick and Whitehead, for the appellee.

Staples, J., delivered the opinion of the court.

This case was before this court at the April term 1870. A decision was then made construing the will of Mrs. Mary W. Cabell, and settling the rights of her legatees and distributees. That was a controversy between legatees and next of kin. This is a controversy between the next of kin and the executor of Mrs. Cabell. It grows out of collections made by the executor in the years 1862, 1863 and 1864 of certain debts in confederate currency; and out of the alleged mismanagement by him, and consequent loss of a claim due the estate against the Howardsville Bank.

Upon the first point the defence of the executor is of a two-fold character. **765** He insists that "his transactions 'in confederate funds' were recognized as valid by the decrees of the circuit court of Nelson pronounced in 1867 and 1868; and these decrees in this particular were affirmed by this court in its decree of April 1870; and the propriety of these collections is therefore no longer an open question. Second, if this ground is untenable, it is claimed that the collections were made in good faith, in the exercise of a large discretion vested in the executor by the will, and were fully justified by the circumstances surrounding him at the time. In the view we take it is only necessary now to examine the first ground of defence relied upon by the executor.

Whatever may have been done in the circuit court, it is very certain that in this court the executorial transactions were examined only so far as they were necessary to a settlement of the conflicting claims of the legatees and next of kin under the will of Mrs. Cabell. The opinion delivered by Judge Joynes, in which all the judges concurred, plainly shows this. It commences with the declaration that the bill was filed by the executor of Mrs. Cabell against her legatees and distributees, for the purpose of obtaining the advice and direction of the court in his administration of the estate; and especially in respect to the construction and effect of certain provisions of the will and codicils of the testatrix. It then proceeds to discuss and decide the various questions arising upon these provisions. Upon three of the points involved the decrees of the circuit court were reversed, and upon the other five they were affirmed. In no part of the opinion is any reference made to the collection of the debts now the subject of controversy, or indeed to the conduct of the executor in the admin-

istration of the assets, any further **766** *than it affected or was connected with the questions at issue between the next of kin and the legatees.

Mrs. Cabell had left a very large personal estate, and a very numerous kindred, widely dispersed throughout the country. Many of the provisions of her will presented serious difficulties in respect to a proper construction; and these difficulties were greatly increased by the disastrous results of the war. In the very protracted controversy before this court, conducted by counsel of great ability, a controversy involving points of a novel and perplexing character, it is not surprising that both counsel and the court lost sight of the executor and of every question affecting his liability. Indeed until the rights of the respective claimants under the will were adjudicated, until it was ascertained who was entitled to that portion of the estate passing under the residuary clause, there was no one especially interested to engage in a controversy with the executor respecting his administration of the assets. That the executor did not consider himself particularly interested in the decision, is shown by the fact that he was not even represented by counsel before this court.

It appears that the executor in the years 1862, 1863 and 1864, had collected in confederate currency a very large amount of debts due the estate, which it is alleged were secured by liens upon real estate. It is not intended here even to intimate that he was guilty of a devastavit in making these collections. But it is incredible that the counsel would have submitted without argument, and this court have decided without considering and without ever assigning a reason therefor, questions of so much importance and difficulty as arise out of the transactions of the executor with reference to these debts. It may be

767 assumed therefore, *with absolute confidence, that the court did not pass, and did not intend to pass, upon any question affecting the executor's liability in this particular.

It is impossible to look into the record as it was before the circuit court without a very strong impression that the question of the executor's liability, as it is now presented, received but little attention in that court. As has been seen, the bill was filed by the executor himself. Its main object was to obtain the direction of the court touching the distribution of the estate under the will. The answers of the defendants are almost exclusively devoted to that subject, and the testimony taken is given the same direction. It appears that the commissioner in settling the executor's accounts with the estate charges him with the debts collected in the years 1862, 1863 and 1864, and finds against him a large balance as of the 1st February 1866. There is no allusion in this account to confederate currency, nor is any credit claimed or allowed upon that ground. There was nothing in this account calling for any exception on the part of the

next of kin. The first reference made by the commissioner to the confederate collections and investments by the executor is in a statement of the executorial accounts with the residuary legatee and "the unknown representatives of Mrs. Cabell." To these statements exceptions were filed by the next of kin, which, in the main, were overruled by the court. The court said, "that to the extent to which the executor proceeded to administer the estate in confederate funds, his transactions in these funds are to be recognized as valid." This does not very clearly indicate whether the court intended to sustain the executor in every respect in the collections made by him, or only to affirm the validity of his transactions in confederate funds, so

768 far as they applied to payments made to legatees and next of kin. The whole manner of taking the accounts, and all the attending circumstances, lead to the conclusion that the latter supposition is probably the correct one. At the time the decrees of 1867 and 1868 were rendered, the perplexing questions growing out of the conduct of fiduciaries during the war had received but little attention from the courts in Virginia. The condition of the country then, under military domination, was far from favorable to the deliberate investigation of such questions. This condition of things had not materially changed down to the hearing of the cause before this court at the April term 1870. It is not surprising therefore, in view of all the circumstances, that the question of the executor's liability to the next of kin received so little consideration from this court and the circuit court.

The decree of this court affirmed the decrees of the circuit court in every particular except so far as they were expressly reversed on the three grounds mentioned. Now if, as is contended here, the decrees of the circuit court recognized the validity of the executor's transactions in confederate collections, this court by its decree of affirmation was placed in the attitude of having adjudicated questions of the greatest importance which it had not even considered; questions involving the interests of a party not even before the court by counsel; questions which ought properly to have been postponed until the main subject of controversy was finally disposed of.

It is very probable that the attention of the court was at the time called to the language of its decree, and its injurious effect upon the rights of the parties. And therefore it was this important reservation was inserted: "On motion of the counsel

769 of C. C. Lee and others, next of kin of Mary W. Cabell, dec'd, it is ordered that nothing in this decree shall prevent the next of kin or any other party interested, from asserting by proper proceedings, any claim they may be advised to assert against D. J. Hartsook, executor of Mary W. Cabell, on account of his transactions as such executor." Can there be a reasonable doubt as to the purpose of the court in making this reservation. In view of all the cir-

cumstances mentioned, can there be a question as to the propriety and justice of some such provision.

It is very true that this court having decided all the questions between the legatees and next of kin, might have gone on to decide those between the next of kin and the executor. One objection to this course was, that the cause was not then in a condition for such a decision. No direct and proper issue had been raised upon these points; nor did the record contain sufficient material for their safe adjudication. If the court had been called on to pass upon the executor's conduct with reference to the debts in question, there is but little doubt it would have remanded the cause for further inquiry—as was done in *Corbin and Mills* the preceding year—or it would have required the parties complaining to proceed by cross-bill against the executor according to the present disposition of the case.

It has been said, and that is the view of the circuit court, that the true intent and meaning of the provision is, that the executorial accounts may be re-opened only as to such matters as were not raised at the previous hearings, or passed upon by the decrees of the circuit court and the court of appeals. If this is the only value of the reservation it was useless and unnecessary. Without such provision it is competent for

the parties to assert their claims 770 against the executor *on account of any matter not adjudicated by the court. The language employed does not admit of any such qualification. If there is any limitation as to the character of the claim which may be asserted against the executor, it is not found in the reservation itself, it must be looked for elsewhere.

Accordingly it is argued that the decrees of 1867 and 1868 being neither affirmed nor reversed as to the executor, necessarily remain in full force as to him; and as the decree of 1868 is final, it can only be impeached by bill of review. If this be so, it is obvious that the reservation practically amounts to nothing. As there is no error on the face of the decree, and no pretence of after discovered evidence, there is, of course, no ground for a bill of review. This court might as well have affirmed the decrees of the circuit court without qualification. The result is precisely the same. This court, in entering the reservation, must have supposed there was some proceeding by which the parties could assert their claim against the executor, and must have intended they might resort to that proceeding if they had any just cause of complaint against the executor. The court renders such decree as the court below ought to have rendered, and the reservation must have precisely the same effect before the court. It seems to me the purposes of justice will be as well if not better subserved by a cross-bill, to be filed by the next of kin against the executor. In conformity with this view, so much of the decree of the circuit court as overrules the twelfth exception of the next of kin to commissioner

Stephen's report must be reversed, and the cause remanded, with instructions that leave be given the parties interested, and they be required to file a cross-bill against the executor, touching the matters set forth in the said twelfth exception.

771 *It only remains to consider the question of the executor's liability for the amount of the claim against the Howardsville bank. The circuit court was of opinion that no liability attaches to him on that account. In this opinion we think the circuit court is unquestionably correct. It appears that as early as August 1863 the executor called the attention of the court below to this claim. One of the defendants also referred to it in his answer, and asked the court to make such decree in relation thereto as might be equitable and just. The matter being thus placed under the direct supervision of the court, it was entirely competent for either of the parties to make application to the court for any order touching the safety of the fund. Complaint is made that the executor did not correctly state the facts in his amended bill, facts with which he must have been perfectly familiar as an officer of the bank.

It is very true that he represented Mrs. Cabell's interest as being state stock; and there is no doubt he honestly believed it to be such. Very able counsel held the same opinion. One of the parties vigorously maintained that view, through all the stages of the controversy, and the question was never regarded as finally settled until the decision of this court in April 1870.

Even had the court below been placed in possession of all the facts, down to the minutest details, there is every reason to believe it would have taken no action in the matter. With the single exception of an order made in 1863, authorizing the executor to invest confederate currency in his hands, nothing was done in the cause, from the filing of the amended bill in 1863, until after the close of the war. This court cannot close its eyes to the fact, that from the beginning of the year 1863, to the termination of hostilities, the courts, even when in session, transacted but little business.

772 *Every part of the state was exposed to sudden incursions of the enemy. Counsel and suitors were in the army, or connected in some way with the public service. If ever there was a period in the history of mankind when the maxim "*leges silent inter arma*" applied, it was to the eventful years of 1863 and 1864 in the state of Virginia.

Does any one suppose that if the executor had called upon the court at such a crisis to adjudicate the character of this claim it would have done so, leaving all other questions in the cause undecided. If the circuit court had complied with the request, it is certain that neither of the parties would have acquiesced in the decision until affirmed by a court of the last resort.

The learned counsel for the appellants contends that a bill ought to have been filed by the executor against the bank for a

specific execution of the contract to deliver the stock. Surely the learned counsel does not forget that this court has already decided that Mrs. Cabell's contract with the bank was nothing more than a loan of money, with a special agreement as to the manner in which the loan should be repaid; and for breach of this contract the remedy was in damages. And so the circuit court also held. It would seem therefore perfectly clear that in neither court would a bill for the stock have been maintained. This would seem to be so upon general principles, as compensation may be obtained in damages at law for a breach of contract to deliver stock.

We are told, however, that the executor was not only a leading stockholder but a cashier of the bank, and therefore in a position to exercise strong influence with the authorities of the bank: that he ought to have exerted this influence, to induce them to redeem the stock from the state.

773 or to go into the market and *purchase other stock in its place, or at least to secure the money in some safe way. This is the burden of the argument on the part of the appellants, presented in the exceptions taken in the circuit court, and reiterated in the petition and the printed briefs of counsel.

There is not the slightest ground for believing that the bank would have made any arrangement of the kind. The executor states that the bank did not have and could not control the means either for redeeming or purchasing the stock: First, for the reason that nothing but countersigned notes of the bank could be used to withdraw the state stock from the treasury. The bank did not have and could not get the countersigned notes, as holders of these notes would not pay them in except for coin; and that the bank did not have, except a small sum: and besides, specie payments had been suspended. Second, in consequence of the stay law the debtors of the bank would not pay their notes, and could not be forced to do so. The correctness of this statement has not been impugned by any one. It effectually disposes of the theory so persistently urged, that the executor, if he had made the effort, could have induced the bank to furnish the stock for the benefit of the estate.

But rejecting this evidence as incompetent, we may think the executor might have succeeded with the bank; still it is a mere matter of conjecture. Surely he cannot be held guilty of a devastavit upon a mere conjecture as to the weight of his influence as an officer of the bank. To hold a fiduciary responsible, upon a mere supposition of what he might have done by the exercise of his official and personal influence at a particular juncture, is to embark in a field of the wildest speculation.

The injustice of such a pretension 774 is the more manifest *when it is remembered we are asked to hold the executor liable for not inducing the bank

o do what this court has held the bank was under no obligation to do.

In many cases a fiduciary incurs liability in respect of losses by his failure to call in money of the testator already invested. And it has been held he ought not, without great reason, to permit funds to remain upon mere personal security longer than is absolutely necessary. But these rules are based upon the idea that the fiduciary may sue and may enforce collection by process of law. They have but little application to a time of war and invasion, such as prevailed here in 1863 and 1864, when trials by jury in civil cases were suspended, the collection of debts by process of law prohibited, and payments, if made at all, only made in a depreciated currency. The most that can be said is, that the executor ought to obtain the lien of a judgment when there is real estate of the debtor. But in this case the bank owned no real estate, and a judgment if obtained would have been wholly unavailing. Possibly the executor might have obtained payment in Confederate money; but it will scarce be now contended that this would have been advantageous to the estate. The present controversy is an indignant complaint of collections in that currency, which have proved entirely worthless to the parties interested.

Upon the whole, we are of opinion that upon neither or any of the grounds suggested is the executor chargeable with the debt against the Howardville bank. The decree of the circuit court in this particular is plainly right, and must be affirmed.

The decree was as follows:

775 *This day came again the parties by counsel, and the court having maturely considered the transcript of the record of the decrees aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the circuit court did not err in holding that Daniel J. Hartsook, the executor of Mrs. Mary W. Cabell, dec'd, ought not to be charged with the sum of thirty-four thousand and six hundred dollars, or any part of it, on account of the claim against the Howardville Bank, and the said decree of the 7th of September 1872, is in this respect affirmed.

The court is further of opinion that C. C. Lee and others, next of kin of Mrs. Mary W. Cabell, dec'd, are not concluded by the several decrees of the circuit court pronounced on the 11th of October 1867, and of May 8th, 1868, or by the decree of this court, from asserting any claim they may be advised to assert against said Daniel J. Hartsook on account of his transactions as executor as aforesaid; and the said circuit court therefore erred in overruling upon the ground stated, the twelfth exception taken by C. C. Lee and others to the report of commissioner Stephens.

It is therefore decreed and ordered that the decree of the 25th day of March, 1872, be, and the same is hereby reversed and annulled so far as the same is herein de-

clared to be erroneous, and that it be affirmed in all other respects; and that the appellee Daniel J. Hartsook do pay to the appellants their costs by them expended in the prosecution of their appeal here. And it is further decreed and ordered that this cause be remanded to the said circuit court for further proceedings to be had therein in conformity with the foregoing opinion and decree, and with instructions that leave be given to the appellants and others the **776** next of *kin of Mary W. Cabell, or any of them, and that they be required to file their cross-bill against the said Daniel J. Hartsook, touching the matters set forth in the said twelfth exception.

Which is ordered to be certified to the said circuit court of Nelson county.

Decree reversed.

777 *The Winch. & Strasb. R. R. Co. & al. v. Colfelt & al.

September Term, 1876. Staunton.

1. Railroad Companies—Court of Appeals—Jurisdictional Amount.—On a creditor's bill against a railroad company, some of the debts proved are under \$500, but there is one for \$1,117.60, proved before the commissioner, and the decree of the circuit court is in favor of all of them against the company. An appeal by the company brings up all of them; and this court will pass upon all.

2. Same—Judgments against—Liability of Road and Franchises.—The road and franchises of the railroad company are liable for the payment of judgments recovered against the company.

3. Same—Same—Lease of.—It appearing from the report of the commissioner that the annual rent of the railroad is \$37,000, and the debts proved are but \$1,236.91, the road should be leased out for the shortest period, for which a sufficient rent may be obtained to pay the debts and the costs of the suit. And if to accomplish this object it is necessary to lease the railroad for a term which will yield in rents a sum far exceeding the amount of the judgments, and cannot be leased at all for a shorter term, the creditors are entitled to have it leased for the longer term.

4. Same—Parties to Creditor's Bill.—It appearing that another railroad company is in possession of the road, it is proper to make that company a party to the suit, to ascertain her interest in it, and that company not responding or showing what its interest is, a decree for leasing the road may be made.

***Court of Appeals—Jurisdictional Amount.**—Where several creditors, by creditor's bill, have obtained a decree against the common debtor, and some of the debts do not amount to \$500, though they aggregate as much, those creditors whose claims are insufficient are not entitled to an appeal; the debtor, however, may appeal as against all of the creditors. See the following cases, citing the principal case: *Craig v. Williams*, 90 Va. 502; *Williams v. Clark*, 93 Va. 691, 25 S. E. Rep. 1018; *Fleshman v. Fleshman*, 34 W. Va. 351, 12 S. E. Rep. 716; *Rymer v. Hawkins*, 18 W. Va. 318. Further see, *Gage v. Crockett*, 27 Gratt. 735, and note; *Devries v. Johnston*, 27 Gratt. 805; *Barton's Ch. Pr.* (2d Ed.) 1216.

This was a creditor's suit in the circuit court of Winchester, brought by Charles Colfelt against the Winchester and Strasburg railroad company, to subject the real estate of the company to satisfy judgments which he had recovered against the company. The bill was afterwards amended, and the Baltimore and Ohio railroad company, which was stated to be in possession of the real estate of the first-named company, under a lease was made a defendant. Both of the said companies

778 *demurred to the bill; but the cause coming on to be heard on the 24th of March 1875, the court overruled the demurrers, and recommitted the report, which had been previously made by a commissioner, with directions, after giving notice for four weeks in some newspaper, &c., to take an account of all debts which were liens upon the property of the Winchester and Strasburg railroad company. And leave was given to the railroad companies to file their answers within sixty days from the rising of the court: which they failed to do.

The commissioner returned his report, stating that but two debts, which were liens on the property, were produced before him. One of these was that of the plaintiff, made up of three judgments, one in the county court of Frederick, and the other two in the circuit court of that county, amounting together, at the date of the report, to \$169.91, and a debt due to John Z. Jenkins' executrix upon a judgment recovered by him in his lifetime, which, at the date of the report, amounted, principal and interest, to \$1,117.60. The real estate of the Winchester and Strasburg railroad company was reported at a valuation of \$630,000, and its annual rental at \$37,000.

The defendants excepted to the report on the ground that the debts reported were not sustained by sufficient evidence. The evidence as to all the judgments was the certificate of the clerk of the court in which it was rendered, stating the court and the term at which it was rendered, the names of the parties, the amount of the judgment, and the amount thereof which bore interest and the date of its commencement; and an execution of fieri facias which had been issued on one of Colfelt's judgments, had been returned no effects. All the judgments had been docketed.

779 *The cause came on to be heard on the 17th of November 1875, when the court overruled the exceptions to the report, and fixed the amount of the debts as reported by the commissioner, and decreed that unless the Winchester and Strasburg railroad company should, within sixty days from the rising of the court, pay to Jenkins' ex'x and Colfelt their debts—stating the amount &c., as reported by the commissioner—the sheriff of the county of Frederick should, after notice &c., offer the Winchester and Strasburg railroad and its franchises, at public rental to the highest bidder for one year from the 1st of April 1876, upon the terms &c. From this decree

the defendants obtained an appeal to this court.

Andrew Hunter and Pendleton, for the appellants.

Barton & Boyd and Dandridge, for the appellees.

Anderson, J., delivered the opinion of the court.

The constitution of Virginia provides that the supreme court of appeals shall not have jurisdiction in civil cases where the matter in controversy, exclusive of costs, is less in value or amount than \$500, except in cases enumerated. In a case decided at the present term, the court held, Judge Staples delivering the opinion, that the value or amount in controversy in the court from whose decision the appeal is taken, at the date of the judgment or decree, determines the question of jurisdiction, and that there may be cases in which the appellate court would have jurisdiction to review the decision upon the petition of the plaintiff, when it would not have jurisdiction to review it upon the petition of the defendant; and vice versa. *Umbarger*

780 * & wife v. Watts & als., 25 Gratt. 167. was a creditor's bill to subject the life estate of Watts in real estate to the satisfaction of the plaintiffs' judgments. Neither of the plaintiffs' judgments amounted to \$500, exclusive of costs. The circuit court dismissed the bill; from which decision the plaintiffs appealed to this court. It was held that the court had no jurisdiction of the case.

Judge Christian, in whose opinion the other judges concurred, says "it is clear that the claims of the appellants are several and independent of each other. They are founded upon different contracts, upon judgments at different times." * * * "If one of the creditors is aggrieved by the decree, it is to the extent that his claim is not paid, and not because other creditors are not paid."

The case in hand was also a creditor's bill to subject the real estate of the Winchester and Strasburg railroad company to lien creditors. The plaintiff Colfelt's judgments, aggregated only \$169.91. John Z. Jenkins' judgment amounted to \$1,117.60, which he was allowed to come in and prove before the commissioner. And the decree against the Winchester and Strasburg company was for the aggregate of all the judgments, amounting to \$1,286.91; of which that company complains. If aggrieved, in what extent is it aggrieved by the decree? To the amount of Colfelt's judgments, or the aggregate of all the judgments? Clearly the latter. And the company being the party seeking the reversal of that decree, if it is erroneous, it is aggrieved to the extent of all the judgments; and this court is rightfully in possession of the case upon the petition of this appellant, and has jurisdiction to review the decision of the lower court and to reverse the decree, if

found to be erroneous as to all the judgments, the aggregate of which being the amount which the said plaintiff had in controversy in this suit. This opinion is not at all in conflict, perfectly consistent with *Umbarger v. Pitts*, supra.

The court is further of opinion that the property of the Winchester and Strasburg railroad company, in the decree mentioned, is liable to satisfy the judgments of the plaintiffs, which it appearing could be satisfied in a reasonable time from rents, it is not error to decree that the same should be leased for that purpose.

But it is contended that it was error to lease the railroad, the property of said company, for so long a term as one year, to satisfy so small a debt. This objection answered by the counsel for the appellees, the declaration that it could not be leased all for a shorter period than one year; and that such a decree for a short time would have been futile. To remove any difficulty on that score, the decree may be amended so as to test that matter. The appellees are certainly entitled to the satisfaction of their judgments out of this plaintiff's property. And if, in order to accomplish it, it is necessary to lease the railroad for a term which will yield in rents sum far exceeding the amount of their judgments, and cannot be leased at all for shorter term, the appellees are entitled to have it leased for the longer term. But it might be made to appear first, that it could not be leased for the shorter term. The court is of opinion therefore that the decree should be amended, so as to direct the commissioner to offer it for a term of three months; and if it cannot be leased for that term, or for an amount sufficient to satisfy the appellees' judgments and costs, including their costs in defending in appeal, that he then offer it for a term of six months; and if that is **12** *unavailing, then for a term of nine months; and if that is unavailing, then for a term of twelve months, as was required by the said decree.

The court is further of opinion that the appellees, plaintiffs below, having been informed that the Baltimore and Ohio railroad company had possession of the said road, upon what terms, or by what right, they were not informed, it was proper that they should have had leave to amend their bill, and to make the said last named company a party defendant, to enable it to assert and disclose any right it had, if compatible with the relief which the plaintiff sought against the Winchester and Strasburg railroad company, and that there was no error in the judgment of the circuit court overruling the demurrer of the said Baltimore and Ohio railroad company. And the said company, not having asserted any right in the Winchester and Strasburg railroad which could be prejudiced by the decree now under review, although if such right existed it had every opportunity of asserting it is too late now to assert any such

right, and it cannot complain of said decree.

The court is of opinion therefore to amend as hereinbefore specified said decree, and to affirm the same, with costs.

Decree amended and affirmed.

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*Mason & als. v. Wood.

September Term, 1876, Staunton.

1. Evidence—Competency of Parties to Testify.—M, and four others, execute a bond to W, for the price of a jack, and W warrants him sound and a good foal-getter. F, one of the obligors, dies, and in suit on the bond by W, against the survivors, they set up a breach of the warranty as their defence. On the trial W introduces witnesses to prove what two of the defendants said to the witnesses, long subsequent to the purchase, to disprove by implication the breach of the warranty. And then the defendants offer these two to testify as to what those conversations were. **Held:**

1. Same—Same.—F being dead, W, the plaintiff, could not under the statute testify in the cause; and therefore the two defendants are incompetent to testify, though in relation to a matter which occurred after the death of F. See Code of 1873, ch. 172, §§ 21, 22, p. 1109, 1110.

This was an action of debt in the circuit court of Warren county, brought in May 1873 by Angus M. Wood against James W. Mason and others, surviving obligors with O. R. Funsten, deceased, upon a bond for \$550, dated the 18th of March 1859, payable with interest one year from its date. The bond was given for the price of a jack, and Wood, at the time of the purchase, gave the purchasers a written warranty of soundness, and that he was a sure foal-getter. The defendants relied upon the breach of this warranty as their defense to the action.

On the trial of the cause there were eight exceptions taken by the defendants to rulings of the court, six of them upon questions of evidence, one as to certain instructions of the court, and one for **784** the refusal of the court to grant a new trial; but, except one or two of them, they do not involve any question of interest; and on these the case is sufficiently stated in the opinion of Judge Anderson.

The jury found a verdict in favor of the plaintiff for \$440, part of the debt in the declaration mentioned, with interest from

***Evidence—Competency of Parties to Testify.**—In an action on a contract if one of the parties has died, the opposing party cannot testify, and since he is incompetent, the testimony of the co-contractors of the decedent is thereby rendered inadmissible also. *Ginter v. Breedon*, 90 Va. 599, 19 S. E. Rep. 656; *McDevitt v. Frantz*, 85 Va. 753, 8 S. E. Rep. 642; *Boyd v. Townes*, 79 Va. 122; *Grandstaff v. Ridgely*, 30 Gratt. 1, and *note*; *Morris v. Grubb*, 30 Gratt. 286, and *note*; *Reynolds v. Callaway*, 31 Gratt. 436, and *note*; *Carter v. Hale*, 32 Gratt. 118, and *note*; *Ellis v. Harris*, 32 Gratt. 684, and *note*. All the above decisions cite the principal case. See further, *Owens v. Owens*, 14 W. Va. 88; *Grisby v. Simpson*, 28 Gratt. 348; *Statham v. Ferguson*, 25 Gratt. 28; Va. Code, § 3346.

the 18th of March 1859 until paid, less four years and two months war interest; and the court rendered a judgment according to the verdict. And thereupon the defendants applied to a judge of this court for a super-seas; which was awarded.

Williams & Williams and Cook & Son, for the appellants.

Walton and Turner, for the appellee.

Anderson, J., delivered the opinion of the court.

The plaintiffs in error, James W. Mason, J. McK'. Kennerly, Alexander M. Earle and James F. Leach, were sued by the defendant in error in debt upon a bond, in which they were the surviving obligors of themselves, and O. R. Funsten, deceased. The consideration of the bond was the price of a jackass, called Royal John, which they purchased from the defendant in error. The bond was delivered to the agent of the defendant in error by Leach, one of the obligors, when the jack was delivered to him several days subsequent to the date of the bond, and at the same time the defendant in error by his said agent delivered to Leach a writing under seal, by which, among other things, he warranted the said jack to be "a prompt performer, a sure foal-getter, and perfectly sound." The defendants below pleaded a breach of the said warranty, by which they had sustained damages, which they offered to set off against the plaintiffs' demand.

785 *In the progress of the trial the plaintiff below introduced as witnesses B. J. Wood, Robert H. Long and McKay, who testified to conversations they had held long subsequent to the purchase of the jack with James F. Leach and A. M. Earle, two of the obligors and defendants, tending by implication to disprove the alleged breach of warranty. To rebut and countervail their testimony, the defendants introduced the said Leach and Earle, with whom the conversations were had, to testify as to what those conversations were. The plaintiff objected to their competency, on the ground that O. R. Funsten, one of the obligors to the bond, was dead. The court sustained the objection, and refused to admit them to give testimony, to which ruling of the court the defendants excepted.

By section 21, of chapter 172 of Code of 1873, no witness is incompetent to give testimony by reason of interest; and in all actions and suits, &c., the parties thereto, whether plaintiff or defendant, are made competent to testify on their own behalf, if otherwise competent, except as thereafter provided. The exception pertaining to this case is in these words: "When one of the original parties to the contract, or other transaction, which is the subject of the investigation, is dead or insane, or incompetent to testify by reason of infancy, or any other legal cause, the other party shall not be admitted to testify in his own favor, or in favor of any other party having an

interest adverse to the party so incapable of testifying."

By the express terms of the above recited clause of this section, Funsten, one of the parties to the contract, being dead, Wood, the adverse party, is made incompetent to testify in his own favor, or in favor of any other party having an interest adverse to Funsten. And Wood being incompe-

786 tent to testify, can either of "the parties adverse to him be admitted to testify? The language of the statute seems to be explicit. When one of the original parties to the contract is dead, "or incompetent to testify by reason of infancy, or any other legal cause, the other party shall not be admitted to testify in his own favor." &c. The legislature may have intended to limit the incompetency to testify to transactions between the living and deceased party, or to the acts and declarations of the deceased party, and not to have otherwise restricted his general competency, as given by the twenty-first section; but if so intended it is not so expressed. By the terms and express letter of the law, parties in such cases are declared to be incompetent to testify in their own favor, &c. There is no limitation of the incompetency as to the subject-matter of the testimony. It is general and unrestricted. They are declared to be incompetent to testify in the cause in their own favor. It might have been reasonable in the legislature to have restricted the incompetency to such matters as the other party, if not incapacitated, might be qualified to speak to, as acts and declarations imputed to him, or transactions in which he acted a part, and left untouched his competency as to other matters; and such restriction might comport with the spirit of the act; but the legislature has not so said, and the court is not disposed to extend the operation of the act beyond its terms and express provisions, and the incompetency of parties to testify in their favor, &c., in such cases, being declared by the act in express terms they must be held incompetent to testify to any matter bearing upon the issues in the cause.

This opinion may seem to conflict with the decision of this court in *Field v. Brown & al.*, 24 Gratt. 74; but the cases are not analogous. In that case the general

787 *competency of the party to testify seemed not to be questioned; but was in fact recognized by the court below, and seems to have been acquiesced in by both parties; and the only point made before this court, was as to the admissibility of some of the questions and answers of the party, whose deposition had been given *à bene esse*. There was no objection made to his general competency, and the question was not raised in this court, nor seems to have been considered by it. In this case it is for the first time pointedly and squarely raised, and has to be met; and the court is of opinion, for the reasons given, that there is no error in the ruling of the circuit court refusing to admit Leach and Earle, parties in the suit, to testify.

The court is also of opinion that upon the facts certified, the court did not err in overruling the motion for a new trial. The facts certified do not establish a breach of the warranty although the jury, by allowing some damages, impliedly have found that there was a breach. But the facts certified would not warrant the court to set aside the verdict, because of the inadequacy of damages. The fact that the defendants never offered to return the jack, and it not appearing that they ever demanded an abatement from the price, on account of defects in the jack, until after the institution of the suit, raises a strong presumption against the justice of their demand for such an abatement, and in favor of the verdict of the jury.

The court is further of opinion that there is no error in the other rulings of the court, as set out in the other bills of exceptions, for which the judgment should be reversed and the controversy reopened. In the 6th instruction, bill of exceptions No. 6, "That such breach of warranty should be clearly proved by those alleging it, that is, there should be a decided preponderance
788 *of evidence of the breach of the warranty," the word decided ought to have been omitted, but the qualification, which immediately follows, that such evidence as will include every reasonable doubt of such breach is not required, so explains the meaning of what preceded, that the word decided was not likely to mislead the jury. Upon the whole, the court is of opinion to affirm the judgment of the circuit court, with costs.

Judgment affirmed.

789 *Pugh & al. v. Russell & als.

September Term, 1876, Staunton.

1. **Decedent's Estates—Priority of Creditors Previous to 1849.**—Previous to the act in the Code of 1849, a judgment against a deceased person had priority over debts by simple contract, and was to be paid out of the personal assets, if these were sufficient for the purpose; and having been paid out of the personal assets, this did not give simple contract creditors a right to have the assets marshaled, and to have their debts paid *pro tanto* out of the real estate.
2. **Same—Same—Marshaling.**—The payment of taxes due to the state out of the personal assets does not give a simple contract creditor a right to have the assets marshaled.
3. **Same—Same—Same.**—Though simple contract creditors might before the act of 1850 be substituted to the rights of a creditor by bond binding the heirs, the doctrine of marshaling assets does not apply to a judgment.
4. **Same—Subrogation.**—Before the act in the Code of

***Decedent's Estates—Priority of Creditors Previous to 1849.**—The principal case is cited in *Alexander v. Byrd*, 85 Va. 700, 8 S. E. Rep. 577; *Harper v. Vaughan*, 87 Va. 431, 12 S. E. Rep. 785; *Brewis v. Lawson*, 76 Va. 44; *Saddler v. Kennedy*, 26 W. Va. 640. See Va. Code, § 2005.

1849, if a judgment recovered against an executor or administrator upon the bond of the deceased, binding his heirs, was paid out of the personal estate, simple contract creditors might be substituted to the right of such creditor against the heirs.

5. **Same—Creditors—Marshaling.**—A commissioner, settling an administration account before a court of probate, states in his report that two of the credits allowed the executor were for payments of judgments, which were liens on the real estate. This is not evidence against the devisees to prove that the judgments were recovered against the executor upon a bond of the testator binding his heirs, and to entitle a simple contract creditor to marshal the assets.
6. **Same—Same—Statute of Limitations.**—A judgment is recovered against an executor by a simple contract creditor of his testator; and the creditor then files a bill against the devisees to marshal the assets, and subject the land of the testator in the hands of the devisees. It must be presumed that his action was not barred by the statute of limitations when the judgment was recovered; and he is not therefore barred by the statute in his proceeding against the devisees to marshal the assets.

790 *7. **Same—Same—Decree Separate.**—There are two devisees, one of whom owns one-fourth of a tract of land, and the other three-fourths; and the land is held to be liable to pay a debt of their testator. The decree should be separate against each for the payment of his *pro rata* share of the debt, with a reservation to the plaintiff to proceed against him for so much of the share of the other as cannot be made out of that other's part of the land.

Louis Wolfe, of the town of Winchester, died on the 10th of June 1850. By his will, which was admitted to probate on the 1st of July 1850, he gave his estate except his library, to his sister Mary Wolfe for her life. He gave a tract of land to Sidney S. Richards, wife of H. W. Richards, for her life, and then to her children; to his niece Delia E. Pugh, wife of John R. Pugh, another tract of land for her life, and then to three of her children, naming them, and another tract to the said Delia E. Pugh for her life, and then to four of her children, naming them; and he gave another tract to Sidney S. Richards in fee. Mary Wolfe who was appointed executrix declined to act, and H. W. Richards qualified as administrator with the will annexed.

In January 1854 Richards settled his administration account before the court of probate, showing a balance due him of \$99.79; and the commissioner reported that three of the debts with which the administrator was credited as having paid, were debts "binding upon the real estate, as well as upon the personalty." These were state taxes paid December 1850, and January 1851, \$34.11, an execution of Wm. B. Baker for \$235.58, and one of Robt. B. Wolfe, cashier, for \$195.90, both paid in June 1852. Neither of these entries show the character of the claim upon which the judgments were founded.

In November 1853 Wm. G. Russell recov-

ered a judgment against Richards as
 791 administrator de bonis *non &c. of
 Wolfe, for \$776.70 damages, with interest from the 11th of September 1850; and \$86.80 costs; and execution having been issued upon this judgment to be levied de bonis testatoris, the return of the sheriff upon it was, "No property found. The administrator states he has no assets."

In November 1860 Russell instituted his suit in equity in the county court of Frederick, which was afterwards removed to the circuit court of that county, against the administrator &c. and devisees of Louis Wolfe, deceased. In his bill he set out his judgment, the will of Louis Wolfe, the commissioner's report stating that debts amounting to \$469.59, which bound the land, had been paid by the administrator; and he stated that John R. Pugh was indebted to Wolfe for money paid by Wolfe for him in his life time, which had not been collected by the administrator. The prayer of the bill is, that the assets may be marshaled; that any balance of the personal assets may be applied to the payment of his debt, and that the real estate devised may be subjected to pay the remainder; and for general relief.

John R. Pugh and Delia E., his wife, and Charles Ginn and Mary C., his wife, who was one of the devisees, answered the bill. They denied that Louis Wolfe was indebted to Russell. They insisted that at any rate the judgment recovered by him was for services rendered, and was not evidence against them, and did not bind the real estate; and they relied on the statute of limitations as a bar to his claim against them.

John R. Pugh admitted that he was indebted to Louis Wolfe, for money paid for him; but as a tract of land had been mortgaged to secure the said Wolfe, and had been sold since his death under a decree
 792 of *the court, he was not able to say what was the balance of the debt he owed.

In March 1869 Rird & Carson were, upon their petition, made parties in the cause, as assignees of H. W. Richards, the administrator d. b. n. c. t. a., of the amount reported by the commissioner to be due to him.

The cause was referred to a commissioner to enquire, among other things, what was the balance of the debt due from John R. Pugh to Louis Wolfe; whether the debt set up in the complainant's bill for \$776.70, with interest, &c., was a just debt and charge upon the estate of Louis Wolfe, deceased; and the present condition, amount, owners and annual value of the real estate of which said Wolfe was possessed at the time of his death.

The commissioner made his report. He refers to the report of the commissioner made to the court of probate; says it seems to be correct, and that it shows that the administrator paid \$465.59 upon debts binding the realty. He reports the balance of the debt due from John R. Pugh to Louis

Wolfe at \$515.48, with interest from January the 12th 1844 to October 31st 1859, \$488.70 equal to \$1,004.24. That a number of depositions were taken by him in relation to the plaintiff's debt, which sustain it; and after crediting upon it a balance due from the plaintiff on account of the purchase money of the land given to secure Wolfe of \$172.96, he makes the plaintiff's debt, principal and interest, on the 31st of October 1859, \$1,116.43. He also reported as to the ownership and value of the lands of which Wolfe died possessed.

The defendants excepted to the report; on the following grounds, among others:

793 *1. In not allowing the statute of limitations; it being a new action against the devisees and subject to all defences.

2. In adopting the judgment of the court in the suit against the executor as the amount due against the devisees, without proof of the account.

3. In reporting a joint liability, and not a pro rata responsibility.

The commissioner returned with his report the depositions taken in relation to the plaintiffs' debt. These depositions showed that Russell had for years attended to the business of Louis Wolfe, who was old and feeble, and in the opinion of this court the evidence sustained the claim.

The cause came on to be heard in January 1872, when the court being of opinion that the unadministered personal assets of Wolfe's estate were sufficient to pay the plaintiffs' debt, without passing on the exceptions to the report, decreed that Charles B. Hancock, the present administrator of Louis Wolfe, deceased, do proceed as administrator to collect the amount due from John R. Pugh to the estate of Louis Wolfe, deceased, and any other debts due the estate, and as a special receiver of the said circuit court to hold the sum of money so collected subject to the future order of the court. And he was authorized to take all steps necessary for this purpose at the costs of said Wolfe's estate, and make report to the court.

The cause came on again to be heard on the 19th of March 1874, when Hancock having reported that an execution against the goods and chattels of John R. Pugh was returned "no property found," the court held that Russell was entitled to recover from the estate of Louis Wolfe, deceased,

the sum of \$776.70, with interest from
 794 September 11th, 1850, and \$86.80 *costs of the common law suit, subject to a credit of \$172.96, as of October 31st, 1859, being in favor of Russell of \$1,116.43, with interest on \$776.70 from October 31st, 1859. And it appearing from the report of the commissioner that the administrator of Louis Wolfe, out of the personalty of said estate, paid debts binding the realty to the extent of \$465.59, it is held by the court that to that extent, and with interest upon the same, from the time of payment, the real estate of Louis Wolfe, deceased, must contribute to the payment of the debt of

Russell. And the cause was referred to a commissioner to ascertain and report among other things—1. Whether John R. Pugh, or his assignee or vendee, is possessed of any realty which is liable for the payment of the debt against him reported in this cause. 2. The exact amount and interest of the debts binding the realty, to which the personality has been applied. 3. What the realty, and in what proportion the same is liable to contribution as adjudged in this decree.

The commissioner reported—1. That Delia E. Pugh and three of her children were dead; that the children died unmarried, childless and intestate, and John R. Pugh inherited three-fourths of the tract of land devised by Louis Wolfe to said Delia E. and her children. 2. That from the report of the commissioner returned to the court of probate, it appeared that the following debts binding the realty were paid out of the personality, viz:

Taxes on lands and lots \$34.11; amount of execution of William H. Baker \$235.58; amount of execution of R. B. Wolfe, cashier, \$195.90—\$465.59. This amount is of January 1st, 1854. Interest from January 1st, 1854, to December 1st, 1874, \$558.70. Amount and interest to December 1st, 1874, 795 \$1,024.29. 3d. *The land devised to Delia S. Richards and her children, and that devised to Delia E. Pugh and her children, each to bear one-half of the burden; and of the last John R. Pugh holds three-fourths, and Susan C. Pugh the other fourth.

The cause came on again to be heard, when the court confirmed the report of the commissioner, and decreed that unless within thirty days from the rising of the court, Susan C. Pugh and John R. Pugh should pay to John J. Williams and R. T. Barton, who were appointed receivers to collect the same, the sum of \$232.79, with interest from January 1st, 1854, commissioners named should proceed to sell the farm described in the commissioner's report at public auction, on terms stated in the decree; and unless John R. Pugh should in thirty days, &c., pay to the same receivers the sum of \$1,004.24, with interest on \$515.48 from October 31, 1859, the said commissioners should sell his interest in said farm. And a like decree was made against Charles L. Ginn and wife and Lewis Richards as to the same sum of \$232.79 and like interest. And thereupon John R. Pugh and Susan C. Pugh applied to a judge of this court for an appeal; which was allowed.

Tucker, for the appellants.

Barton & Boyd and Williams & Williams, for the appellees.

Staples, J., delivered the opinion of the court.

The act of March 1st, 1842, was the first statute of this state making real estate assets for the payment of simple contract

debts. That act, however, was subject *to a proviso, which declared that no debt which is not evidenced by writing, signed by the debtor or some person legally empowered by him, shall be charged on the real estate by virtue of this act. This proviso was omitted at the revival of 1849, so that as the law now stands, the real estate is subject to the payment of all the just debts of the decedent, without qualification.

In this case, the judgment of the appellee, Russell, against the administrator was upon a claim not evidenced by writing. That claim was therefore not a charge upon the real estate under the act of 1842, nor does it constitute such charge under the Code of 1850, because the debtor died before the revival took effect. This was not seriously controverted in the argument. The appellee claims that inasmuch as judgments which did constitute liens on the real estate of the debtor, were paid by the administrator of the latter out of the personality, he is entitled, upon the principle of marshaling assets, to be subrogated to the lien of the judgments thus paid.

It is a well settled doctrine of equity, that if a specialty creditor, whose debt binds the heirs, receives satisfaction out of the personal assets of the decedent, a simple contract creditor will in equity stand in his place against the real assets, to the extent that the specialty creditor shall have exhausted the personal assets in the payment of the debts. The reason is that when there is both real and personal assets, creditors by specialty, in which the heirs are bound, are by the common law entitled to payment out of either of these funds. At law they may take their remedy against the heir, or against the executor. Having their election of remedies, if they exhaust the only fund to which the simple contract creditors can apply, equity places the latter in the position of the former, so far 797 *as the specialty creditors have exhausted the personal estate. 2 Lomax on Executors, pp. 418, 419.

The question is whether this principle applies to a creditor having a judgment recovered in the life time of the debtor: under the law, as it stood previous to the Code of 1849, a judgment was a debt of superior dignity in the administration of the personal estate. It also constituted a lien upon the real estate, but it conferred no right of election, as in the case of a specialty binding the heirs. The creditor was bound to exhaust the personal estate before he could resort to the land in the possession of the heir. The judgment being a debt of higher dignity than bonds or simple contract debts, the executor was required to pay the former before the latter. If the personal estate was exhausted in paying the judgment, the simple contract creditor was utterly without remedy. And this was upon the very absurd principle that the right of subrogation only occurs where one of the creditors has two funds,

805 *Devries & Co. v. Johnston & Wolfe & al.

September Term, 1876, Staunton.

1. Suits in Equity—Attachments—Court of Appeals—Jurisdictional Amount.—Three suits in equity are brought by the same plaintiffs against the same defendants to enforce payment of debts by attachment and sale of the same land. By order of the court these suits are directed to be consolidated and heard together, and then plaintiffs file an amended bill bringing in a third party. There being a decree dismissing the attachments, the plaintiffs may appeal to the court of appeals, though neither of the debts amount to \$500, the sum of all of them being more than that amount.

2. Same—Same—Debts Not Due.—*Quere:* If a creditor, whose debt is not yet due, may bring a suit in equity to attach the property of his absent debtor, or to set aside a deed as fraudulent.

This was a contest between the creditors of Johnston & Wolfe, of Baltimore. Devries & Co. filed three bills against Johnston & Wolfe, which are set out in the opinion of Judge Anderson. Francis White filed six bills against the same parties to attach the same tract of land. These suits were commenced on the 13th of May 1872, and were to recover debts then due.

In September 1872, Francis White filed his petition in the case of Devries & Co., in which he stated the institution of his suits and the amounts involved in each. He says that when Devries & Co. instituted their respective suits, and issued their attachments, the debts sued for by them were

***Suits in Equity—Consolidation of Suits.**—The principal case is cited on this subject in Patterson v. Eakin, 87 Va. 54, 12 S. E. Rep. 144. See also, Barton's Ch. Pr. (2d Ed.) 861.

Jurisdictional Amount for Court of Appeals.—See W. & S. R. Co. v. Colfelt, 27 Gratt. 777, and *note*.

***Attachments in Equity—Debts Not Due.**—On the subject of attachments in equity for debts not yet due, see Va. Code, § 2964; Batchelder v. White, 80 Va. 108; Barton's Ch. Pr. (2d Ed.) 612.

BILLS QUIA TIMET.

Definition.—A bill *quia timet*, as the term implies, is a remedy for anticipatory mischief, in the form of a bill in equity, filed by a person fearing some future injury to his rights in property, real or personal, from the negligence, fault, or fraud of another. Enc. Pl. & Pr. 599; Stephenson v. Taverners, 9 Gratt. 398.

When Resorted to.—In Randolph v. Kinney, 8 Rand. 397, the court said: "When a person is apprehensive of being subjected to a future inconvenience, probable, or even possible, to happen, or be occasioned by the neglect, inadvertence or culpability of another, or where any property is bequeathed to one after the death of another, and which the former is desirous of having secured safely for his use; or where a surety is fearful of injury, from the neglect of his principal to pay the debt; in all these cases, and others of this kind, the bill *quia timet* may be resorted to."

Necessary Allegations.—In the case of Lane v. Eggleston, 2 Patt. & H. 231, it was held that a bill *quia timet* must allege that the complainant may be subjected to loss by the negligence, inadvertence or

not due; and he charges that the said attachments sued out by Devries & Co. are null and void; and he prays that they may be quashed, and that the land may be sold, and the petitioners debts satisfied out of the proceeds of sale.

808 *In November 1872, the case came on upon the petition of Francis White, and the court being of opinion that the attachments sued out by Devries & Co. were improperly sued out, it was ordered that they be abated. And thereupon Devries & Co. applied to a judge of this court for an appeal; which was allowed.

Dandridge and Pendleton, for the appellants.

Barton & Boyd, for the appellees.

Anderson, J. The appellants are creditors of the appellees by three promissory notes, one bearing date December 2nd, 1871, payable at three months; another one bearing date November 22nd, 1871, payable at four months; and the other bearing date December 20, 1871, payable at four months. On the same day, the 20th of February 1872, they brought three several suits in equity, by suing out three several subpoenas and attachments in chancery, and on the 26th of the same month filed a bill in chancery in each case, the same in substance; and in each case upon affidavit of non-residence, and the return of the sheriff an order of publication was awarded against the defendants. The bill in the first case.

culpability of the defendant. See also, Randolph v. Kinney, 8 Rand. 394; Randolph v. Randolph, 2 Leigh 544.

A bill in the nature of *quia timet* must show grounds for sustaining it. Fowler v. Saunders, 4 Call 381.

Sureties.—In Croughton v. Duval, 3 Call 69, where the obligee in a bond refused to sue, upon the request of the surety of the obligor, it was held that such surety might bring a bill *quia timet* to compel the principal to pay and the creditor to receive the money. This case also decided that the statutory provision, allowing a surety on a bond to compel the creditor, in a court of law, to institute suit against the principal, did not take away any remedy which the surety was entitled to before. For re-enactment of the statute, see Va. Code, §§ 2390, 2391. As sustaining the above proposition, see Norris v. Crummer, 1 Rand. 388.

A surety, whose principal is dead, may file a bill *quia timet* against the creditor and the executor of the debtor, to compel the latter to pay the debt so as to exonerate the surety from responsibility. Stephenson v. Taverners, 9 Gratt. 398.

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vers the indebtedness of the defendants to the plaintiffs on the 2nd day of December 1871, in the sum of \$438.29 cents, which it is averred is evidenced by a note of that date, payable three months after date. It appears from the bill and exhibits that neither note was due at the time suits were brought.

The bill avers that the firm of Johnston & Wolfe, the defendants, since the giving of the note had become insolvent. But that he said Wolfe owned a tract of land in Frederick county, described in the bill, which was devised to him by the will of his father.

107 *It alleges that the defendants are non-residents of the state of Virginia, and were so at the commencement of this suit; and that the said Wolfe was in hopeless financial embarrassment.

It further charges, that by a deed dated the 16th of December 1871, shortly before the institution of this suit, and recorded in the clerk's office of Frederick county on the 7th of December 1871, the said Wolfe conveyed the aforesaid tract to said Johnston, which conveyance was made with intent to hinder, delay, and defraud creditors; by reason whereof the plaintiffs have just cause to apprehend that their said debts may not be paid, and are advised that by the equitable powers of the court, and by its attachment process, the said tract of land may be subject to its payment. The prayer is that the land may be sold and the proceeds applied to the payment of their debt.

At a subsequent term of the court, 24th of May 1872, the three suits by order of the court were to be consolidated, or proceeded in as one suit; and the plaintiffs were given leave to file their amended bill.

The amended bill adds to, and amends the allegation of the original bill, with regard to the conveyance of the land by Wolfe to Johnston, by alleging that the said Wolfe on or before the 16th of December 1871, executed to the said Johnston his writing obligatory for a large sum of money, which he secured to said Johnston by a mortgage upon the land in question, which was admitted to record in the clerk's office of the county court of Frederick on the 27th of December 1871. And it further charges that a deed purporting to be an assignment of the said mortgage to Miles White, bearing

property out of the way." *Per Curiam*, in *Mortimer v. Moffatt*, 4 H. & M. 504. The power of a court of equity to require such security from a tenant for life, is to be exercised, not as a matter of course, but of sound discretion, according to circumstances. *Holliday v. Coleman*, 2 Munf. 102.

In *Chisholm v. Starke*, 3 Call 25, a testator devised slaves to his wife for life, remainder to his children. On the remarriage of the wife, her husband sold the slaves to bona fide purchasers. Held, that if the remaindermen bring a bill *quia timet* against the husband and the purchasers, a court of equity will decree that the husband must give security for the forthcoming of the slaves (with their increase) at the death of the wife, but that the purchasers need not give such security.

ing date the 10th of December 1871, which is the date of the mortgage, was recorded in the clerk's office of said county court 808 on the 5th of January 1872. *Copies of both deeds are in the record. The bill further charges that the said mortgage securing the bond aforesaid, was executed together with the bond, for the sole purpose of raising money thereon for the firm of Johnston & Wolfe. That White, who is a money dealer, agreed to advance the money to Johnston on said bond, and that the assignment was drawn up with a view to that end, and was left with White, who failed to comply with his agreement to advance the money; and the bond was never passed to him, but remains in the possession of Wolfe the obligor: which he was never to part with until the arrangements for raising the money were completed. And the bill charges that White fraudulently designing to make avail of said assignment without advancing the money, which was the condition on which it was placed in his hands, refused to deliver it to Johnston or Wolfe who demanded it, but fraudulently retained it. And to the detriment of Wolfe & Johnston, and to the plaintiffs their creditors, had the assignment recorded as aforesaid, to effectuate his iniquitous and fraudulent design. The prayer is that the said White may be made a party to this and the original bill, and be compelled to answer them; and that the said assignment may be set aside, and for general relief. On the 20th of February 1872 notice lis pendens of these suits, the plaintiffs by their counsel caused to be recorded in the clerk's office of the county court of Frederick.

The court is of opinion, upon the preliminary question raised by the appellees' counsel, as to the jurisdiction of this court to hear this cause upon the appeal, that inasmuch as the three causes were essentially one, and were very properly consolidated, or united in one, and proceeded in and heard as one cause by the court below, that the matter in controversy upon 809 this appeal *exceeds the amount necessary to invest this court with jurisdiction; and therefore that the objection raised to the jurisdiction of this court must be overruled.

Upon the merits, the case is presented in two aspects. First, as a proceeding by foreign attachment in equity, or second, as

Creditor.—A bill of *quia timet* is not applicable, on behalf of a creditor, whose debt is payable at a future time, to compel the debtor to give security for the prompt payment of the debt when it shall become due. See also, *Devries v. Johnston*, 27 Gratt. 806.

To Quiet Title.—On the principle of *quia timet*, a court of equity will entertain a suit by the owner in possession of land, to remove a cloud from his title, by annulling a deed that by mistake or fraud, conveys the land to another who makes adverse claim thereto, but brings no suit. *Stearns v. Harman*, 80 Va. 48; *Carroll v. Brown*, 28 Gratt. 791. These cases hold that when the owner is out of possession, ejectment is the proper remedy.

805 *Devries & Co. v. Johnston & Wolfe & al.

September Term, 1876, Staunton.

1. **Suits in Equity—Attachments—Court of Appeals—Jurisdictional Amount.**—Three suits in equity are brought by the same plaintiffs against the same defendants to enforce payment of debts by attachment and sale of the same land. By order of the court these suits are directed to be consolidated and heard together, and then plaintiffs file an amended bill bringing in a third party. There being a decree dismissing the attachments, the plaintiffs may appeal to the court of appeals, though neither of the debts amount to \$500, the sum of all of them being more than that amount.
2. **Same—Same—Debts Not Due.**—*Quere:* If a creditor, whose debt is not yet due, may bring a suit in equity to attach the property of his absent debtor, or to set aside a deed as fraudulent.

This was a contest between the creditors of Johnston & Wolfe, of Baltimore. Devries & Co. filed three bills against Johnston & Wolfe, which are set out in the opinion of Judge Anderson. Francis White filed six bills against the same parties to attach the same tract of land. These suits were commenced on the 13th of May 1872, and were to recover debts then due.

In September 1872, Francis White filed his petition in the case of Devries & Co., in which he stated the institution of his suits and the amounts involved in each. He says that when Devries & Co. instituted their respective suits, and issued their attachments, the debts sued for by them were

***Suits in Equity—Consolidation of Suits.**—The principal case is cited on this subject in *Patterson v. Eakin*, 87 Va. 64, 12 S. E. Rep. 144. See also, *Barton's Ch. Pr.* (2d Ed.) 861.

Jurisdictional Amount for Court of Appeals.—See *W. & S. R. Co. v. Colfelt*, 27 Gratt. 777, and *note*.

***Attachments in Equity—Debts Not Due.**—On the subject of attachments in equity for debts not yet due, see *Va. Code*, § 2964; *Batchelder v. White*, 80 Va. 108; *Barton's Ch. Pr.* (2d Ed.) 612.

BILLS QUIA TIMET.

Definition.—A bill *quia timet*, as the term implies, is a remedy for anticipatory mischief, in the form of a bill in equity, filed by a person fearing some future injury to his rights in property, real or personal, from the negligence, fault, or fraud of another. *Enc. Pl. & Pr.* 590; *Stephenson v. Taverners*, 9 Gratt. 398.

When Resorted to.—In *Randolph v. Kinney*, 3 Rand. 397, the court said: "When a person is apprehensive of being subjected to a future inconvenience, probable, or even possible, to happen, or be occasioned by the neglect, inadvertence or culpability of another, or where any property is bequeathed to one after the death of another, and which the former is desirous of having secured safely for his use; or where a surety is fearful of injury, from the neglect of his principal to pay the debt; in all these cases, and others of this kind, the bill *quia timet* may be resorted to."

Necessary Allegations.—In the case of *Lane v. Eggleston*, 2 Patt. & H. 231, it was held that a bill *quia timet* must allege that the complainant may be subjected to loss by the negligence, inadvertence or

not due; and he charges that the said attachments sued out by Devries & Co. are null and void; and he prays that they may be quashed, and that the land may be sold, and the petitioners debts satisfied out of the proceeds of sale.

806 *In November 1872, the case came on upon the petition of Francis White, and the court being of opinion that the attachments sued out by Devries & Co. were improperly sued out, it was ordered that they be abated. And thereupon Devries & Co. applied to a judge of this court for an appeal; which was allowed.

Dandridge and Pendleton, for the appellants.

Barton & Boyd, for the appellees.

Anderson, J. The appellants are creditors of the appellees by three promissory notes, one bearing date December 2nd, 1871, payable at three months; another one bearing date November 22nd, 1871, payable at four months; and the other bearing date December 20, 1871, payable at four months. On the same day, the 20th of February 1872, they brought three several suits in equity, by suing out three several subpoenas and attachments in chancery, and on the 26th of the same month filed a bill in chancery in each case, the same in substance; and in each case upon affidavit of non-residence, and the return of the sheriff an order of publication was awarded against the defendants. The bill in the first case

culpability of the defendant. See also, *Randolph v. Kinney*, 3 Rand. 394; *Randolph v. Randolph*, 2 Leigh 544.

A bill in the nature of *quia timet* must show grounds for sustaining it. *Fowler v. Saunders*, 4 Call 381.

Sureties.—In *Croughton v. Duval*, 3 Call 69, where the obligee in a bond refused to sue, upon the request of the surety of the obligor, it was held that such surety might bring a bill *quia timet* to compel the principal to pay and the creditor to receive the money. This case also decided that the statutory provision, allowing a surety on a bond to compel the creditor, in a court of law, to institute suit against the principal, did not take away any remedy which the surety was entitled to before. For re-enactment of the statute, see *Va. Code*, §§ 2890, 2891. As sustaining the above proposition, see *Norris v. Crumney*, 2 Rand. 338.

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The bill avers that the firm of Johnston & Wolfe, the defendants, since the giving of the note had become insolvent. But that the said Wolfe owned a tract of land in Frederick county, described in the bill, which was devised to him by the will of his father.

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The court is of opinion, upon the preliminary question raised by the appellees' counsel, as to the jurisdiction of this court to hear this cause upon the appeal, that inasmuch as the three causes were essentially one, and were very properly consolidated, or united in one, and proceeded in and heard as one cause by the court below, that the matter in controversy upon **809** this appeal *exceeds the amount necessary to invest this court with jurisdiction; and therefore that the objection raised to the jurisdiction of this court must be overruled.

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a proceeding upon the principles of original equity jurisdiction. As has been seen, "the equitable powers of the court," and "its attachment process," both are invoked in the bill as clothing the court with power to relieve.

It would seem that the attachment process was relied on only as ancillary or auxiliary to the original equity jurisdiction, and not as a distinct primary ground of jurisdiction. Whether it is material to consider the distinction in this case I will not stop now to inquire, but will proceed with the more important inquiry, whether upon the case made by the original and amended bills, a court of equity has inherent original jurisdiction to afford relief.

By the statute Code of 1873, chap. 175, § 2, p. 1126, a creditor before obtaining a judgment or decree for his claim, may institute any suit to avoid a gift, conveyance, assignment, or transfer of, or charge upon the estate of his debtor, which he may institute, after obtaining such judgment or decree," &c. The plaintiffs were creditors at the time of instituting this suit. Their claim was *debitum in presenti, solvendum in futuro*. They have present interest in their debtor's property on which alone they rely for the satisfaction of their debt at maturity, and the getting a conveyance or assignment of it by a third party surreptitiously and fraudulently, and the placing that conveyance or assignment on record, may be the means of enabling him to transfer the property to an innocent purchaser for value, and thereby consummate his fraud, and irretrievably

810 *prevent its application to the payment of the appellants just debt; an apprehension which is well justified, by the circumstances under which he procured the possession of the deed of assignment, and his unjustly and fraudulently withholding it from the debtor; and instead of returning it to him, causing it to be spread upon the record of the county court. It was a wrong to the debtor of the plaintiffs, and it was equally a wrong to them.

There can be no question that Johnston & Wolfe could maintain a suit against White to set aside said assignment, or to compel its surrender to them. If they could, why may not their creditors? Why may not their application to the interposition of a court of equity be made, before their debt is due, to prevent this wrong? They have a present interest which is threatened to be destroyed by the consummation of the fraudulent transaction to the same extent that it would be if their debt was due. The injury to them is the same that it would be, if their debt were due. They have a present interest which is brought into jeopardy by a fraudulent transaction, and which, if not at once arrested, by the interposition of a court of equity, will result in the total destruction of that interest.

It is a favorite doctrine of courts of equity, that they are invested with jurisdiction to prevent injury and wrong, as well as to

compel the reparation of injuries already accomplished.

I am of opinion, therefore, that a court of equity had jurisdiction to relieve the plaintiffs against the injury by which they were menaced, and the notes all falling due before any decree was pronounced in the cause, the first one falling due a few days after the suit was brought, the plaintiffs were entitled to a decree to subject 811 *the land in question to the payment of their debt, they being entitled to priority over the subsequent attachment creditor. I am of opinion, therefore, to reverse the decree, and to remand the case to the circuit court for further proceedings to be had therein in conformity with this opinion.

Moncure, P., concurred in the opinion of Anderson, J.

Christian and Staples, J's, dissented.

Decree affirmed by a divided court.

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*Brock v. Rice & als.

September Term, 1876, Staunton.

1. *Commissioners' Sales—Confirmation by Court.*—

Whether the court will confirm a sale made by commissioners under its decree, must, in a great measure, depend upon the circumstances of each case. It is difficult to lay down any rule applicable to all cases; nor is it possible to specify all the grounds which will justify the court in withholding its approval.

2. *Same—Same—When Withheld.*—In such a case, if there is reason to believe that fraud or mistake has been committed to the detriment of the owner or purchaser, or that the officer conducting the sale has been guilty of any wrong or breach of duty to the injury of the parties interested, the court will withhold a confirmation of the sale.

3. *Same—Report—Who May Object.*—In such a case, either party may object to the report of the commissioner, and the purchaser himself, who becomes a party to the sale, may appear before the court and have any mistake corrected.

4. *Same—Same—Discretion of Court.*—The court in acting upon a report of sale, does not exercise an arbitrary but a sound legal discretion in the interests of fairness and prudence, and with a just regard to the rights of all concerned.

5. *Same—Auctioneer Acting Partially.*—An auctioneer or crier making a sale, cannot properly act for himself or any other person in bidding for the property.

**Commissioners' Sales—Confirmation.*—For the principles by which the court determines whether a sale by a commissioner should be confirmed or set aside see the following decisions, citing the principal case: *Thomas v. Bank*, 36 Va. 292, 9 S. E. Rep. 1122; *Todd v. Gallego, etc., Co.*, 84 Va. 590, 591, 5 S. E. Rep. 68; *Coles v. Coles*, 83 Va. 527, 528, 5 S. E. Rep. 673; *Terry v. Coles*, 80 Va. 702, 708, 707; *Effinger v. Kenney*, 3 Va. 558; *Hickson v. Rucker*, 77 Va. 138; *Langyber v. Patterson*, 77 Va. 474; *Hansucker v. Walker*, 7 Va. 756; *Berlin v. Melhorn*, 75 Va. 641; *Redd v. Jones*, 30 Gratt. 133; *Roudabush v. Miller*, 32 Gratt. 45; *Hartley v. Roffe*, 12 W. Va. 425; *Marling v. Robrecht*, 18 W. Va. 474; *Hilleary v. Thompson*, 11 W. Va. 18.

. Same—Same—Effect.—A case in which the court refused to enforce a sale against the purchaser, on account of the misconduct of the life tenant and the auctioneer, though the conduct of the commissioner was unexceptionable.

. Same—Setting Aside.—The sale being set aside as to the life-tenant, must be set aside *in toto*, though some of the remaindermen are infants.

Dr. John W. Rice, of the county of Shenandoah, died in 1862. He left a large estate in land, and a number of children. He gave to his sons each a tract of land; and among them to his son, John Harper
113 *Rice, a tract of about four hundred and seventy-five acres, of which, about two hundred and seventy-five acres, he describes as lying along Smith's creek, and two hundred acres of wood land on the west side of Massanutton mountain. This land he estimates at \$13,000; and he charges the land with two sums each of \$1,000. This land he gives to John Harper Rice for his life, and at his death it is to be sold, and the proceeds divided among his children.

In February 1872, John Harper Rice instituted his suit in equity in the circuit court of Shenandoah county, in which he set out the devise to him and his children, and the said charges thereon; and also that he owed about \$1,000, as one of the executors of his father, which is directed by the will to be paid out of the land. He says that the sums directed by his testator, to be paid by him, cannot be paid without a sale of the said real estate, and that he believes it will be for the benefit of his infant children as well as his adult child that a sale of the same be made. And making the children parties defendants, he asks for a sale of the land.

The case was regularly proceeded in, and a decree was made appointing commissioners to sell the land. In August 1874 they returned their report, in which they say that they had advertised the land for sale at public auction, and at the sale John P. Brock, by his agent, C. P. Moore, became the purchaser of said land at the price of \$34.50 per acre. That said Brock by said agent signed a memorandum of said sale and purchase, which was also on the same day, and immediately after it was signed by said agent (the said Brock not then being present), recognized and affirmed by said Brock in a writing signed by him. They further state, that about the 1st of June one of the commissioners
314 *received a letter from Brock, in which he denies the authority of Moore to bid for him in the manner the sale was made.

At the August term of the court for 1874, a rule was made upon Brock returnable to the 27th of August, to show cause why he should not be required to comply with the terms and conditions of the said sale. In response to the rule Brock filed his affidavit; and a number of affidavits were filed by him and the plaintiff in the cause; and a number of depositions were afterwards taken and filed.

On the 14th of April 1875, the case came on to be finally heard upon the rule, when the court overruled Brock's objection to the confirmation of the sale, and decreed that he should comply with its terms by the payment of the sum of \$4,071.87, that being one-fourth of the purchase money which was required to be paid on the 20th of August 1874, with interest from that day, and the execution of his bonds payable in four equal instalments of \$3,053.90, at one, two, three and four years from said 20th of August 1874, with good personal security in the first two of said bonds. And thereupon Brock applied to a judge of this court for an appeal; which was allowed. The evidence is sufficiently stated in the opinion delivered by Staples, J.

James M. Williams and Henry C. Allen, for the appellant.

Walton, for the appellees.

Staples, J., delivered the opinion of the court.

In considering this case, it is important to bear in mind the rules of law governing judicial sales. All the authorities agree there is a wide distinction between
815 *an application to set aside a sale after it is approved by the court, and an application to withhold a confirmation. A decree of confirmation is a judgment of the court, which determines the rights of the parties. Such a decree possesses the same force and effect of any other adjudication by a court of competent jurisdiction. But before confirmation the whole proceeding is *in fieri*, and under the control of the court. Until then, the accepted bidder is not regarded as a purchaser. His contract is incomplete, and he acquires by his bid no independent right to have it perfected.

According to the English practice, the preferred bidder is never entitled to the benefit of his purchase till the master's report of the bidding is confirmed by the court. He is not liable to any loss by fire or otherwise, which may happen to the premises, nor is he entitled to the benefit of any appreciation of the estate by the accidental falling in of lives or other means. Until confirmation, the purchaser is not compelled to complete his purchase, nor is he entitled to the possession of the estate.

It is not material to inquire how far these rules of the English courts prevail in this state. It is very certain that with us the commissioner conducting a sale is regarded merely as the agent or servant of the court, and his proceedings are necessarily subject to its revision and control.

Whether the court will confirm the sale, must in great measure depend upon the circumstances of each particular case. It is difficult to lay down any rule applicable to all cases; nor is it possible to specify all the grounds which will justify the court in withholding its approval. If there is reason to believe that fraud or mistake has been committed to the detriment of the owner or

the purchaser, or that the officer conducting *the sale has been guilty of any wrong or breach of duty to the injury of the parties interested, the court will withhold a confirmation. Either party may object to the report, and the purchaser himself, who becomes a party to the sale, may appear before the court and have any mistake corrected.

The court, however, in acting upon a report of sale, does not exercise an arbitrary but a sound legal discretion in view of all the circumstances. It is to be exercised in the interests of fairness, prudence, and with a just regard to the rights of all concerned. See *Taylor v. Cooper*, 10 Leigh 317; *Daniel v. Leitch*, 13 Gratt. 195, 211, 214; *Blossom v. Railroad Company*, 3 Wall. U. S. R. 205, 6, 7; *Rover on Judicial Sales*, and cases cited at pages 30, 55, 56.

There is another rule which may be noticed in this connection. No person employed or concerned in selling at a judicial sale is permitted to become a purchaser, or even to act as agent of a purchaser. It is impossible with good faith to combine the inconsistent capacities of seller and buyer, crier and bidder, in one and the same transaction. If the commissioner or auctioneer faithfully discharges his duties, he will, of course, honestly obtain the best price he can for the property. On the other hand, if he undertakes to become the purchaser for himself, or for another, his interest and his duty alike prompt him to obtain the property upon the most advantageous terms. There is an irreconcilable conflict between the two positions. And so the courts have always held. *Rover on Judicial Sales*, 30.

In the case before us the auctioneer (Moore) in acting as agent for the appellant, therefore clearly violated his duty. In doing so he was not influenced by anything said or done by the appellant. The latter not *being able to attend the sale, requested a friend to bid for him. The auctioneer then volunteered to act for the appellant. The appellant said he only desired to purchase a part of the tract; he was willing to pay forty-five dollars per acre for that part, and he did not care who made the bids. As this was a distinct specific offer for the part named, there would have been no great impropriety in the auctioneer in declaring and accepting it on the day of sale. But the auctioneer claims that he was clothed with an unlimited authority, if part could not be so purchased, to bid for the entire tract at such sum as he might in his discretion think proper to give. This is denied by the appellant; and in this denial I think he is sustained by the facts. This departure from the plain line of his duty throws suspicion, if not discredit, upon the conduct of the auctioneer throughout.

When the sale commenced there was a single bid of ten dollars per acre. The next bid was by the auctioneer for the appellant, of twenty-five dollars per acre, an advance of fifteen dollars per acre upon a

single bid. At this point the bidding ceased; at least no one seemed inclined to offer more. The auctioneer then approached the appellee, John Harper Rice, and asked him why he did not bid, saying "mine is a bona fide bid, and I am not going to stop at this."

The object of this communication is plain enough. It was to induce the owner to run up the property upon the appellant, whom the auctioneer was professing to represent. It is my bid—and I shall continue to bid—you may therefore safely become a bidder. is the intimation to the appellee. This declaration was not made publicly, but privately to a party at whose instance and for whose exclusive benefit the sale was made; who was a gainer by every dollar

added to the *purchase money; and who is now insisting upon a confirmation of the sale. And what is more than all, it was made to one who if not insolvent at the time, was certainly in no condition to become a purchaser. Testimony has been adduced with a view to show that Rice might have raised the means to pay for the property. This testimony does not deserve serious consideration. The charges upon the property scarce exceeded three thousand dollars. This comparatively small sum Rice was unable to raise, and he was compelled to resort to a court of equity for a sale of the property to discharge his liabilities. We are now asked to believe he could have met a cash payment of more than four thousand dollars; and that he could have given personal security to the amount of the first two bonds, being more than six thousand dollars. I do not attach any importance to any advantage he could have derived from his life estate. His life interest in the land was subject to the charges already alluded to, and his life interest in the proceeds of sale was of course bound to the same extent. As to his giving personal security, such an idea is contradicted by the whole record. Looking to all the facts, it is difficult to believe that Rice could seriously have entertained the idea of becoming the purchaser. His conduct on the day of the sale tends strongly to show that he had but little thought of bidding until approached by the auctioneer. When the property was crying at the small sum of twenty-five dollars, he enquired of a friend, what he should do; and the latter being no doubt acquainted with his circumstances, told him "to do nothing." This advice he seems to have followed. But when the auctioneer informed him that the bid of twenty-five dollars was his, (the auctioneer's) and that he did not intend to stop at that, all difficulty on the

*part of Rice seems at once to have been removed; he at once began to bid, and he and the auctioneer between them, in a short time run the price up to more than sixteen thousand dollars; three thousand dollars more than the former owner had estimated it, and more than two thousand dollars in excess of the estimate of any disinterested witness. Rice having

id thirty-five dollars, no doubt at once perceived he had far exceeded every just and reasonable limit; he was permitted to withdraw his bid, and in a few moments he property was knocked down to the appellant at thirty-four dollars and fifty cents.

It is not extravagant to assert that Rice must have been satisfied that the auctioneer was not bidding for himself, but for some person not present; and the auctioneer must have been equally well satisfied, that Rice was not bidding with any view to an actual purchase of the property. The bystanders do doubt thoroughly comprehended the whole situation—the auctioneer and one of the parties chiefly interested, the only competitors.

It is not surprising that there was no bid for the property after the first, by any other person. It is very true that both Rice and the auctioneer deny there was any arrangement or understanding between them with respect to the bidding; and we are not disposed to impeach their testimony in this particular. But it is undeniable that each must have fully comprehended the entire situation: *Res ipsa loquitur*. Rice certainly well understood that acting under the auctioneer's invitation, and aided by his connivance, he was creating a factitious competition at the expense of the appellant. It is impossible that a sale thus made can receive the sanction of a court of equity. The conduct of Rice precludes him from insisting upon a confirmation.

20 *That is very clear. The other parties, the remaindermen, stand in no better situation. They cannot enforce a contract made by their agent, the auctioneer, and at the same time evade all responsibility for his conduct in making the contract. They are equally affected by the misconduct of Rice with whom they have certain interests in common. If the purchase is confirmed as to them it must necessarily be confirmed as to him also. A contract entire and indivisible, if vacated it all must of course be vacated in toto. More especially is this true when the rescission is owing to one of the parties through whose agency the contract was made.

It has been said, however, that the appellant ratified the sale after it was made. A satisfactory answer to this is, that at the time of the supposed ratification the appellant could not have known of the existence of the facts in respect to the conduct of Rice and the auctioneer at the sale. It is very probable that he was not apprized of them until they were brought out on the examination of the witnesses, or at least a short time before that testimony was taken. The ratification of course amounts to nothing unless made with an understanding of all the material facts and circumstances attending the sale.

Before concluding this opinion it is proper to advert very briefly to other matters having some connection with what has been said. In the first place it is very questionable whether the appellant ever authorized

Moore, the auctioneer, to bid for the whole tract of land. He certainly did empower him to purchase a part of the tract designated; but the appellant was very careful to limit the price, a price he was willing to give at a public or private sale. The appellant had not even looked at the other part of the tract. He had declared he would

821 not buy it on any terms. It is almost incredible that he would under such circumstances, empower this auctioneer, the agent of the seller, to buy the entire tract at any price the latter might choose to give. The story is so absolutely improbable it ought to be supported by very clear and satisfactory evidence. If the decision rested alone upon this point, there would be no serious difficulty in declaring that the auctioneer had exceeded his authority, and the appellant is not bound by his action. But the appellees rely upon the fact that the appellant was informed of the purchase of the whole tract, and deliberately ratified the same. On the other hand the appellant affirms that at the time he signed the memorandum he was so deeply intoxicated he was not conscious of the character of the paper he was signing. He supposed he was simply ratifying the purchase of the part he had designated.

It must be premised that the courts always listen with suspicion and reluctance to any defence founded upon an alleged voluntary intoxication. Here, however, the question is not upon the avoidance of a contract made by the party himself; but upon the ratification of an unauthorized act of another, by which the supposed principal is involved in a very heavy liability. If the appellant honestly believed he had only authorized the purchase of a part of the tract, he would naturally believe that such part only had been purchased, and he might as reasonably conclude, when called on by the commissioner to sign the memorandum of sale, that it related only to that part. This would be peculiarly so if the appellant at the time, from any cause, was not in complete possession of his mental faculties.

Upon the question of the appellant's drunkenness the evidence is very con-

822 flicting. But it cannot be denied that the great preponderance of testimony strongly sustains the view that the appellant at the time of signing the paper was too deeply intoxicated to have a clear comprehension of the nature and effect of the act he was doing. Very great weight is certainly due to the testimony of the distinguished gentleman who acted as one of the commissioners of sale on that occasion. But it detracts somewhat from the force of that testimony, that the witness was, previous to that day, a total stranger to the appellant, and therefore not so well qualified to judge of his capacity as others who knew him more intimately. However that may be, there are numerous witnesses who testify with great minuteness to facts which outweigh any mere opinions formed from a few moments observation. But while the appellant was evidently much under the in-

fluence of liquor at the time, that of itself would not be sufficient to prevent a confirmation of the sale. But his condition at the time of the supposed confirmation, considered in connection with all the circumstances surrounding the sale, exhibit such a case of mistake, surprise, unconscionable advantage and injustice as calls for a rescission of the contract. In arriving at this conclusion we are not to be understood as impeaching in the slightest degree, the conduct of the commissioners conducting the sale. There is nothing in the record tending to throw even a shade of suspicion upon the perfect fairness and integrity of their conduct.

Upon the whole we are of opinion the decree of the circuit court must be reversed, the sale set aside, the rule awarded against the appellant discharged, and the cause remanded for further proceedings.

The decree was as follows:

823 *This day came again the parties by counsel, and the court having maturely considered the transcript of the record of the decree aforesaid, and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the circuit court erred in confirming the sale made by commissioners Bird and Walton on the 23rd day of May 1874, to the appellant John P. Brock. It is therefore decreed and ordered, that the decree of the said circuit court confirming said sale, be reversed and annulled; and that the appellee, John Harper Rice, do pay to the appellant, John P. Brock, his costs by him expended in the prosecution of his appeal aforesaid here.

And this court proceeding to render such decree as the said circuit court ought to have rendered, it is decreed and ordered, that said sale be and the same is, hereby annulled; that the rule awarded against the said John P. Brock on the 25th day of August 1874, be discharged, and that the appellee, John Harper Rice, do pay to the said Brock his costs by him expended in his defence to said rule. And it is further ordered that this cause be remanded to the said circuit court for such further proceedings as the parties interested may be advised to take with reference to a sale of the property in the bill and proceedings mentioned.

Which is ordered to be certified to the said circuit court of Shenandoah county.

Decree reversed.

824 *Omohundro's Ex'or v. Omohundro & als.

November Term, 1876, Richmond.

1. *Commissioners—Receiving Confederate Money.*—R. a commissioner selling land in 1860 under a decree.

**Trustees Receiving Confederate Money.*—As to the liability of trustees for receiving confederate currency, see *Crawford v. Shover*, 29 Gratt. 82, where the principal case is cited; *Ammon v. Wolfe*, 26 Gratt. 621, and *note*; *Tosh v. Robertson*, 27 Gratt. 270, and *note*.

is guilty of a breach of trust in receiving confederate currency from the purchaser in payment of his bonds, in 1863.

2. *Same—Authority.*—Such a commissioner who is directed to file the bonds with his report, has no authority to collect them.

3. *Same—Breach of Trust.*—A commissioner who in April 1860 is appointed to sell lands is guilty of a breach of trust in selling them in 1863, for confederate currency.

4. *Same—Same—Parties to—Liability.*—S, a brother of the commissioner, who is one of the parties entitled to the land and its proceeds, induces R to collect the purchase money of the land sold, and to sell the balance, both to be received in confederate currency, and to lend it to him. S is a party to the breach of trust by R, the commissioner, and is responsible for it.

5. *Court of Appeals—Judgment—New Trial.*—Upon a writing under seal given by S for the return of the money, R in 1866, brings an action against the executor of S, and recovers a judgment, which upon appeal is reversed, and it is held that the debt should be scaled, and the cause is sent back for a new trial. On a bill by the other parties interested in the lands sold. *Held:*

1. *Same—Same—Same—Finality.*—If the judgment of the court of appeals was final, these plaintiffs not having been parties to the cause, would not be concluded by it.

2. *Same—Same—Same—Same.*—The cause having been sent back for a new trial, the judgment was not final.

3. *Confederate Money—Scaling.*—Though upon the face of the paper the court might correctly hold that the contract was a confederate contract, and should be scaled, the facts connected with the transaction may, and do show that it should not be so treated; and these facts may be received in evidence and the bond construed by the light of them.

825 Richard Omohundro, the elder, of the county of *Fluvanna, died previous to April 1860, possessed, among other property, of a tract of land of nine hundred and ninety acres, and leaving eight children or their descendants. These children were scattered, some in Texas, and others in different parts of the country, and some of the descendants were infants. Among his children was his son Silas who lived in Richmond, and was extensively engaged in business in that city, and Richard who lived in Fluvanna.

In April 1860, Richard Omohundro instituted a suit in equity in the circuit court of Fluvanna county, against the other heirs of Richard Omohundro, the elder, to have a sale of the land, on the ground that it could not be divided among the heirs without injury to all of them; and this suit was so proceeded in, that on the 11th day of April 1860 the court made a decree appointing the plaintiff, Richard Omohundro, a commissioner to sell the land, in one or more parcels for cash as to one-fourth of the purchase money, and on a credit of one, two and three years for the residue, taking bonds with approved security for the deferred payments, and retaining the title as further security, till the whole was paid.

And he was directed to report to the next term of the court his proceedings under this decree, and file therewith the bonds taken for the deferred payments.

On the 17th of June 1860, the commissioner sold a part of the tract called Gale Hill, including five hundred and eighty-eight acres, when it was purchased by John H. Burgess, at \$20 per acre; and Burgess paid the cash payment of \$2,940, and executed his bonds with security for the three deferred payments, each for \$2,940; but the commissioner did not report to the court, or file the bonds. The part of the land called Wills' tract was not then sold; but

afterwards, about the 5th of March 1863, he sold this tract to James M. Thomas, at \$22.50 per acre cash; and Thomas paid him in March and April \$8,900. This sum was paid by Thomas in confederate money. And about the same time the commissioner received from Burgess the payment of his three bonds in the same currency. This sale of the Wills' tract, and receipt of the payment of the bonds of Burgess in confederate currency, was done at the urgent and repeated request of Silas Omohundro, that it should be done, and that Richard Omohundro would lend him the money; he saying he could use the money in payment of his debts, and for real estate which he was then purchasing extensively. And accordingly Richard Omohundro after paying to Silas his share of the fund, and a debt which one of the other heirs owed to him, lent to Silas Omohundro the remainder of it, and took from him the following obligation:

\$12,800. Richmond, May 22d, 1863.

On demand I promise to pay R. Omohundro, Jr., the just and full sum of twelve thousand eight hundred dollars, for value received, borrowed money, this date, to be paid when called for in confederate money, or whatever money may be current of the state, or our banks pay out to depositors. As witness my hand and seal.

Silas Omohundro. [Seal.]

Silas Omohundro died in 1864; and in June 1866, Richard Omohundro brought an action of covenant upon this paper in the circuit court of the city of Richmond, against his executor Richard Cooper; and in November 1869, recovered a judgment for \$12,800, with interest from the 2nd of

June 1866. From this judgment the executor applied for and obtained a supersedeas from the court of appeals; and the case coming on to be heard in that court, in January 1872, that court reversed the judgment, on the ground that the bond being payable on demand, the obligor had a right to pay it at any time, and therefore to pay it in confederate treasury notes. And the cause was sent back to the circuit court for a new trial to be had therein; and the case for all that appears in this record, is still on the docket of that court. The case is reported in 21 Grattan 626.

In March 1872 the defendants in the suit in equity, instituted by Richard Omohundro, for the sale of the land, except Silas

Omohundro's executor, filed a cross-bill in that suit against Richard Omohundro, Silas Omohundro's executor, and the purchasers of the land, in which they set out the foregoing facts, except as to the action at law, and charged that Richard Omohundro had violated his duty as commissioner in receiving from Burgess payment of his bonds for the purchase money of the land without authority from the court, and in a greatly depreciated currency, and also in selling the Wills' tract and receiving in payment the same depreciated currency. They charge that this was done by the said Richard upon the repeated request of Silas Omohundro, in order that he might get the money, and upon the promise to save Richard harmless, and pay the money after the war was ended, when it was required for distribution, in whatever fund should then constitute the currency of the country.

There were statements in the bill in relation to the timber used and sold from the land, by the purchasers, and a prayer for an account by them; but it is not involved in this appeal. There was also a prayer that all proper accounts be taken, and for general relief.

Richard Omohundro answered, admitting the facts as to his action, and the urgent request of Silas Omohundro, that he should sell the Wills' tract and collect the money from Burgess and let him have it, and that he had complied with his request, upon his promise to save him, the said Richard, and all the parties interested harmless; and that he would be responsible for the money and make it good when the heirs interested should demand it for distribution after the war, in whatever currency was then in use.

Cooper, the executor of Silas Omohundro, demurred to the bill. 1. Because of multifariousness; and 2. Because there is no ground of equitable relief against the said defendant set forth in said bill. He also, as to the bond of \$12,800, pleaded in bar of the recovery sought by the bill, the judgment of the court of appeals in the common law case hereinbefore mentioned; setting out a copy of said judgment. And he also answered, saying that after the death of his testator he advertised in the newspapers for the creditors of said Silas Omohundro to come forward and present their demands against his estate. That Richard Omohundro presented a claim for \$1200, which respondent paid him; that at that time respondent asked him if he had any other claim against the said Silas, telling him respondent was prepared to pay it if he had; and the said Richard then declared that he had no other demand. Some time afterwards the said Richard came forward with the claim for \$12,800. The respondent did not then and does not now believe that the money was due, and he defended the suit. He relies upon the judgment of the court of appeals, and insists that that question cannot be again opened.

The cause came on to be heard on the 13th of September 1872, when the court

overruled the demurrer, and held that the plea furnished no bar against the
 829 *equitable grounds of relief stated in the bill. And it was decreed that Richard Cooper, executor of Silas Omohundro deceased, out of the assets of his testator's estate in his hands to be administered, do pay into the First National Bank of Virginia at Richmond, the State Bank of Virginia at Richmond, and the Richmond Banking and Insurance Company, in equal parts, one third into each, the sum of twelve thousand eight hundred dollars, with interest thereon at the rate of six per centum per annum from the 22d of May 1863 till paid, and the costs of the plaintiffs in the cross-bill, &c. &c. And thereupon Cooper applied to this court for an appeal from the decree; which was allowed.

Lyons, for the appellant.

Pettit, Guy & Gilliam, for the appellees.

Moncure, P., delivered the opinion of the court.

1. The court is of opinion, that Richard Omohundro, Jr., was guilty of a breach of trust, in collecting in confederate money, in March and April 1863, the bonds for the deferred installments of the purchase money of the Gale Hill tract of land; and also, in selling for confederate money, in March 1863, the Wills' tract of land in the proceedings mentioned. At those periods the actual value of confederate money was depreciated greatly below its nominal value. There was then no necessity, and could not for a long time be any, for converting the subject into money, as it could not be divided among the parties entitled thereto, some of whom were non-residents of the state. The subject was then in the best possible state in which it could be and remain during the war, which was then
 830 flagrant; *a part of it consisting of good specie debts, perfectly well secured; and the residue consisting of valuable real estate.

2. The court is further of opinion, that it is proved by the evidence in the record, that Silas Omohundro persuaded his brother Richard, Jr., to make the collection and sale aforesaid; promising to receive his portion of the proceeds thereof in confederate money, and to borrow the balance of said proceeds in said money, (which would be as useful to him as good money,) and account for it after the war in money then current; and the said Richard, Jr., was induced by such persuasion and promise to make such collection and sale, and such disposition of the proceeds thereof as aforesaid.

3. The court is further of opinion that Silas Omohundro, by such persuasion and promise, and by receiving and borrowing the money of his brother Richard as aforesaid, became a particeps criminis in the said breach of trust, and became liable to indemnify his brother Richard and all the other heirs of their father who had not con-

sented to receive confederate money in payment of their shares of the proceeds of sale of the real estate of their father, against loss arising from the said collection and sale.

4. The court is further of opinion, that the judgment of the supreme court of appeals in favor of the executor of Silas Omohundro against Richard Omohundro, Jr., in the case of Omohundro's ex'or v. Omohundro, 21 Gratt. 626, is not a bar to the liability of the said Silas for the indemnity of the said Richard and the other heirs of their father as aforesaid. Even if that judgment had been a final judgment in favor of the defendant in the action of covenant in which it was rendered, it would not have been conclusive, except between the parties thereto, to-wit: the plain-

831 tiff *Richard Omohundro, and the defendant, the personal representative of Silas Omohundro. The other heirs at law of Richard Omohundro, Sr., not being parties to the action at law in which the said judgment was rendered, were, of course, not concluded thereby. Richard Omohundro, Jr., had no authority to collect the deferred installments of the purchase money of Gale Hill, much less to collect them in confederate money. The bonds for those installments were directed by the court under whose decree the said property was sold, to be returned to the said court and filed among the papers of the suit in which the said decree was made, and there was no order of said court authorizing him to withdraw and collect the said bonds. Nor had he any authority to sell, as he did, the Wills' tract of land at private sale for cash, and much less for confederate money. Still less had he any authority to loan to his brother Silas the proceeds of said collection and sale, or any part thereof, and take his bond, without security, for the repayment of the same in confederate money. There is nothing, therefore, in the said judgment of this court, and would have been nothing in the said judgment if it had been final and conclusive between the parties thereto, to conclude or prevent the other heirs of Richard Omohundro, Sr., from claiming and recovering their respective portions of the real estate of their father or of the proceeds of the sale thereof, and for that purpose, from further prosecuting, as they have done and are now doing, the said suit in which the said decree was rendered, and in which also was rendered the decree appealed from in this case. But in fact the said judgment was not final and conclusive in its nature and effect, even as between the parties to the action, but

832 merely decided the case as it then stood *upon the record, reversed the judgment of the court below, set aside the verdict, awarded a new trial, and remanded the cause to the court below to be proceeded with in accordance with the principles announced in the judgment of this court. The court construed the covenant on which the action was brought without any light derived from the surrounding cir-

cumstances, of which there was no evidence in the record; and in so construing it, though of opinion that "what the parties intended by their written agreement is not very clear," yet the court held the contract to be one for the payment of confederate money; and that as the case was presented by the record, the plaintiff was entitled to the value of the currency advanced by him, scaled as of the date of the contract, with interest thereon from that period.

5. The court is further of opinion, that though the contract aforesaid, construed as it was by this court, looking alone to the written contract itself, and without the light of any of the surrounding circumstances, was properly construed to be a contract for the payment of confederate money, and therefore to be scalable; yet, in the light of all the surrounding circumstances as they appear in this record, it ought to be construed as a contract payable in current or good money on demand after the war, or in confederate money on demand during the war, at the election of the said Richard Omohundro, Jr., and it may in this cause be construed in the light of those circumstances, and effect given to it accordingly.

Looking alone to the written contract for its meaning, it appeared to be a case in which Richard Omohundro, Jr., having in his hands in March and April 1863, confederate money to loan out, loaned it to his brother Silas, taking for its repayment with interest, *the bond or covenant on which the action at law was brought; and though the terms of the bond were unusual, and it was not very clear "what the parties intended by their written agreement;" yet in that view of the case, this court had no difficulty in holding it to be a contract for the payment of confederate money.

But looking to the written contract in connection with, and by the light of the surrounding circumstances as they now appear to the court, the case is very different; and there is no difficulty in ascertaining the true intention of the parties, and the meaning of the words used by them in their contract to express that intention. It thus appears that Richard Omohundro, Jr., had no money to loan out in March and April 1863; but he had then in his hands, as a fiduciary, bonds payable in good money and well secured, which he had no occasion to collect, and could not collect in good money during the war, and a valuable tract of land belonging to the heirs of his father, and decreed to be sold for distribution among them by a decree made before the war; but which had not been sold before the war and could not be sold for good money during the war, but could only be sold during that period for confederate money, which was so depreciated in value as to render a sale of trust property for such a currency a breach of trust, and improper except under very peculiar circumstances. Richard Omohundro, Jr., acting under the advice of his counsel and under

his own sense of duty and propriety, had made up his mind, in the state of things which then existed and were getting worse and worse, not to collect the said bonds and sell the said land; when his brother Silas persuaded him to do so, and pay him out of the proceeds of such collection and sale, his

portion thereof; and loan him the 834 balance, which he said he *could use to great advantage in the payment of debts due in good money, and in his business of a speculator in land and other property; he assuring his brother Richard that he would indemnify him and the other heirs of his father against all loss which might possibly arise from such collection and sale. Richard Omohundro, Jr., trusted to this assurance, and yielded to this persuasion of his brother Silas, who was a perfectly responsible man; and accordingly collected the said bonds, sold the said land, and disposed of the proceeds of such collection and sale, in pursuance of his brother's request; who thereupon executed the bond or covenant aforesaid for the repayment of the money loaned him with interest. These are the clearly proved facts of the case. And if we read the bond in the light of these surrounding circumstances, we can have no difficulty in understanding its meaning; which is as before stated.

That it is legal and admissible so to read the bond, is clear on general principles; and it is especially clear under the provisions of the Code, chapter 138, § 1, p. 979.

6. The court is further of opinion, that the objection made to the amended bill for multifariousness, is not a valid objection to the relief prayed for and given in this case.

7. The court is therefore of opinion that there is no error in the decree appealed from, and that the same ought to be affirmed.

Decree affirmed.

835 *Gordon v. Fitzhugh & als.

November Term, 1876, Richmond.

Absent, MONCURE, P.

Assignments of Bonds Secured by Deed of Trust.—Priority.*—K made a deed to F conveying a tract of land in trust to secure the purchase money of the land, evidenced by five bonds, payable at different periods to R, the vendor. R first assigned the bond payable second in date to M; next he assigned the bond payable first, to McG, and afterwards he assigned the last three to G. The land when sold did not produce sufficient to pay all the bonds.

***Assignments of Bonds Secured by Deed of Trust.**—Where several bonds, equally secured by a deed of trust are assigned, the assignees take in the regular order of their successive assignments. Grubbs v. Wysors, 32 Gratt. 131; Armentrout v. Gibbons, 30 Gratt. 651; Armstrong v. Poole, 30 W. Va. 670, 5 S. E. Rep. 250, in each of which the principal case is cited. See also, McClintic v. Wise, 25 Gratt. 448; Paxton v. Rich, 85 Va. 378, 7 S. E. Rep. 581; Jenkins v. Hawkins, 34 W. Va. 799, 12 S. E. Rep. 1090; Barton's Ch. Pr. (2d Ed.) 1130.

HELD: the bond assigned to M, the first assignee, is to be first paid; then the bond assigned to McG, the second assignee, and the balance, if any, is to be paid to G, the last assignee.

On the 11th of November 1867, H. S. Kepler conveyed to Wm. H. Fitzhugh, of Fredericksburg, a tract of land in the county of Chesterfield, "in trust to secure to A. P. Rowe, the payment by the said H. S. Kepler, of the purchase money of the said tract of land, which purchase money, amounting to \$8,680, is evidenced by five bonds of the said Kepler to the said Rowe, payable as follows: The first for," &c. There were five of these bonds, and they were assigned by Rowe to different persons at successive periods. The land when sold by the trustee did not sell for enough to pay off all the bonds, and the assignees not agreeing as to the mode of applying the fund, Fitzhugh filed his bill of interpleader in the circuit court of Spotsylvania, against the assignees, to have the direction of the court in the disposition of the fund; and on the hearing of the cause the court held that the assignees were to be paid in
836 the order of the dates of *the assignments. From this decree H. S. Gordon, who was the last assignee, applied to this court for an appeal; which was allowed. The facts are stated by Judge Christian in his opinion.

Jas. Pleasants, Braxton & Wallace, for the appellant.

Wm. H. Fitzhugh, for the appellees.

Christian, J., delivered the opinion of the court.

The question we have to decide arises upon the following facts: Kepler conveyed by deed to Fitzhugh, trustee, a certain tract of land, to secure to Rowe the payment of the purchase money of said land, amounting to the sum of eight thousand six hundred and eighty dollars, evidenced by five bonds payable by Kepler to Rowe as follows: the first for \$1,540, payable on the 1st January 1871; the second for \$1,000, payable on 1st January 1872; the third for \$2,000, payable 1st January 1873; the fourth for \$2,000, payable 1st January 1874; and the fifth for \$2,140, payable on 1st January 1875.

None of these bonds being paid at maturity, the trustee sold the land in execution of his trust. The net proceeds of said sale amounted to the sum of \$4,338.36, leaving a large deficiency in the trust fund for the payment of the bonds secured by the trust deed. All of these bonds were assigned by Rowe. He first assigned the bond for \$1,000, payable the 1st January 1872 to Moncure. He afterwards assigned to McGee the bond of \$1,540, payable on 1st January 1871; and afterwards the three remaining bonds were assigned to Gordon. The fund not being sufficient to pay all, the question arises whether these assignees are to be paid pro rata, or according to the priority of the several assignments. The circuit court
837 decreed *that the fund should be paid

to the assignees in the order of the assignment of the several bonds respectively; first, to the payment of the bond held by Moncure, that being the first assigned; second, to the bond held by McGee; and third, the balance, if any, to be paid to Gordon. From this decree, on petition of Gordon, an appeal was allowed by this court.

The court is of opinion that there is no error in the decree of the circuit court. An assignee is a purchaser for valuable consideration of all the securities of the assignor and of all his remedies. *Martin v. Nowlin*, 2 Burr. R. 978; *Jackson v. Willard*, 4 John. R. 41; 1 *Mad. Ch.* 435.

Both deeds of trust and mortgages are regarded in equity as mere securities for the debt, and whenever the debt is assigned, the deed of trust or mortgage is assigned or transferred with it. 2 *Lead. Ca. in Eq.* pt. 2, p. 236; 1 *Lomax Dig.* 220; *McClintic v. Wise's adm'rs & als.*, 25 *Gratt.* 448. The assignee may use these securities and remedies of the assignor as freely and beneficially as could the assignor himself, to whom it was indisputably competent to hold the trust deed as security for the installment due on a particular bond.

Judge Tucker lays down the rule as follows: "It is said, if several bonds be secured by mortgage, and the fund prove insufficient to pay all, and the bonds be assigned to different persons, who shall have priority? I should conceive he should have preference who was first assignee, for by the assignment he at once acquired preference over his assignor, who then remained the holder of the other bonds; and this preference would not be taken away by subsequent assignments."

In *McClintic v. Wise's adm'rs*, supra, p. 454, Judge Staples, delivering the opinion of the court, says: "It seems to me the assignment of the bond carries with
838 *it so much of the lien as is necessary to pay the bond. If the vendor means to restrict or qualify the effect of the assignment, he should do so by express reservation. In the absence of such reservation, or of some stipulation qualifying the rights of the parties, the assignee may justly regard the assignment as securing to him the benefit of the lien, so far as it is necessary to his protection or indemnity."

The case before us is a stronger case for asserting the lien in favor of the first assignee than that of *McClintic v. Wise*. In that case the assignor retained the bond first due, and assigned the bond which last matured. In that case priority was declared in favor of the assignee, although the bond retained by the vendor was first due. Here the appellees (Moncure and McGee) not only have priority in the date of the assignment, but the bonds assigned to them fell due before those assigned to Gordon.

If these latter bonds had been retained by the vendor, it is plain that he could not have successfully asserted his right in a court of equity to any part of the fund arising from a sale of the trust subject until

fter the assignees of the bonds first due and assigned by him, had been satisfied. and why? Because he had certainly the right to order a sale of the trust property whenever any one of the bonds became due and there was default in payment. This was the security and the remedy of the vendor. This security and this remedy was transferred by him to the assignees. With the assignment went the lien for the payment of the bonds assigned. Having transferred the bonds first due, the vendor could only subject the fund to the payment of the remaining bonds after those assigned had been satisfied. The assignees having this

139 preference by the assignment over the assignor, cannot be divested *of their rights by any subsequent assignment.

Jordon, the subsequent assignee of the bonds last due, can have no better rights or larger remedies than the vendor. He simply stands in his shoes, having all his rights and remedies, but no other, and cannot deprive the first assignees of the rights and remedies transferred by the same assignor to them before the assignment to him.

As between the assignees, the maxim prior in tempore portior in jure must apply; and the appellees having the first assignment of the debts first due must be paid first.

In some of our sister states, the question here considered has been the subject of judicial consideration, and the decisions have been somewhat conflicting.

In Alabama it was held, that where several notes taken for the purchase money of and are assigned at different times, the assignment of each note is pro tanto an assignment of the vendor's lien, unless expressly waived; and the liens of the several assignees are to be preferred according to the priority of their assignments without reference to the maturity of the notes. *Briggsby v. Hair*, 25 Alab. R. 327. See also 9 Alab. R. 645, and 4 Alab. 492.

In Pennsylvania, on the other hand, it was held that where a mortgage is given to secure a debt payable in instalments at various times, and five of the bonds were assigned, and the balance retained by the holder, and the fund arising from a sale of the mortgaged premises is insufficient to pay all, the respective assignees, and the mortgagee are entitled to a pro rata dividend of the proceeds. *Donley, assignee of McKean v. Hays*, 17 Serg. & Rawle 400. In his decision, however, Mr. Chief Justice Gibson dissented in an able and learned opinion; and I think the dissenting
140 opinion *is the better law. Mr. Minor, the distinguished and learned professor of law at the University of Virginia, in his valuable "Institutes," referring to a number of authorities, says:

"When there are several notes secured by the mortgage, assigned to successive assignees, and the mortgage is insufficient to pay all, it is the better opinion that they are to be paid in the order of priority of assignment: for upon the first assignment

the assignee, upon a deficiency of the fund, would certainly be preferred to the assignor; and any subsequent assignee of any other of the notes could only take subject to all equities; and standing in the same position with the assignor, be excluded, like him, from coming in on the security until the claim of the first is satisfied. It will be observed that this principle is analogous to that which prevails when land, subject to a prior lien, is sold to successive purchasers." 2 Minor's Institutes, p. 347, and authorities there cited.

The counsel for the appellant, in the very able and elaborate note of argument submitted by them, lay much stress upon the provision of the Code, §§ 5 and 6, ch. 117 (Code 1860). These provisions, in my opinion, have no effect upon the question arising in this case, and do not apply to such a deed as the one under consideration. The fifth section simply prescribes what may be the form of a deed of trust "to secure debts or indemnify securities." The sixth section provides, that when sale is made under such a deed, the trustee "shall apply the proceeds of sale first to the payment of expenses attending the execution of the trust, including a commission of five per cent. on the first three hundred dollars, and two per cent. on the residue of the proceeds, and then pro rata (or in the order of priority, if any prescribed by the deed,) to

841 the payment *of the debts secured, and the indemnity of the sureties indemnified by the deed, and shall pay the surplus, if any, to the grantor, his heirs, personal representatives or assigns."

This provision manifestly applies to deeds of trust, securing different creditors and sureties; to cases where more than one debt is secured, and more than one surety indemnified. These sections certainly do not apply to a deed where a single debt is secured. It was never intended, and cannot be so construed, to fix the rights of assignees of an instalment of the same debt which has been assigned for value. The deed of Kepler is not a statutory deed "to secure debts or indemnify sureties," but is an ordinary deed of trust to secure a single debt, payable in instalments, to a single creditor, payable at different times prescribed in the deed, and assigned at different periods to different assignees. To such a case the pro rata distribution prescribed by the statute can have no application, but the assignees, upon a deficiency of the trust fund, must be paid according to the priorities of their respective assignments.

Upon the whole, I am of opinion that there is no error in the decree of the circuit court, and that the same must be affirmed.

Decree affirmed.

842 *Routh & al. v. Nash's Adm'r & als.

November Term, 1876, Richmond.

Wills—Construction.—Testator names three of his nieces whom he says he has taken care of from their infancy, and he wishes them still provided

for, and for that purpose he wishes the whole of his estate, both real and personal, kept together, and so much of the proceeds thereof as might be essential to their genteel and comfortable support applied in that way, so long as they should continue unmarried; and then he gives his estate to certain persons and these nieces. But this postponement of distribution was only to secure his nieces during a state of dependence, such comfortable support as they needed, but not to deprive those interested from that share in the estate, when such provision shall be made for the nieces as shall ensure such support.

Same—Codicil Explaining.—By a codicil made the same day, testator says: In speaking of a comfortable and genteel support for my said nieces during the time they remain single, I think the sum of \$800 each, provided my estate will afford it, ought to secure the end designed. **Held:** The testator has designated what he deems a proper provision, and it will be fixed at that.

In January 1855 John H. Nash, of the city of Norfolk, died, having made his will, which was duly admitted to probate in the circuit court of Norfolk, and Wm. W. Lamb qualified as administrator with the will annexed.

By his will he in the first place gave to his three nieces, Virginia N. Routh, Sarah A. Routh, and Martha R. O. Portlock, equally to be divided among them, any and all sums of money which might be due him at the time of his death, from the provident societies of Norfolk and Portsmouth, of which he was a member. He then says:

My nieces, Virginia N. and Sarah
843 *A. Routh, and Martha R. O. Portlock, I have taken care of from their infancy, and I wish them still provided for; and for that purpose, in addition to what I have given to them above, I wish the whole of my estate, both real and personal, kept together, and so much of the proceeds thereof as may be essential to their genteel and comfortable support, applied in that way, so long as they shall continue unmarried; and after the marriage of my said nieces, or their death, I wish the same to be divided among my brothers, naming several, and Emily Hedges and my said nieces, naming them. * * * * * Fearing that some difficulty may arise in having confined the distribution of my estate to the marriage of my said nieces, I hereby declare, that such was designed only to secure to them, and each of them, during a state of dependence, such comfortable support as they needed, but not to deprive those interested, from their share in the estate, when such provision shall be made for them as shall insure such support.

By a codicil to his will made on the same day, the testator says: In speaking of a comfortable and genteel support for my said nieces during the time they remain single, I think the sum of three hundred dollars each, provided my estate will afford it, ought to secure the end designed.

The administrator seems to have supposed that the will required him to keep the whole estate together, and to pay the debts out of

the profits; and until this was done, the nieces of the testator were not to receive the annual provision made for them.

In March 1858 these nieces instituted their suit in equity against the administrator and the legatees, to recover the provision made for them. At this time Miss Portlock was married, and she of course
844 only *claimed hers up to the time of her marriage in 1856.

In June 1858 accounts were directed to be taken; and from the reports of the commissioner it appeared that the administrator had paid a considerable amount of debt, and there remained in October 1858 of indebtedness to be paid, to himself \$114.01, and a legacy of \$25 to a negro woman who had lived with the testator for several years; and fixing the bequest to the nieces at \$300 a year from the testator's death, there was due to each of the Miss Rouths \$1,308, and to Martha R. O. Portlock, who had married Rowland R. Doggett, \$550. The net income of the real estate was \$745.38, and of the personal estate \$194.25—\$939.63.

The decree having directed the commissioner to enquire and report whether the sum of \$300 per annum specified in the codicil of the testator's will, was a reasonable and proper allowance for the comfortable support of the said annuitants, according to the true meaning of the will; and if not, what other sum, greater or less, would be a reasonable and proper allowance to that end; the commissioner reports that whilst he was of opinion that the said sum of \$300 per annum was too small a sum for the comfortable and genteel support of the annuitants, yet, considering the capability of the testator's estate on which said annuities are charged, the sum was as large as the estate could afford.

To this report Virginia N. and Sarah A. Routh excepted, on the ground that the allowance made them by the report was wholly inadequate; and that a much larger sum ought to have been allowed for that purpose. That in making the allowance the commissioner ought to have acted with reference to the state and condition of the said plaintiffs, and the circumstances of the estate of the testator, and the annual rents and
845 profits *thereof; and in view of these the sum should have been larger.

The cause came on to be heard in January 1859 when the court held that the plaintiffs were entitled to their annuities from the death of the testator, with interest, to be paid out of the profits of the estate remaining after the payment of debts; that as the testator had made no provision for the payment of his debts, the administrator should have regarded the whole personal estate, including slaves, as the primary fund for the payment of debts; and as the amount of the profits of the real estate applied to their payment was more than the amount due to the annuitants, they were entitled to be paid by a sale of the personal property; and decreed that Lamb should sell three slaves named, and out of the proceeds of the sale, pay first the expenses of sale;

second, the debts, including the legacy of \$25; and then apply the balance of the proceeds pro rata to the payment to the plaintiffs of the sums of money respectively due them, as ascertained by the commissioner's report. And Lamb was directed to continue to rent out the real estate of the testator until the further order of the court.

In May 1862 a commissioner's report of Lamb's transactions since the last report was filed. This included the proceeds of the sale of the slaves; and the payment to the plaintiffs of the amounts decreed to them. And this terminated the proceedings in the cause until 1870, when it was revived against representatives of several of the defendants who had died, and a further account was ordered. This account was returned in November 1872, showing that nothing was due to the plaintiffs Virginia N. and Sarah A. Routh, they having each received the sum of \$300 per annum each

year since the death of the testator, 846 or an amount equal thereto; *that the net income of the estate from rents was \$937, and that there was a balance in the hands of the administrator of \$1,185.38, which was apportioned among the legatees of Nash as directed in his will.

The cause came on to be heard on the 21st of December 1872, when the court confirmed the report, to which there was no exception, and made a decree distributing the amount reported to be in the hands of the administrator, among the legatees. And thereupon Virginia N. and Sarah A. Routh applied to a judge of this court for an appeal; which was allowed.

Scarburgh & Duffield, for the appellants.

Baker & Walke, for the appellees.

Anderson, J., delivered the opinion of the court.

The court is of opinion that, whilst the testator directed his whole estate, real and personal, to be kept together so long as his three nieces, named in the will, continued unmarried, "and so much of the proceeds thereof as may be essential to their genteel and comfortable support," to be applied to that object, if the proceeds or income from his estate exceeded the sum essential for that purpose, the excess should be distributed without delay, amongst the other objects of his bounty, including also his said nieces. He expressly declares that the limitation on the distribution of his estate, until the marriage of his nieces, was not designed to deprive others, who were also objects of his bounty, of their share in his estate, when provision shall have been made, for "such comfortable support" of his nieces "as they needed."

But the terms "genteel and comfortable," are very 847 indefinite. They have no exact and precise meaning; and would convey different ideas to different ears. What one would regard as genteel and comfortable, another might think was

very uncomfortable and not at all genteel. The testator, probably to remove difficulty on this score, indicates in a codicil to his will, what he meant by a genteel and comfortable support, by saying that he thinks the sum of \$300 each, ought to secure it. That was perhaps the best definition or description that he could have given, of what, according to his ideas, would constitute a genteel and comfortable support for his nieces. But, lest it might be construed that he intended his nieces to have the sum designated whether or not, he uses the precaution to insert the words, "provided my estate will afford it." And his deeming it necessary to make this qualification, implies that he himself when preparing his will, understood the language he was using to import a reduction of the legacies of support to a fixed sum, an annuity of \$300 to each, and hence he inserts the above qualification, lest it might be too heavy a draft on his estate. Why should he have mentioned any sum unless he intended it as a restriction? He uses words to show that it might not reach that sum, but gives no intimation that in any event it should exceed that sum.

The court is strongly inclined to construe this clause in the codicil restricting the legacies of support so as not to exceed an annuity of \$300 to each.

But if it should not be so construed, it is a clear indication by the testator himself, what sum he regarded as sufficient to satisfy the charge he made upon his estate for the genteel and comfortable support of his nieces, and the court would not be warranted in increasing the appropriation, unless it 848 clearly appeared from the evidence in the record, that the testator had *designated that amount under a misconception, and that to restrict the annuities to it would defeat the testator's manifest intention and purpose of benefaction to them. But this is not shown by the record. Indeed there is no evidence in the cause to show that the annuity of \$300 to each, is not sufficient for their support in the manner contemplated and desired by the testator. The court is of opinion therefore to affirm the decree of the circuit court.

Decree affirmed.

849 *Barton v. Bowen & Wife.

November Term, 1876, Richmond.

1. *Confederate Transactions—Adjustment.*—In the adjustment of confederate transactions, to lay down fixed, unbending rules of decision applicable to all cases, is not only unjust, but in the nature of things utterly impracticable. Every case must depend upon its particular circumstances. The measure of relief must vary according to the equities of the parties.
2. *Same—Fiduciaries—Scaling.*—The mother of G in her will expressed an earnest wish that her daughter G might be educated, so as to fit her for teaching, and this was the wish of G's family. Accordingly B, the guardian of G, kept her at

school during the years 1860, 1861, 1862 and 1863, and paid the expenses of her board and tuition by moneys collected upon *ante-bellum* debts, a part of it his own, and a part of her estate. In settling the guardian's account, his payments are not to be scaled as of the dates of the payments; but he will be allowed what would have been a just charge in good money for the board and tuition. In this case he was allowed what he paid for the years 1860 and 1861, and \$350 a year for 1862, 1863.

3. **Guardian and Ward—Using Ward's Principal for Board and Education.***—In paying the ward's expenses for board and tuition, the guardian expended the principal of her personal estate. As a court of equity would have authorized the expenditure, if application had been made to the court for authority to do it before it was done, a court of equity will approve and confirm it after it is done.

This was a suit in equity in the circuit court of Fauquier county brought in June 1871, by Henry C. Bowen and Georgie C., his wife, who before her marriage was Georgie C. Rothrock, against her former guardian William S. Barton, for a settlement of his account as guardian. This guardianship commenced in 1859, and probably continued until some time after the war. The account was referred to a

850 commissioner, *who made his report.

The only questions in this court were whether certain payments made by Mr. Barton for the board and tuition of his ward during the war, were to be scaled, and whether the principal of her personal estate was properly expended upon the ward. The commissioner reduced the charges to what he deemed a reasonable compensation for the board and tuition; and the plaintiffs excepted, insisting that the guardian should only be allowed for the scaled value of the money at the time of the payments.

The cause came on to be heard on the 23d of March 1872, when the court held that the payments of the guardian should be scaled to their true value, and that the guardian should be credited to the full value of the personal estate expended upon the ward; and recommitted the report.

The cause came on again to be heard on the 9th of September 1872 when the court made a decree in favor of the plaintiffs for \$306.46 with interest on \$277.41, part thereof, from the first of September 1872. And Barton thereupon applied to this court for an appeal; which was allowed. The facts are sufficiently presented in the opinion of Staples, J.

Guy & Gilliam, for the appellant.

Johnston & Royall, for the appellees.

Staples, J., delivered the opinion of the court.

***Guardian and Ward—Expenditure of Ward's Principal for Board and Education.**—See the following cases, citing the principal case with approval: *Sedgwick v. Taylor*, 84 Va. 823, 6 S. E. Rep. 226; *Cogbill v. Boyd*, 77 Va. 456; *Wallis v. Neale*, 43 W. Va. 537, 27 S. E. Rep. 230. Further see, 1 Min. Inst. (4th Ed.) 472.

This case is easily distinguishable from that of *Bird's committee v. Bird*, 21 Gratt. 712. There the guardian had expended in the support and maintenance of his ward five hundred dollars in January 1865, and eight hundred dollars in March thereafter in confederate currency—thirteen hundred dollars in two months. Notwithstanding

the enormous depreciation of the 851 *currency at that time, he claimed credit in his settlement for the full nominal amount of these expenditures. The guardian did not pretend that he had used the ward's money in making these disbursements, or that he had collected for that purpose debts due him individually in a sound currency. The fact was, that he had appropriated the money of the ward before the war, and he sought to discharge this liability with a worthless currency. The court was compelled to reduce that currency to its true value, or to allow a credit for the nominal amount expended. There was no middle ground, no materials for an adjustment of the guardian's claims upon any basis of a just compensation. But in adopting the true value of the currency in that case, the court did not mean that this measure of recovery must be inflexibly adhered to under all circumstances. In the adjustment of these confederate transactions, to lay down fixed, unbending rules of decision, applicable to all cases, is not only unjust, but, in the nature of things, utterly impracticable. Every case must depend upon its particular circumstances. The measure of relief must of course vary according to the equities of the parties.

In the case before us, the appellant states, both in his answer and deposition, that the disbursements made by him as guardian, for the support and education of the ward, were derived partly from collections of *ante-bellum* debts due him individually, and partly from debts due the ward of the same character. He is unable to state the amount derived from each source in consequence of the loss of many of his books and papers by the great fire of Richmond in 1865. There is nothing in the record tending in the slightest degree to throw discredit upon these statements. They must therefore be taken as true.

852 *The circumstances under which the disbursements were made were of a peculiar character. It was understood that the appellee (female) would adopt teaching as her avocation. To that end, it was the earnest wish of her friends she should receive a liberal education. Her mother was so strongly impressed with this idea, that in her will she made it the subject of a special provision. She declared it to be her wish that her executor shall hold all funds and property which might belong to her daughter, and apply the interest towards her support and education; and she authorized him to dispose of the principal of her estate for the same purpose according to his discretion. In accordance with the wishes of her family, and as it seems in pursuance of an arrangement made in the

lifetime of her mother, the appellee, in the year 1860, was placed in the family of Mrs. W. K. Gordon, to be educated with the daughters of the latter. At the suggestion of the appellee's elder sister, she was afterwards sent to Miss Seaton's school in Charlottesville. It is but just to say, that in consideration of the increasing expenses incident to the war, the appellant was of opinion, and suggested that his ward should be boarded with her relatives in the country until the return of peace, and then resume her studies. Her friends objected, however, that by this course the appellee would lose the most important period of her life for study, and for a thorough preparation for the occupation to which she was destined. She was accordingly sent to Charlottesville in the spring of 1862, where she remained two years. There is no doubt but that the education she received under the supervision of her guardian was sufficient for the duties of a teacher, and would have enabled her successfully to maintain herself in life, but for her subsequent marriage.

853 *In 1860 and 1861, the appellee's expenses for tuition and board while at Mrs. Gordon's, amounted to two hundred and seven dollars; which was paid by the appellant as guardian. The payment was made by a check upon the bank in which the appellant kept his deposits. Although the check was probably paid in confederate notes, there is no doubt but the deposits were made in a sound currency, and the payee of the check might legally have demanded payment in the like medium. It is now insisted that this sum thus expended shall be scaled, so as to reduce the charge to the sum of one hundred and fifty dollars. In the year 1862 the appellant paid Miss Seaton about four hundred dollars for the board and tuition of the year; a sum perhaps less than is now required in any desirable female school in Virginia. It is insisted that this sum shall also be scaled to two hundred and fifty dollars. In the year 1863 the appellant expended in board and tuition about seven hundred and forty dollars; which it is insisted shall be reduced by the application of the scale to the sum of ninety dollars. According to this rule the appellee will have received a four years instruction at a cost of about five hundred dollars; and at a loss to her guardian of more than eight hundred dollars. And this loss the appellees are disposed to impose upon the guardian without the slightest scruple; notwithstanding the instruction she received was in accordance with the wishes of her mother and the rest of her family, and was regarded by all as absolutely essential to her future success as a teacher, and her position in society. I think the conduct of the guardian under all the circumstances was eminently proper and considerate. He cannot, it is true, be repaid the nominal amount (dollar for dollar) of his disbursements, because neither the interest nor the principal of the

854 personal estate *justified such an expenditure. He is certainly entitled

to be repaid such sum as would constitute a reasonable outlay in the education and maintenance of the ward.

The commissioner to whom the accounts were referred for settlement, has adopted the true measure of the guardian's compensation. In his report he states:

It will be seen by comparing the account, as first stated, with the alternate statement made at request of plaintiff's counsel, that your commissioner did not scale the payment of \$207, made by the guardian to Mrs. Gordon, for the ward's board, &c., in 1861, which charge was upon a specie basis; hence its payment ought not, in the opinion of your commissioner, to be scaled. But as to the payments to Miss Seaton for the board and tuition of the ward for the years 1862 and 1863, which were in excess of the ante-war charges, your commissioner thought it just to both parties to reduce these amounts to what was reasonable compensation, and hence fixed the amount at \$350 for each year. But had your comm'r scaled the payments down to their green-back values, as is done in the alternate statement, the ward would have greatly profited by the loss and injury of the guardian. She would only have been charged \$235 for the year 1862, and the small sum of \$95 for 1863. As this balance in the hands of the guardian was held for the very purpose, as set forth in the will of Mrs. Mary R. Rothrock (the mother), of educating the ward, there is no impropriety in her being charged a reasonable amount for board and tuition, when she actually enjoyed the same and received the benefits. The guardian in his answer declares that the money paid by him cost him dollar for dollar; and from all the evidence in the case it does not appear

that it was the purpose of the guardian to take any advantage *of the ward, or that he profited by speculating upon the money in his hands. Under the above state of facts, your commissioner thinks he did right to charge the ward with a reasonable yearly board, and not to reduce the payments made by her guardian for such below that sum by scaling them to greenbacks or gold.

It may be that in allowing the credits claimed by the appellant the principal of the ward's personal estate will be absorbed. So far as the property derived from the mother is concerned, the appellant was authorized by the will to dispose of it at his discretion in educating the ward. But without this, if the disbursements of the guardian are such as the court would have authorized had the application been previously made, they will be allowed, although made without authority. Had the guardian in the year 1860 applied to a court of chancery for authority to expend \$350 in the education of the ward, there is no doubt it would have been given. Such an expenditure would then have been regarded as eminently proper and judicious. The court is as competent to allow it now as then.

I think the appellant is entitled to a decree in conformity with the views of the com-

missioner already adverted to. There is the greater satisfaction in arriving at his conclusion, because it is shown by this record that the action of the guardian met with the unqualified approval of the husband of the ward. On two occasions the expenditures of the appellant were fully disclosed to him. He was informed of the circumstances under which they were made, and of the extent and nature of the credits claimed. He not only made no objection, but he expressed his entire satisfaction with the accounts. It was not until after the institution of the present suit that 856 the application of the *scale to all the disbursements in confederate currency was so strongly insisted upon by the appellee.

Upon the whole, I think the decree of the circuit court must be reversed, and the cause remanded for further proceedings in conformity with the views herein expressed.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the appellant in the settlement of his accounts as guardian ought to be allowed such sum or sums as under the circumstances would constitute a just and proper expenditure for the education and maintenance of the female appellee; and to this end he is entitled to a credit for the sum of two hundred and seven dollars, paid in the year 1862, on account of the board of the said female appellee in the years 1860 and 1861; and he is entitled to a further credit of three hundred and fifty dollars for each of the years 1862 and 1863, on account of payments made during the same period for the education and board of the female appellee; and the circuit court therefore erred in holding that all confederate items of payments or receipts, in the account of the appellant as guardian, should be scaled to their true value. Therefore for the error aforesaid, it is decreed and ordered that the decree of the said circuit court be reversed and annulled, and that the appellant recover against the appellees his costs by him expended in the prosecution of his appeal aforesaid here; and the cause is remanded to the said circuit court for further proceedings to be had therein in accordance with the principles of this decree.

Which is ordered to be certified to the said circuit court of Fauquier county.

Decree reversed.

857 *Bedinger v. Wharton & als.

September Term, 1876, Richmond.

Equitable Separate Estate.—W died in 1858, and by his will, made a few days before his death, he devised and bequeathed the residuum of his estate, consisting of land, slaves, &c., to H, in trust "for the sole use and benefit" of his daughter G, his only child, then about fourteen years of age, to manage it for her, giving to her the rents during her life; with power in H and G, by their joint consent and act, to sell such portions of the estate for the con-

venience of management as may be desirable and beneficial to G, the proceeds of sale to be invested on the same trust; and at her death to her children then alive, and the descendants of such as were dead. If G shall die unmarried or without such children &c., she to have the power of disposing of the property by will; and if no will, then over to his brothers. G marries J in 1859, and in 1862, in a cause in which G is plaintiff, H is released from the trust, and J is appointed in his place to hold the property for her sole and separate use. In September 1864 J and G sell and convey the land to B, for \$66,800 cash in confederate money, when it was depreciated as twenty-five for one; G being then under the age of twenty-one years; though B did not know that. In August 1869 G and her two infant children file their bill against B to set aside the sale and conveyance of the land. **Held:**

1. **Same—Words Creating.**—That though the words "for the sole use and benefit" are not the most appropriate to vest in G a separate estate, yet looking to the whole provision it is obvious that such was the intention of the testator.

2. **Fiduciaries—Breach of Trust—Confederate Money.**—The sale of the land for confederate money, depreciated as it then was, and daily sinking in value, was a breach of his trust on the part of J.

3. **Same—Same—Parties to.**—B was a privy to and participated in the breach of trust by J; and though the evidence shows that he acted in good faith in the purchase, the sale and conveyance is void.

4. **Infants—Voidable Contracts.**—G having been under the age of twenty-one years, her deed is 858 *voidable; and by her bill in August 1869, to set aside the conveyance, she expressed her purpose to avoid it.

5. **Same—Same—Laches.**—G having only come of age in 1865, and being still a married woman, in the then condition of the country and the law, she had not by her laches lost her right to avoid the deed when she filed her bill in 1869.

6. **Same—Same—Restoring Consideration.**—Whether a contract is executed or executory, it cannot be avoided by an infant on the ground of his infancy, after attaining lawful age, without restor-

***Fiduciaries Receiving Confederate Money.**—In the case of *Patterson v. Bondurant*, 20 Gratt. 95, the principal case is cited for the following proposition: "The doctrine has been well settled by several decisions of this court, that a fiduciary is not justified in receiving greatly depreciated currency in payment of a gold debt, unless it was necessary for the payment of debts or legacies, or unless other circumstances in relation to the safety of the debt or the condition of the estate make it expedient and proper." See also, *Wayland v. Crank*, 79 Va. 609, citing the principal case; *Tosh v. Robertson*, 27 Gratt. 270, and *see Dickinson v. Helms*, 29 Gratt. 402, and *note*.

†**Infants—Voidable Contracts—Restoration of Consideration.**—In *Abernethy v. Phillips*, 82 Va. 773, 1 S. E. Rep. 113, the court said: "It is undeniably true that if infants enter into contracts, and after becoming of age repudiate their contracts, they must make restitution of the consideration remaining in kind in their hands. *Mustard v. Wohlford*, 15 Gratt. 23; *Bedinger v. Wharton*, 27 Gratt. 858." See further citations of the principal case in the following decisions: *Birch v. Linton*, 78 Va. 590; *Gillespie v. Bailey*, 12 W. Va. 92, 94; *Ogle v. Adams*, 12 W. Va. 227; 1 Min. Inst. (4th Ed.) 521 *et seq.*

ing anything which may have been received by him in consideration of the contract, and which may remain in his hands on his arrival at such age.

7. *Same—Same—Same—Consumed.*—When such contract is executory merely, it can be avoided by the infant after attaining lawful age, without restoring anything which may have been received by him in consideration of the contract, and which may have been consumed by him during infancy, or may not remain in his hands on his arrival at lawful age.

8. *Same—Executed Contracts.*—*QUEST:* If this last stated principle applies to the case of an executed contract.

9. *Same—Same.*—Though the purchase money received from B, or a large part of it, was consumed in the support of said infant and her family, she could not become liable on her arrival at age, to refund the consideration which had been received by J from B, or be prevented from disaffirming the said contract and recovering the land from B.

10. *Same—Same.*—*QUEST:* Whether to the extent that G derived her support from the consideration received from B, or actually received and enjoyed for her sole use and benefit, the said consideration, he should be accountable for rent of the land purchased by him.

11. *Fiduciaries—Confederate Money—Burden of Proof.*—Even if the power to sell vested in the trustee, and G authorized a sale of the land, the sale of the land in September 1864, for confederate money, when it was so much depreciated in value, and was daily and rapidly depreciating more and more, was a palpable breach of trust, in which B participated, unless there were very peculiar circumstances to warrant or excuse such a sale; and the burden of proving such circumstances devolved on the purchaser.

859 *William Wharton, of the county of Culpeper, died in July 1858, leaving a widow and one child, a daughter about fourteen years of age. He owned a tract of land in the county of about five hundred and sixty-eight acres, slaves and other personal property. His will was made but a few days before his death. By it, after making provision for his widow, and giving some other legacies to his brothers, he gave the residue of his estate to Joseph J. Halsey in trust for the sole use and benefit of his daughter, &c., as set out in the 7th clause of his will; which is given at length in the opinion of Moncure, P.

The widow of William Wharton died in 1859; and in July 1859 his daughter Gabriella intermarried with John S. Wharton.

Halsey, the trustee, assumed the trust, and acted until 1863; when in a suit instituted in the circuit court of Culpeper by Mrs. Wharton, by the decree of that court made in November of that year, Halsey was relieved of his trust, and John S. Wharton was appointed in his place. This decree is also given in the opinion of Judge Moncure.

In 1864 Wharton sold the tract of land embraced in the residuum of Wm. Wharton's estate, disposed of by the seventh clause of his will to a trustee for his daughter, to

Everett W. Bedinger, for \$56,860; which was paid in cash in confederate money; and he and his wife conveyed the land to Bedinger, by deed bearing date the 16th day of September 1864. In this deed, Wharton in his own right as husband, and also as trustee of his wife, conveys to Bedinger, and Mrs. Wharton joins with him. At this time Mrs. Wharton was still a minor under the age of twenty-one years. There was some question in the cause whether she did not tell the counsel of the purchaser **860** that she was of *full age; but this court was of opinion that she did not. Certainly neither she, nor her friends who were present, one of them actively promoting the sale, gave to the purchaser or his counsel any intimation that she was not twenty-one years old.

With \$30,000 of the proceeds of said sale, Wharton purchased a house and lot in Richmond, where he was residing with his family, and took the conveyance to himself. This deed bears date the 13th September 1864. He afterwards sold it, and he and his wife united in a deed, dated January 5th, 1865, conveying it to the purchaser; Mrs. Wharton being still a minor. What further was done with the purchase money of the land in Culpeper does not appear, though it is probable that much of it was consumed in support of the family.

In August 1869, Mrs. Wharton and her two infant children, by their next friend John W. Ashby, instituted their suit in equity in the circuit court of Culpeper, against Everett W. Bedinger, and others, to set aside the sale and conveyance to Bedinger, on the ground that she was under the age of twenty-one years when she executed the deed, and that the trustee had violated the trust in selling the land, and Bedinger, the purchaser, had concurred with him in this breach of trust.

Bedinger answered the bill, denying on his part any intended injustice to the plaintiff, saying that he had, a very short time before his purchase, sold his own farm in Orange county for confederate money; that his attention was called to the plaintiffs' land by John W. Ashby, the next friend of the present plaintiffs in the suit, who never intimated to him any difficulty about the title; that he was informed by his attorney who was his agent in the purchase, **861** that both the plaintiff *and her husband informed him at the time of the execution of the deed, that she was of full age. And he further insists that the will of Wm. Wharton does not vest in his daughter a separate estate; and for that reason her husband joined in the deed in his own right, as well as trustee.

The cause came on to be heard on the 14th of June 1872, when the court made a decree, setting aside the sale and conveyance to the defendant Bedinger, directing him to deliver possession of the land to John S. Wharton, the trustee, who should hold it subject to the trusts of the decree of the 2nd of November 1863, and upon the further trusts of the will of William Whar-

ton. Wharton and wife were directed to convey to Bedinger all their interest in the house and lot in Richmond, which had been purchased by Wharton as hereinbefore stated. And a commissioner was directed to take an account of rents and profits from the 16th of September 1864, making a rest in the account on the 12th of July 1869; and also an account of the value of permanent improvements put upon the land between the 16th of September 1864 and the 12th of July 1869. And thereupon Bedinger applied to this court for an appeal from the decree; which was allowed. The other material facts in the case are stated by Judge Moncure in his opinion.

Field & Gray, and Lucas, for the appellant.

Green & Williams, for the appellees.

Moncure, P., delivered the opinion of the court.

The court is of opinion that by the seventh clause of the will of William Wharton, 862 deceased, the residuum *of his estate is given to Joseph J. Halsey in trust for the separate use of his daughter, Gabriella D., during her life; and that John S. Wharton, with whom she afterwards intermarried, acquired by such intermarriage no beneficial interest in the said estate. Though an infant of tender years at the time of her father's death, and though when he made his will he had no particular marriage of his said daughter in contemplation, yet it was competent for him to give property to her for her separate use, in contemplation of her future marriage generally, the effect of which gift would be, that she would be entitled to a separate use in such property during the existence of any future married state into which she might enter. Whether he made such a gift to her of the residuum of his estate, by the seventh clause of his will, is a question of intention, depending upon the true construction of the will. The intention to create such an estate is generally plainly expressed by appropriate words. But frequently it must be ascertained by construction, especially where the instrument on which the question arises, as in this case, is a will. The seventh clause of the will in this case is in these words:

"Seventhly. All the residue of my estate, real and personal, I hereby devise and bequeath to Joseph J. Halsey, to hold the same in trust for the sole use and benefit of my daughter Gabriella, and to manage the same for her, giving to her the rents, hires, issues and profits thereof during the term of her natural life, with power in the said trustee and the said Gabriella, by their joint consent and act, to sell such portions of the estate for the convenience of management as may be desirable or beneficial to my said daughter; the proceeds arising from such sales to be invested as the said trustee and my daughter Gabriella 863 shall jointly determine, *and be held

in trust by my said trustee for the sole use and benefit of my said daughter Gabriella during the term of her natural life, and after her death to be divided equally amongst her children living at the date of her decease, and the representatives of such as may die leaving children; and in the event of my said daughter's dying unmarried, or having been married, without leaving children living at the time of her death, then my will is, that my estate, subject to the provisions and legacies hereinbefore made for my wife and others, shall pass and go to such persons, and in such proportions and manner as my said daughter Gabriella shall, by her will duly executed, appoint; and in the event of my said daughter's decease without children and without leaving a will, then that my estate shall be equally divided between the children of my brothers, share and share alike."

The testator died shortly after the date of his will, which was on 16th day of July 1858. The will was recorded August 16th, 1858. He had but one child, the said Gabriella D., who was born on the 20th day of May 1844, and was therefore only a few months over fourteen years of age when her father died. She was the chief object of his bounty, the other objects being his wife, mother, brother and sister, who were provided for by prior clauses of his will. By the 8th and last clause, he nominated William J. Wharton, Joseph J. Halsey, and John Wharton his executors, and they duly qualified as such. The widow of the testator died in 1859; and about a week thereafter, to-wit in July 1859, their daughter, the said Gabriella, intermarried with John S. Wharton. They were married in Washington city. Joseph J. Halsey, the trustee named in the residuary clause of the will aforesaid, accepted and undertook the trust thereby reposed in him, and 864

*continued to act as such trustee until the 2nd day of November 1863; when by a decree of the circuit court of Culpeper county, made in a suit brought by the said Gabriella D. Wharton against the said Joseph J. Halsey trustee, &c., and John S. Wharton, the said Halsey was released from the trusteeship aforesaid, and the said John S. Wharton was "appointed trustee in the place and stead of the said Joseph J. Halsey, to hold in trust for the sole and separate use and benefit of the plaintiff Gabriella D. Wharton, all of the estate bequeathed and devised for her benefit and use, with such rights and powers over, and subject to such responsibility concerning the same, as the said Joseph J. Halsey had, or was subject to, by virtue of the said will; but this decree," it was further declared, "shall be suspended and of no effect, unless and until the said John S. Wharton shall, before the court or before the clerk thereof in his office, execute bond with good security, in a penalty of \$25,000, payable to the commonwealth of Virginia, and conditioned for the faithful performance of his duties as such trustee."

John S. Wharton complied with the con-

dition of the said decree by executing bond with security as thereby required; and afterwards, to-wit: on the 16th day of September 1864, acting as such substituted trustee, sold and conveyed a large and valuable portion of the trust subject to-wit: 568½ acres of land, to the appellant E. W. Bedinger, for \$56,805 in confederate money. It is stated in the deed that it is, "between John S. Wharton in his own right, as husband of Gabriella D. Wharton, as trustee of his said wife, by virtue of an appointment by the circuit court of chancery of Culpeper county, Virginia, by decree entered on the 2nd day of November 1863, and Gabriella

D. Wharton his wife, both of Richmond 865 county, Virginia, of the first part, *and Everett W. Bedinger, of Orange county, Virginia, of the second part;" and that it "witnesseth, that in order that the estate of Wm. Wharton, dec'd, devised by him unto his daughter, the said Gabriella D. Wharton, may be more conveniently and profitably managed for the sole use and benefit of the said devisee, Gabriella D. Wharton, and in consideration of the sum of" money aforesaid to them in hand paid by the said purchaser, the said parties of the first part convey to him by the said deed, with general warranty, the tract of land aforesaid.

By the 7th clause of the testator's will, the residuum of his estate is given to a trustee "for the sole use and benefit" of his daughter. While these are not the most appropriate words for creating a separate estate, and while the word "separate" would have been more appropriate for that purpose, and would have left no room for doubt as to the intention of the testator, yet there are cases in which it has been held that the words "for the sole use and benefit," especially when used in connection with the appointment of a trustee to hold for that purpose, are sufficient to create a separate estate. 2 Story's Eq. § 1382; Nixon v. Rosel, 12 Gratt. 425, and cases there cited.

But it is unnecessary to decide in this case what would have been the effect if these words only had been used in connection with the appointment of a trustee, and whether they would have sufficiently indicated an intention to create a separate estate. It is very clear that we may look at the whole residuary clause to ascertain whether such an intention is thereby sufficiently indicated; and if so, effect will be given to the intention, just as much as if a separate estate had been expressly given, in the most direct and appropriate

866 *terms. *Id.*; and *Prout v. Roby*, 15 Wall. U. S. R., 471.

Now, looking at the whole clause together, it would seem that there can be no room for doubt as to the intention of the testator; and that he certainly intended to create a separate estate in his daughter, and to guard it effectually against the marital rights of any husband she might marry. Such rights would have been wholly inconsistent with some of the most important trusts created by the clause. It is true the

daughter was not only unmarried when the will was made, but was then an infant, and quite young, and no particular marriage of said infant was then in contemplation. It was clearly in the contemplation of the testator, however, that his daughter might, and probably would, marry and have children. And though any future husband she might have is not provided for, nor even referred to in the clause, it expressly provides for any children she might leave, and also for the event of her dying without children: disposing of the estate, in either event, without reference to any right or interest of any husband she might have.

It is difficult, if not impossible, to suppose, that with the subject of the marriage of his daughter in his mind, and thus providing for the issue of such marriage, and the event of there being no such issue in existence at her death, there would have been no reference whatever in the clause to the existence or non-existence of her husband, if it had been intended that the estate left in trust "for the sole use and benefit" of his daughter should be subject to the marital rights of any husband she might have. These important words "for the sole use and benefit," twice occur in the clause, and in each instance to show the purpose for which the trustee should hold and 867 manage the "trust subject. In the

former instance the trustee is directed "to manage the same for her, giving to her the rents, hires, issues and profits thereof during the term of her natural life; with power in the said trustee and the said Gabriella, by their joint consent and act, to sell such portions of the estate for the convenience of management as may be desirable or beneficial to my said daughter; the proceeds arising from such sales to be invested as the said trustee and my daughter shall jointly determine, and be held in trust by my said trustee for the sole use and benefit of my said daughter during the term of her natural life, and after her death to be" disposed of as further provided in the clause. It must be manifest how inconsistent with all, or nearly all, of the trusts of this clause, would be the idea of any marital rights of her husband in the trust subject.

This view of the case renders it unnecessary to decide what would be the effect of the decree, which substituted her husband as trustee in the place of the one appointed by the will, and which declares that the substituted trustee is to hold the trust subject, "for the sole and separate use and benefit of the said Gabriella D. Wharton." We need not, therefore, decide whether the question of separate estate be not in fact *res adjudicata* in this case, and between the parties thereto. Certainly her husband had a right, so far as he was concerned, to waive and relinquish his marital rights, if he had any, and to sanction any construction of the court as to the existence or non-existence of such rights, adopted in a suit to which he was a party. And any subsequent purchaser of the trust subject from the trustee, with full knowledge that such

construction had been adopted and acted on, as was the case here, would seem to stand on the same ground with the husband in regard to any claim to marital rights in the *subject. But it is unnecessary, as before stated, to decide that question in this case.

The learned counsel for the appellant refers to the case of *Gilbert v. Lewis* as having been reported in 66 Eng. Ch. R. 38, and decided in 1862, upon which he places much reliance; and he expresses the hope that the court will attentively consider the case. We have accordingly examined and attentively considered it. But we do not think that it is at all in conflict with what we have said. We find the case reported in 1 DeGex, Jones & Smith's Reports, p. 38. It is a decision of Lord Chancellor Westbury, and only decides that a mere devise to a woman for her sole use and benefit does not sufficiently indicate an intention to limit the devised property to her separate use. There, no trustee was interposed, and there was nothing to indicate an intention to create a separate estate but the words, "for her sole use and benefit." The chancellor in delivering his opinion said: "There is no trust created by the will. There are no words indicative of exclusive enjoyment beyond those that I have mentioned. There is no such machinery, in short, provided by the will, as is requisite in effect for the creation, or at all events for the administration of the separate estate of a married woman. The devise is a legal devise, and the proposition is, that the words, 'for her sole use and benefit,' manifest a clear intention on the part of the testator, that in the event of subsequent coverture of his widow, she should be entitled to a separate interest in the property." He then proceeds to review the cases on the subject, and concludes thus: "There is no case of a will containing a disposition to a woman, either single or becoming discoverer immediately on the death of the testator, in which these simple words, unconnected with a gift

869 to trustees, have been made the *foundation of a decision that the devisee takes a separate estate. I entirely concur in the observations of Lord Brougham in the case of *Tyler v. Lake*, (2 Russ. & Myl. 183); that the words, to exclude the operation of the legal rule transferring the estate to the husband upon subsequent coverture, must be clear, and afford no room for doubt as to the intention of the testator." Surely these remarks of his lordship do not apply to this case, which is wholly unlike the one in which they were made. Here, a trustee was appointed, the most careful trusts were created, and "such machinery, in short, provided by the will as is requisite, in effect, for the creation, or at all events for the administration of the separate estate of a married woman." The words of the clause are "clear, and afford no room for doubt as to the intention of the testator."

The court is further of opinion that the sale aforesaid, made on the 16th day of September 1864, by John S. Wharton as

substituted trustee in the place of Joseph J. Halsey, to the appellant Everett W. Bedinger, of the tract of land lying in the county of Culpeper, constituting a part of the residuum and trust subject aforesaid, was a breach of trust in the said substituted trustee, to which the said purchaser was privy, and in which he participated. The sale was made for \$56,805 dollars in confederate money, which, at the time of the sale, was so much depreciated in value, that twenty-five dollars of it were worth only one in gold. The gold value of the price at which the land was sold per acre was but four dollars, whereas the value of the land before the war was about twenty-five dollars. Nothing but the most extraordinary circumstances could have warranted such a sale, and the burden of proving the existence of such circumstances devolved on the purchaser, in order to sustain, even if it should *be sustained at all, the validity of the sale. There is certainly no such proof in this record; and the sale is therefore invalid. In saying that the purchaser was privy to, and participated in, the breach of trust aforesaid, we do not mean to impute to him any moral or intentional wrong; but our meaning is that such is the legal effect of the transaction; as will hereafter be more fully explained.

The court is further of opinion, that the said Gabriella D. Wharton, being an infant on the 16th day of September 1864, when the deed by which the said land was conveyed to the said purchaser was executed, the said deed was therefore voidable by the said infant after she arrived at the age of twenty-one years, which was on the 30th day of May 1865; and was actually avoided by her after that event by the institution of this suit to recover the said land and the possession thereof, notwithstanding the execution of the said deed. *Mustard v. Wohlford's heirs*, 15 Gratt. 329.

The court is further of opinion, that there was no such laches on the part of the said Gabriella D. Wharton in disaffirming her said deed as could prevent her from disaffirming it. Little more than four years elapsed after she arrived at the age of twenty-one years before the institution of this suit; she was a feme covert during all that period; and there were acts of assembly in force during the whole, or nearly the whole of it which prevented the running, even of the act of limitations, much less the operation of presumptions arising from laches and lapse of time.

The court is further of opinion, that there is no error in the decree appealed from is not dismissing the original and amended bills in this case, because neither of them contained any offer to restore the purchase money. Whether a contract of an is-

871 tant be completely *executed or be executory merely, it is very clear that it cannot be avoided by the infant after attaining lawful age without restoring anything which may have been received by him in consideration of the contract, and may remain in his hands on his arrival at such

age. And when such contract is executory merely, it is very clear that it can be avoided by the infant after attaining lawful age, without restoring anything which may have been received by him in consideration of the contract, and may have been consumed by him during infancy, or not remain in his hands on his arrival at lawful age. 1 Am. Leading Cases, edition of 1871, top page 318, marginal 258. *Mustard v. Wohlford's heirs*, 15 Gratt. 329, 340-342. Whether or not the same principle applies to the case of an executed contract, is a question which was left undecided in the last named case, and has never yet been decided by this court. Nor is it necessary now to decide it, and no opinion, therefore, is intended to be expressed in regard to it.

It does not appear, and is not probable; on the contrary it is extremely improbable, that any part of the consideration received from the appellant for the land sold and conveyed to him as aforesaid, or anything purchased or procured with such consideration or any part of it, remained in the hands of the infant on her arrival at lawful age; or even in the hands of her husband and trustee at that period. The consideration was received altogether in confederate money; which, if retained in the hands of the trustee until the end of the war, which happened not very long thereafter, would have wholly perished. Whether any, and if any, what, part of it was so retained, or what was done with it, does not appear; except that a part of it, to-wit: \$30,000, (about one-half of it,) was expended in the purchase of a house and lot in the city of

872 Richmond, *which were conveyed to the husband in his own right, and was afterwards sold and conveyed by him to another person for confederate money; his wife joining him in the deed which was executed to the purchaser, and being still under age at the time of the execution of such deed. Whatever interest the said husband and wife or either of them may have had in the said house and lot at the date of the decree appealed from, was then, in pursuance of the said decree duly conveyed by them to the appellant. What was done with the purchase money received of such purchaser does not appear. No doubt a portion, and perhaps a large portion of the said purchase money, and of the remaining consideration received for the land sold and conveyed to the appellant as aforesaid, was applied to the support of the said infant. But certainly the said infant could not, on that account, have become liable on her arrival at age to refund the consideration which had been received by her husband from the appellant as aforesaid, or be then prevented from disaffirming the said contract and recovering the said land from the appellant. The most that he could justly claim against her, if even he could justly claim to that extent, would be, that while she derived her support, or any part of it, from the consideration received from the appellant as aforesaid, and to the extent to which she so derived such support, or actu-

ally received and enjoyed for her sole use and benefit the said consideration, he should not be accountable for rent of the said land. But that question does not now arise in the case, and it is not intended now to decide, nor express any opinion upon it. It may hereafter arise in the court below, when that court comes to act upon the account of rents and profits which remains yet

873 to be taken under the *decree appealed from. The only interest given to her by the will of her father in the residuum of his estate, is to have and enjoy for her sole use and benefit, "the rents, hires, issues and profits thereof during the term of her natural life." He expressly declared that the trustee should hold the trust subject during his daughter's life, and "manage the same for her, giving to her the rents, hires, issues and profits;" which he plainly intended she should receive and enjoy as they accrued, and not dispose of by anticipation; so that she might have the continual means of support during her life. Subject to that life estate, the residuum is given by the will on other and ulterior limitations in which she has no personal interest. In no manner and to no extent is she accountable for the principal of the said consideration, and no benefit which she may possibly have derived from that consideration can prevent her from avoiding the deed executed by her during her infancy as aforesaid and having the property thereby conveyed, retaken and held under the trusts created by the seventh clause of the will.

It is contended by the appellant, that he is entitled to the property now in controversy under that provision of the residuary clause of the will which empowered the trustee and the said Gabriella by their joint consent and act "to sell such portions of the estate for the convenience of management as may be desirable or beneficial to my said daughter; the proceeds arising from such sales to be invested as the said trustee and my daughter Gabriella shall jointly determine, and be held in trust as aforesaid, by my said trustee, for the sole use and benefit of my said daughter during the term of her natural life." It is contended that under this power a good

874 title was sold and conveyed *to the appellant, who was not bound to see to the application of the purchase money.

The testator does not empower the trustee to make a sale of any part of the trust subject, except in conjunction with the said Gabriella, and by their joint consent and act; and then, only such portions of the estate for the convenience of management, as may be desirable or beneficial to his said daughter. His daughter was but fourteen years old at the date of his will, and we cannot suppose that he intended to intrust to her so important a power to be exercised during her infancy, even conceding that he had the right to do so. We must suppose that he intended this power to be exercised, if at all, after her arrival at lawful age. If so, there was no power, even in the trustee, to

sell the property at the time the deed was made, and of course the deed is void.

But even if the daughter was empowered to act in making a sale during her infancy; or, if the trustee was empowered to act alone in making it, did it come within the power to sell the whole of the trust subject? or so important a part of it as the tract of land in question, which was no doubt the chief part of the trust subject, and the whole of the real estate embraced therein? Or was it intended to empower the sale of any comparatively small portions of the estate, perhaps slaves or other personalty especially, and then only "for the convenience of management."

But however these questions may be, it is unnecessary now to decide them. Certainly the sale of the land under the power, even conceding its existence, for confederate money, when it was so much depreciated in value as it was at the time of the sale, and when it was daily and rapidly depreciating

more and more, was a palpable breach
875 of trust in which the purchaser *participated as aforesaid, unless there were very peculiar circumstances to warrant or excuse such a sale; the burden of proving which circumstances devolves on the purchaser, and there is no such proof in the record. The exposure of the land to the ravages of two contending armies, and the manner in which it had been wasted by them, may have made it desirable and proper, if possible, to exchange it for, or sell it and buy, other land not so much exposed, to be held in trust as aforesaid; and if that had been proved to have been done, it might have warranted or excused the act of the trustee in making such exchange, or sale and purchase. But certainly proof that other property of about the same value with the land sold by the trustee, was acquired by him with the proceeds of said sale, to be held on the same trusts, would be required to validate the said sale, either at law or in equity. If the trustee had sold the land in pursuance of the power in this case, and for good money, a question might well have been raised whether the purchaser was bound to see to the application of the purchase money, according to the rules of law on that subject. But such was not the case. The trustee sold the land, not for good money, but for confederate money, then current, at an enormous depreciation, and daily depreciating more and more. The purchaser paid to him the whole amount of this depreciated purchase money, and no part of it was invested as required by the will in the purchase of other property to be held in trust as aforesaid, but all appears to have been lost, as might well have been expected. And, in the meantime, it seems the trustee has become perfectly insolvent and nothing can be recovered of him.

It may be proper for us to say, in justice to the appellant, before we close our
876 opinion in this case, that *we consider it a very hard one on his part, and have, therefore, decided it against him with

great reluctance. He acted in good faith in making the purchase in confederate money, and paying it to the trustee. He had sold his own land for confederate money, shortly before he made the purchase, and applied the money he received to the purchase of the land in controversy, which he was advised and believed his vendors had power to sell and convey. He and his counsel in making the purchase, no doubt believed as they said they did, that the female complainant was over twenty-one years of age when the deed was executed, as she had been for several years married. But though the said counsel was under the impression that he was informed both by Dr. J. S. Wharton and G. D. Wharton, his wife, before the deed was executed, that she was over age; yet we think it appears from the record that the said counsel was not really so informed, but inferred the fact from her appearance, and the length of time she had been married. But it is no doubt true, as he states, that neither Dr. Wharton nor his wife, nor Mr. and Mrs. Glass then living on the land, (the latter being her aunt), nor Dr. J. W. Ashby, a friend and connection of the family, and the next friend of the complainant in this suit, who was active in promoting the sale, ever intimated to him that she was under age, though it does not appear that any of the said parties was influenced by fraudulent motives in failing to give such information. But notwithstanding the hardships of the case on the part of the appellant, we think the law is against him, for the reasons before stated, and decide accordingly.

It is insisted by the appellees, that they are entitled to rents and profits from the 16th of September 1864, or at least from the close of the late war, instead of
877 *from the date of the institution of this suit whereby the contract was disaffirmed by Mrs. Wharton, to wit: the 12th day of July 1869; and they ask that the court will pass on this question for the guidance of the court below, that the case may not be brought back to this court on this point by either party. But as our jurisdiction in this case is appellate only, we do not consider it proper to decide, or express an opinion upon this question, until it shall have been first adjudicated by the court below; we therefore decline to do so.

The decree appealed from is therefore affirmed.

Decree affirmed.

878 *Ober v. Goodridge, Trustees.

November Term, 1876, Richmond.

Negotiable Notes—Transfer "Without Recourse"—A case of the transfer of a number of negotiable notes "without recourse," in which it was held looking to all the circumstances, that the words were to be construed in their liberal sense; and that the transferrer was not liable for the failure to recover from the endorser. If the transferee

intended that they should be sued in this instance in their restricted and limited sense, he should have been careful to express his meaning, or have it expressed in plain and unmistakable terms.

This is an appeal from the decree of the circuit court of Westmoreland county, rendered on the 25th day of April 1871, in a foreign attachment suit, in which John Goodridge was plaintiff, and Gustavus Ober, Willoughby Newton, Willoughby Newton, Jr., and William R. Dozier, were defendants. The bill was filed on the 22nd day of October 1869. The plaintiff states, substantially, the following facts therein: that on the 20th day of September 1866, the said Dozier executed a deed of trust, which was duly recorded, and of which a copy was exhibited with the bill, whereby he conveyed to the plaintiff a tract of land lying in said county, in trust to secure the payment of the debts of said Dozier in certain classes; in which deed the plaintiff was empowered to sell the said land either publicly or privately, in his discretion, with the consent of the said Dozier. That in September 1867, the plaintiff with the assent of the said Dozier, sold the said land to the said Ober, a resident of the city of Baltimore in the state of Maryland, and received in payment for the same, the negotiable notes

879 of divers debtors of the said Ober, of which notes he the said Ober was owner and holder, the amount of which was \$4,040.42, and which were due by certain makers and endorsers as set out in a list filed with the bill. That the plaintiff "with the assent of the said Dozier, agreed to take the said paper without recourse to the said Ober, should the makers and endorsers prove insolvent, supposing and believing that the said notes had been all treated regularly as negotiable paper should be; and that the same were, at that time, legal and valid obligations, as well as to the endorsers as to the makers. That at the time of said sale, suits had been brought by said Ober upon the said notes, against the makers and endorsers, in the said court; and the said Ober directed his attorney in the cases—Robert M. Newton, Esq.—to pay over the same to the plaintiff; and the papers were endorsed for the benefit of the plaintiff, trustee as aforesaid. That among these notes was one against Wat H. Tyler, maker, dated 26 January 1861, payable four months after date, at the Bank of Baltimore, for \$528.52, endorsed by Thomas S. Rice and S. B. Atwill, which last is now deceased. That in the case of this note, he (said plaintiff) especially looked to the endorser, T. S. Rice, well knowing, and he charges the fact so to be, that the maker, Wat H. Tyler, was at the time, and had been long before, utterly insolvent, and the circumstances of the other endorser Atwill, were doubtful. That at the March term 1868 of said court, the case of Ober, for the benefit of the plaintiff as aforesaid, against Wat H. Tyler, maker, and Thomas S. Rice, endorser of the said note of \$528.52, was tried, and recovery was resisted by said Rice, endorser aforesaid, upon the ground

that he had received as such endorser, no notice, actual or otherwise, of the non-payment and protest of the said note.

880 That on the said trial the only protest and notice of protest which the said Ober offered in evidence was that made on the — day of July (ought to be the 29th of May) 1861, and filed in said suit. That the said Ober was present at said trial, aiding the counsel employed by him, and was himself examined as a witness in the case; and admitted on cross-examination by the counsel of said Rice, that at the date of said protest and notice, a state of hostilities existed between the United States of America, of which the state of Maryland was one, and the so-called confederate states, of which Virginia was a part; and further, that all intercourse by mail or otherwise between Maryland and Virginia had been prohibited by authority, and ceased until the year 1865. That the said Ober further admitted at the trial aforesaid, that after the cessation of said hostilities and the resumption of intercourse between Maryland and Virginia, no notice at all of the said non-payment and protest had ever been given by him, said Ober, or any other person interested, to the said T. S. Rice or said S. B. Atwill, endorser aforesaid, actually or otherwise. That the said Rice was also examined at said trial, on oath, and stated that he had never, at any time received notice of said non-payment and protest. That the judge who tried said case took time to consider of his judgment therein; and at the October term of the said court, 1868, gave judgment against the said Wat H. Tyler, maker of said note, for \$528.52, with interest from 26th May, 1861, and cost of protest and of suit, and discharged said Rice as endorser, with his costs, upon the ground that no legal notice of said non-payment and protest had been given him by said Ober or any other, or received by said Rice;" all of which, so far as it is matter of record, will appear by reference to a transcript of the said suit of Ober v. Tyler & Rice, filed with the said bill.

881 *The plaintiff then further states in his bill that he is advised that by reason of the matters hereinbefore set forth, the said note was a nullity as to the said endorsers at the time the same was transferred by said Ober to plaintiff in part payment for said land; and that the said Wat H. Tyler being insolvent at said time, and still so, the said Ober is justly indebted to said plaintiff for the amount of said note, with interest and costs as aforesaid; that said plaintiff has, since said judgment was rendered, applied to said Ober to pay him said money; but the said Ober refuses so to do, pretending that the plaintiff, having received the assignment or transfer of said note without recourse to him, has no claim upon him as assignor or transferrer. And the plaintiff charges, that in agreeing to take the said notes without recourse, he looked solely to the solvency or insolvency of the makers and endorsers, and intended

to take upon himself the risk of such solvency or insolvency only; and that such was the view and intention of said Ober at the time; and the plaintiff reiterates his charge, that he supposed and believed at the time of said transfer of said notes that they had been so treated by said Ober as to bind all parties, makers and endorsers.

The plaintiff then further states that said Ober is a non-resident of the state of Virginia; that he possesses property and debts due him in the said county, to wit: the land sold him as aforesaid by the plaintiff, a large sum of money due to him by Willoughby Newton, and other debts and effects in the hands of Willoughby Newton, jr., of said county.

The plaintiff therefore prays that the said Ober, said Newton and said Dozier may be made defendants to said bill, and answer the same on oath; that said plaintiff may recover against said Ober the said **882** sum of \$528.52, with interest and costs as aforesaid; that the said Newton may be compelled to disclose what debts they owe to said Ober, or what effects they may have in their hands belonging to him; that the same, or so much thereof as may be necessary, may be attached to pay to the plaintiff in his demands; and in case the said debts and effects shall be insufficient to pay the same, then that the said land, or so much thereof as may be necessary, may be sold to pay any deficiency or balance due to him; and that he may have such other and further relief in the premises as the case may require.

The exhibits referred to in the bill are copied in the record in this case, and form a part thereof. No. 2 is a list of the notes which were transferred by said Ober to the plaintiff as aforesaid, showing the names of the makers and endorsers, and amount of the said notes respectively. They are twelve in number, and amount in principal to \$4,040.44. At the foot of the list is a writing in these words:

"Montross, September , 1867.

The above claims are this day transferred to John Goodridge, as trustee of William R. Dozier, in consideration of a bargain entered into, and concluded between said William Dozier & Gustavus Ober, to wit: William R. Dozier having sold to said Ober a farm of 225 acres in extent for the amount vested in the said claims, equal to \$4,040.44.

Robert M. Newton,
Attorney for G. Ober."

The first note included in said list is the one involved in the present controversy, and is therein thus described:

883 "W. H. Tyler, endorsed by Thomas S. Rice and S. B. Atwill, \$528.52."

Opposite to each of four of the said notes in said list, amounting together to \$1,723.05, is written the word "paid."

Exhibit No. 3, referred to in the bill, is a copy of the record in the action at law brought by said Ober against the said Tyler and Rice on the said note for \$528.52. It was brought in the circuit court of said

county, on the 23d day of July 1867, and was pending at the time of the sale of said land and transfer of said notes as aforesaid, which were made in the same county. The declaration in the action was filed on the first Monday in August 1867, about a month before the said sale and transfer. The note and protest referred to in the declaration were filed therewith and are copied in the record. The note is in the following words and figures, to wit:

"\$528.52.

Hague Post-office,
Westmoreland County, Va.,
January 26, 1861.

Four months after date I promise to pay to Thomas S. Rice, or order, five hundred twenty-eight dollars and fifty-two cents, payable and negotiable at the Bank of Baltimore, Maryland, without offset.

Wat H. Tyler."

[Endorsed.].—"Thomas S. Rice, pay to John Kettlewell, S. B. Atwill, John Kettlewell, G. Ober, John Kettlewell."

The note was duly presented for payment on the day on which it became payable, to wit: the 29th of May 1861, at the Bank of Baltimore, where it was payable, and being dishonored was duly protested for **884** non-payment. *The notarial certificate is in due form. After stating the demand of payment and protest of the note, the certificate concludes with these words: "Thus done and protested at the city of Baltimore aforesaid; and on the same day I addressed written notices to the endorsers of said promissory note, informing them that it had not been paid; payment thereof having been demanded and refused, and that they would be held responsible for the payment thereof. Notice for Thomas S. Rice I mailed to him: Rice's store, Westmoreland county, Virginia. Notice for S. B. Atwill I mailed to him: Montross, Westmoreland county, Virginia. Notices for the other endorsers I left at their respective places of business. In testimony whereof," &c.

On the 21st of October, 1867, the general issue was plead and joined in the action, and leave was given the defendants to give any special matter in evidence at the trial of the issue. And on the 19th day of October 1868, at a circuit court held for said county, came the parties by their attorneys; and neither party requiring a jury to try the issue joined in the cause, and agreeing to submit the same to the judgment of the court, and the court having heard the evidence adduced, as well by the plaintiff as the defendants, judgment was thereupon rendered by the court against the defendant. Wat H. Tyler, maker of the note, for the amount thereof, with interest and costs as aforesaid, and in favor of the defendant, Thomas S. Rice, endorser of the note, who recovered his costs against the plaintiff. The plaintiff excepted to the judgment, and prayed that the evidence in the case might be certified. No certificate of evidence is copied in the record, and no writ of error or supersedeas appears to have been obtained

or applied for to the judgment.

885 *The answer of said Ober was filed at the same time with the filing of the bill, to wit: on the 22d of October 1869. The said defendant states the following facts therein: "That on the day of September 1867 he, at the special instance and earnest request, often repeated, of said William R. Dozier, transferred to the plaintiff, John Goodridge, trustee of said Dozier, certain negotiable notes, then long past due by parties as named in the bill of the plaintiff, in consideration of a tract of land as described in the bill of the plaintiff; that the land was of not more than half the value of the notes transferred, if their amount had been guaranteed; that no guaranty was asked or expected by the plaintiff, but the notes were taken entirely at the risk of the plaintiff for what they were worth, and expressly without recourse; that the plaintiff knew every fact and circumstance connected with the notes as well as the defendant; that the notes were all in the clerk's office as the foundation of suits then pending; and that the notices of protest were all in the clerk's office as the foundation of suits then pending; and that notices of protest and all the facts connected with the protest were filed with the declarations in said suit, and were open to the inspection of said Dozier and his trustee, and your respondent avers were fully examined by them; that if they were ignorant of the legal consequences of these facts, they were ignorant in common with the respondent, and they could not claim relief because of their ignorance of the law. This respondent avers that he was utterly ignorant of the principles of law relied on by the plaintiff as ground for relief; and is assured by counsel, learned in law, that no such principle exists, and that the decision on the law side of this court in the case of Dozier, trustee, v. Tyler & Rice, was entirely

886 *erroneous, and would be reversed on appeal, which appeal it was the duty of the complainant to institute. This respondent utterly denies all fraud or concealment, and affirms that the contract between himself and said Dozier was entirely fair and open on his part; and he is assured, even if the complainant should fail to realize the amount of Tyler's note, the bargain has been very profitable to the said Dozier; that it is true that this respondent was examined as a witness in the case of Dozier's trustee v. Tyler & Rice, and was anxious to give the plaintiff the benefit of any facts within his knowledge; but he knew nothing which was not a matter of public history, and certainly made no admission inconsistent with the facts of the answer and his entire freedom from all responsibility for the notes assigned to the trustee of said Dozier."

On the same day on which the said bill and answer were filed, on the motion of the complainant and by consent of parties, it was ordered that the cause be put upon the argument docket.

No other answer was filed in the cause, and no evidence was taken thereon. Indeed it appears that no process was issued against any of the defendants; and there was no replication to the answer of said Ober. But on the 25th day of April 1871 the cause came on to be heard upon the bill of complainant with the exhibits therewith filed and the said answer, and was argued by counsel: On consideration whereof the court was of opinion, and decided that the complainant on the one hand, and the defendant on the other, when the note of Wat H. Tyler and Thomas S. Rice was assigned by the defendant to the complainant "without recourse," contemplated only the risk of the solvency or insolvency of the maker and endorser of the said note; and the court therefore decreed that the defendant,

887 *Ober, pay to the complainant the sum of \$528.52, with interest as aforesaid till paid, and costs. And the court further decreed, that unless the said Ober pay the complainant or his attorney the said sum of money, interest and costs within ninety days from the date of the decree, then a sale of the said land, or so much thereof as might be necessary for the purpose, was decreed to be made by a commissioner appointed by the decree for the purpose and in the manner and on the terms and conditions prescribed by the decree.

To the said decree the defendant, Ober, applied to this court for an appeal; which was accordingly allowed.

R. L. T. Beale and Holladay & White, for the appellant.

Ro. Mayo, for the appellee.

Moncure, P., delivered the opinion of the court.

After stating the case he proceeded as follows:

The court is of opinion that the circuit court erred in deciding that the complainant on the one hand, and the defendant on the other, when the note of Wat H. Tyler and Thomas S. Rice was assigned by the defendant to the complainant, "without recourse," contemplated only the risk of the solvency or insolvency of the maker and endorser of the said note; and in rendering a decree that the said defendant pay to the complainant the amount of said note with interest and costs, as mentioned in the said decree. The bill and answer were filed on the same day; whereupon, on motion of the complainant and by consent of parties,

it was ordered that the cause be put upon the argument *docket. And afterwards, the cause came on to be heard upon the bill and answer only, without any other evidence, and without any replication to the answer. In such a case, the facts stated in the answer in relation to the controversy, whether responsive to the bill or not, must be taken to be true. 2 Rob. Old Pr., p. 312, and the cases there cited.

But it is stated as a fact in the bill as well as in the answer, that the assignment aforesaid was "without recourse;" and the question is whether these words are to be construed in this case according to their literal sense, at least so far as to embrace the risk in regard to the sufficiency of proof of the dishonor of the note to charge the endorser; or in the restricted or limited sense in which they were construed by the circuit court?

This court is of opinion that they ought to be construed in their literal sense, at least so far as to embrace the said risk, and not in the restricted and limited sense aforesaid; and that such was the manifest intention of the parties.

The ground on which the circuit court held that the endorser of the said note was not liable, to wit: the supposed insufficiency of proof in regard to notice of the dishonor of the note to the said endorser; was as well known to William R. Dozier, and to John Goodridge, his trustee, the transferee of the note, as to Gustavus Ober the transferor. The former two lived in the county of Westmoreland, where lived also the maker and endorser of the note; and where, too, the note was made and endorsed; though it was payable and negotiable at the Bank of Baltimore. At the time of the transfer, an action had been brought by said Ober against the said maker and endorser of said

note in the circuit court of said county, 889 and *was then pending in said court, and the plaintiff in the action had filed his declaration therein; and with it, as evidence of the presentation and demand of payment and dishonor of the note, and notice thereof to the endorsers, the notarial certificate of protest, &c., which has ever since remained on file among the papers in the said action. This evidence was seen and known to the said Goodridge and Dozier at the time of the transfer of the said note to them by the said Ober; the said note being then on file among the papers of the said action, and remaining there after the transfer. The said transferees became thereafter the beneficiaries in the said action, and prosecuted the same in the name of the said Ober for their own use, upon the evidence which had been filed by him to establish his right to recover in the action, both against the maker and endorser. No doubt the same attorney who brought the action for Ober continued to prosecute it for Goodridge and Dozier after the transfer, and until it was determined. There is no affirmative evidence of this fact in the record, but it may well be presumed, in the absence of evidence to the contrary. The fact no doubt is, that the doubt or difficulty in regard to the sufficiency of proof as to the notice of dishonor to charge the endorser, was the cause of the resistance by the endorsers of the demand against them, upon this and other notes of the same kind held by Ober, and of the necessity for the actions which were brought upon them against the said endorsers. And the risk arising from that vexed question was, no

doubt, the very risk which induced Ober to transfer the notes "without recourse," in consideration of the purchase of the land. For he expressly says in his answer, that the land was of not more than half the value of the bonds transferred; if their

890 amount had *been guaranteed. The amount of the notes was \$4,040.41; and it seems that four of them, amounting to \$1,723.05, had already been paid when the bill was filed in this case. Ober in his answer says, that "even if the complainant should fail to realize the amount of Tyler's note, the bargain has been very profitable to the said Dozier." That the question in regard to the sufficiency of the proof of notice to charge the endorser was a vexed one, is plainly evident from the record. The circuit court so considered it, and held the case under advisement until another term after it was submitted, and the judgment when rendered was excepted to, no doubt by the beneficiary plaintiff who then had charge of the action, and who seems by such exception to have then contemplated applying for a writ of error and supersedeas to the judgment. But he never did so.

It is plain that Ober intended by the transfer of the note "without recourse;" that those words should include the risk in question, and they sufficiently express his intention. If the transferee intended that they should be used in this instance in the restricted and limited sense now contended for by him, he should have taken care to express his meaning, or have it expressed in plain and unmistakable words. But he manifestly did not so intend.

We deem it unnecessary to comment on the cases referred to by the learned counsel in their notes of argument in this case. There is nothing in any of them in conflict with the views we have expressed; and both of the two cases mainly relied on by the said counsel respectively, to wit: *Crawford v. McDonald*, 2 Hen. & Mun. 189, by the counsel for the appellant; and *Mays v. Callison*, 6 Leigh 230, by the counsel for the appellees, sustain these views.

891 *The decision of the question we have just been considering is, in effect, a decision of this case; and we need not consider any of the other questions arising in it, although there are several others.

The court is therefore of opinion that the decree is erroneous for the reasons aforesaid, and that it ought to be reversed and the bill dismissed.

Decree reversed.

892 *Berkeley v. Smith & als.

November Term, 1876. Richmond.

Trespassers.—J by his will in 1845 gives to his son S a store-house and lot, together with the east side or half of the privy situate on the adjoining lot west; and by a codicil he gives to his son W the said adjoining lot; and in 1848 W sold his lot to B subject to the rights of the owner of the lot given to S, to the east side or half of the privy. The store-

house of S extended back 70 feet to his back line; that of W extended only about 55 feet, leaving a vacant space, on which the privy was located; and there was a door in the side of S's house entering into this vacant space with lights in the door. B being the tenant of S, and on the death of his children shut up the said door, extended his store-house to his back line, one story high, with a flat roof, and built a privy upon the roof. **HOLD:**

1. **Same—Relief against in Equity.**—The title of the children of S to the door in the wall of their store and to the east half of the privy being unquestionable, they may without proceeding at law to establish their right, go at once into equity to compel the removal of the obstructions.
2. **Same—Compensation against.**—If a just compensation may be made to the plaintiffs for the injury done to their property and rights, the court may ascertain and decree such compensation, instead of having the obstructions removed.

This was an appeal from the decree of the corporation court of Alexandria, in a suit in which Hesselius Smith and others, children and heirs at law of Sidney Smith, were plaintiffs, and William N. Berkeley was defendant. The object of the suit was to compel the defendant to remove an addition to his store-house which adjoined a store-house of the plaintiffs, and to repair other injuries he had done to their property. The cause came on to be heard **893** on the 13th of November *1872, when the court held that the plaintiffs were entitled to the relief they asked for, and made a decree that the defendant be perpetually restrained and enjoined from continuing the erections and obstructions set forth in the bill, and that he forthwith remove them, and restore the said premises to the condition in which they were before said erections and obstructions were made by him, &c. From this decree Berkeley applied to this court for an appeal; which was allowed. The case is stated by Judge Anderson in his opinion.

Beach, for the appellant.

Claughton, for the appellees.

Anderson, J. The appellees, who were plaintiffs in the court below, have title in fee to the store-house and lot at the intersection of King and Fairfax streets, in the city of Alexandria, which may be described as the south-west corner lot. Their store-house covers the entire area of the lot, extending back from King's street to its rear boundary line. The appellant owns the adjoining lot west, which is of the same depth, each extending back seventy feet; but the store-house upon the appellant's lot did not extend back from King's street the whole depth of the lot, so that there was an open space in the rear of his store-house of twelve by twenty feet, which was unoccupied, except by a privy. Both lots were formerly owned by Joseph Smith, and were as thus described, when by his will bearing date January 1st, 1845, he devised them as follows: the corner house and lot, together with the east side or half of the privy, sit-

uate on the adjoining lot west to his son William, in trust for his son Sidney; **894** *and by a codicil to his will, the said adjoining lot to his son William, who afterwards, in the year 1848, sold and conveyed the same to the appellant subject to the rights of the owner of the corner lot to the east side or half of the privy. By the death of Sidney Smith, the appellees, who are his heirs at law, became invested with title to the corner lot by descent. The appellant, in the lifetime of Joseph Smith, held possession of the corner store-house and lot, and continued possession thereof as tenant to Sidney Smith; and after his death he continued to hold possession thereof as tenant to his heirs, the appellees, or their guardian, they being infants. And during his tenancy, and the infancy of the appellees, he removed the privy, blocked up the door on the west side of their store-house, which opened on the space in the rear of his store-house, and through which they had access to the privy, and which afforded light and air to their store-house, and extended the first story of his store-house to the rear line of his lot, so as to cover the entire space, which he covered with a flat roof, upon which he erected another privy, which could be approached from the second story of both store-houses, over the roof of his store extension. To give access to the privy, to the tenant of the corner store-house, though it is not alleged or directly proved, it would seem that he must necessarily have to cut a door through the wall of the appellee's store-house from the second story through which to enter upon the flat roof, as there does not appear from the diagram exhibited with the record, or by any evidence in the cause, that there was a door or any opening there before.

The plaintiffs allege in their bill, that they were wholly ignorant of the **895** changes which the appellant *had made in their property, and the invasion of their rights, until the year 1866, and that on the 2nd of April of that year they instituted an action on the case against him, to recover damages therefor, and obtained a verdict for one cent damages, and a judgment for costs—the court certifying that the object of this suit was to try a right, as well as to recover damages. This judgment was affirmed by the district court of appeals, upon a writ of error which was awarded to the defendant. The defendant continuing the nuisance afterwards, the plaintiffs instituted a second action of trespass on the case against him, which resulted in a verdict for one cent damages, and a judgment in their favor for costs, and damages.

The plaintiffs claim, that their rights herein alleged to have been violated by the appellant, and the fact of their violation, have been determined by the said action at law, and cannot now be questioned. The appellant insists that they have not been determined by those actions. The court is of opinion, that the verdict of the jury being

general, and responsive to the issue upon all the counts, is a finding in favor of the plaintiffs on all of them, which is confirmed by the judgment of the court, and establishes the plaintiff's right to the east half of the privy, to the door in the west side of their store-house, and the right of egress and ingress through it, to and from the east side of the privy, over the appellant's yard, and to the communication of light and air through it to their store-room, which rights have been violated by the appellant, by his acts and doings aforesaid.

But if the appellee's rights were not clearly established by the judgments at law, they are clearly set out and proved in this chancery suit; and the court is of opinion that the appellees, their right **896** being clear, *might have pursued their remedy in a court of equity without first resorting to a court of law to establish their right. (2 Eden on Injunctions, p. 273; Law of Nuisance, Wood, § 777, and cases cited.)

It might be conceded, that the extension by the appellant of his store-house over the open space in the rear of it and raising the privy to a level with the second story of the appellees' store-house, would not be a substantial violation of the appellees' right to the east half of the privy, provided he had made the change, and given the appellees a commodious and convenient access to it, from their second story, without violating any other of their rights.

But this he has not done, and could not do. What right had the appellant to block up the appellees' door-way in their own building, and thereby exclude light and air from their store-room? What right had he to deprive them of egress and ingress through their door, as they had enjoyed it before he purchased his lot? What right had he to cut a door through the wall of their house, as he probably did, to give access from the second story to the flat roof of his store extension, without their consent?

Thus it appears that whilst the raising of the privy to a higher level by the appellant may not have been in itself a substantial violation of the plaintiffs' right, provided he gave them as convenient a way of access to it over the roof of the extension of his store-house from the second story of their store-house, the execution of the change involved him necessarily in the violation of other important unquestionable rights of the plaintiffs, which seems to be essential to the comfortable enjoyment of their property.

The appellant purchased his store-house and lot when subject to those rights **897** of the plaintiffs, which *must have diminished the value of the property he purchased, and consequently the price he had to pay for it. By the improvements he has made to his store-house he has added to its value. He has increased the annual rental of it, according to the proof in the cause, from \$50 the first year to \$100 or \$150 subsequently. But he has done so at the

expense of the plaintiffs, by a reduction of the annual rental value of their property, according to the proofs, from \$50 to \$5, and to their permanent damage of five or six hundred dollars. And those changes he made in violation of their manifest rights and without their consent, and whilst he was in possession of their property as tenant thereof, and they were in their minority and incapable of protecting their rights. He says they were made with the knowledge and approbation of their guardian. If that were proved it could not avail him, as the guardian had no authority to consent to such impairment of the value of his ward's property. The appellant had no right to enhance the value of his property by invading the rights of the plaintiffs, and deducting from the value of their property, as the record clearly shows he has done. He may have done it with no wilful design to injure the plaintiffs, or to trample on their rights, and without considering that he was doing them a wrong and injury, as is very probable; but, nevertheless, he has invaded their substantial rights, and done them serious permanent damage.

And now as to the remedy. Mr. Justice Story says, when a party builds so near the house of another as to darken his windows against the clear rights of the latter, either by contract or ancient possession (in this case the appellant did not build so near as to merely darken the plaintiffs' windows, but actually blocked up the door in which

were lights in the plaintiffs' house. **898** *so as entirely to exclude the light and air), in such case the eminent jurist says courts of equity will interfere by injunction to prevent the nuisance, as well as to remedy it if already done, although an action for damages would lie at law, for the latter can in no just sense be deemed an adequate relief in such case. The injury is material, and operates daily to destroy or diminish the comfort and use of the neighboring house, and the remedy by multiplicity of actions, for the continuance of it, would furnish no substantial compensation. 2 Stor. Eq. Jur., § 926.

Where ancient lights have existed for upward of twenty years undisturbed, the owner of an adjoining lot has no right to obstruct them, and, particularly so, if the adjoining lot was owned by the person who built the house containing the ancient lights at the time of building, and was subsequently sold by him. Eden on Injunctions, p. 269, note 1, citing Robeson v. Pittenger, 1 Green's Ch. R. 57.

Injunction will be awarded in such cases where the windows are ancient lights, or where the act is in violation of some agreement express or implied. (2 Eden on Injunctions, p. 269, note (1), and cases cited.)

The court is well satisfied that in this case the remedy at law is wholly inadequate for the purposes of justice. They cannot but regard the injury to the appellees as of a serious character. But they are not satisfied, from all that is shown by the record, that ample pecuniary compensation might

not be made to the appellees for the invasion of their rights, and the impairment to the value of their property. And as a mandatory injunction would subject the other party to serious inconvenience, it would seem to be proper for a court of chancery to

direct an inquiry before itself, whether the injury is capable of being *fully and abundantly compensated by a pecuniary sum, and what sum would be reasonably adequate. In *Kerr on Injunctions* (page 231), it is said, "the court will not interfere by way of mandatory injunction without taking into consideration the comparative convenience and inconvenience which the granting or withholding of the injunction would cause to the parties. If the injury done is capable of being fully and abundantly compensated by a pecuniary sum, while the inconvenience to the other party from granting an injunction would be serious, the court will not interpose by mandatory injunction; but will either direct an inquiry before itself, in order to ascertain the measure of damages that has been actually sustained, or will, on dismissing the bill, reserve to the plaintiff his right to proceed at law." An action at law could not afford an adequate remedy for the permanent and continuing injury. Whilst in the proceeding in equity, he may be awarded compensation, not only for past injuries, but also for the permanent and continued anticipated injury caused by the appellant's acts of aggression upon their rights, already accomplished, and thus avoid a multiplicity of suits at law to recover damages from time to time, for the continuing injury, after the damage has been actually sustained; the pecuniary compensation to be awarded in lieu of all damages actually incurred, or which may hereafter be incurred, by the appellee, from the acts and doings of the appellant complained of, and the appellees perpetually enjoined from the prosecution of other suits or actions against the appellant therefor. In a recent case of *Isenberg v. The East India House Estate Co.*, decided in England, (*The Jurist*, 1864, part 1, page 221), the lord chancellor suspended the order of the master of the rolls,

awarding a mandatory injunction, and directed an inquiry *before him for the purpose of ascertaining what damage had been sustained by the plaintiff, by reason of the buildings erected by the defendants, and what would be the proper amount of compensation to be paid by the defendants to the plaintiff as satisfaction for such damages. The court, approving of the decision of the lord chancellor, are of opinion that it may be safely followed as a precedent. They are of opinion, therefore, to reverse the decree of the circuit court, and suspend the mandatory injunction, and to remand the cause for the purpose of directing the inquiries before indicated, and then to be proceeded with to a final hearing and decree, as may be right and proper on the case as it may be then presented. But the appellees being the parties substantially prevailing here, are entitled to their costs.

Moncure, P., concurred in the opinion of Anderson, J.

Staples, J., concurred in the results.

Christian, J., dissented.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that whilst the rights of the appellees are clear, the injury and damages which they have sustained are serious, and that the corporation court did not exceed its powers in awarding a mandatory injunction, yet as the exercise of that power is one which ought to be attended with great caution, and the court here is not satisfied that the appellees may not be abundantly compensated in damages by a pecuniary sum for the injury which they have sustained. It is therefore decreed and ordered that the decree of *the said corporation court be reversed and annulled, and that the cause be remanded to the said corporation court with instructions to direct an enquiry to be made by a jury, to be empanelled at its bar, to ascertain whether any and what pecuniary sum may adequately compensate the appellees for the permanent damages which they have sustained by the acts and doings of the appellant; and upon the return of the verdict of the jury to render such decree as will be right and proper in the case as then presented; and in the meantime to suspend the order awarding a mandatory injunction. And the appellees being the parties substantially prevailing, it is further decreed and ordered that they recover of the appellant their costs by them about their defence in this behalf expended.

Decree reversed.

902 *Cabells v. Puryear & als.

November Term, 1876, Richmond.

Wills—Advancements—Interest on.—W, in his lifetime, made advancements to some of his children. By his will he gave his estate to his widow for her life, and authorized her to make advancements to their children; and he directed that at her death his estate, including these advancements, should be equally divided among his children. Mrs. W did make advancements to all of the children, but to one much less than to the others. She died in February 1868, but the estate was not ready for a division until October 1874. **Held:** Interest should be charged to each legatee on the excess of the advancements made to him or her from the death of Mrs. W in 1868 until the time of the division in 1874.

This is a sequel to the case of *Puryear v. Cabell & als.*, 24 Gratt. 260, and all the facts upon which the only question in this appeal depends, are stated in that report of

***Advancements—Interest on.**—See citation of principal case in *Barrett v. Morriss*, 33 Gratt. 278, and note; monographic note to *Watkins v. Young*, 31 Gratt. 84, on "Advancements Generally"; monographic note on "Interest Generally" appended to *Fred v. Dixon*, 27 Gratt. 541.

the case. That question relates to the time when interest shall be charged upon the advancements to the legatees by Colonel Wilson and his widow, in order to effect the equality directed by the testator among his children.

When the cause went back, the court referred it to a commissioner to take an account of the advancements, and of the proceeds of the sale of the estate made by commissioners in 1874. From the report of commissioner Mosely it appeared that the advancements made to all the children by Colonel Wilson and Mrs. Wilson, were \$97,419.82, and that the estate yet to be divided amounted to \$33,923.37 as cash on the 16th of October 1874; the two sums making \$131,343.19; and giving to

903 each legatee \$16,417.89. *From this sum the commissioner deducted the advancements made to each legatee, charging no interest on the advancement; and showing the advancement to be paid to each legatee out of the fund to be distributed. This statement was excepted to by the Cabells; and a special statement was made by the commissioner in accordance with their views. By this statement, charging Mrs. Puryear with the amount of her advancements and interest thereon from the death of Mrs. Wilson up to October 1874, she had received more than her share by \$1,618.59; what she had received was therefore left out of the further statement of the account. The amount of advancements received by the other seven legatees was \$81,059.82; six of them receiving sums ranging from \$12,090 to \$13,883; whilst the seventh, Mrs. Cabell, received but \$3,458. In this statement each of these legatees was credited with one-seventh of \$81,059.88, the amount of the advancements, and also one-seventh of the sum in hand, each of them \$4,846.19, making \$16,426.16, and then was charged with the amount of his or her advancements, with interest thereon from Mrs. Wilson's death, in February 1868, until October 16th, 1874, when the fund to be distributed was in the hands of the court; and thus showing the amount which was due to each legatee to be paid out of this fund.

The cause came on to be heard on the 30th of April 1875, when the court overruled the exception to the commissioner's report, disallowed interest on the advancements, and made a decree accordingly, distributing the fund among the eight legatees. And from this decree the children of Mrs. Cabell applied to this court for an appeal: which was allowed.

Ould & Carrington, for the appellants.

904 *E. E. Bouldin, for the appellees.

Christian, J., delivered the opinion of the court.

This case is for the second time before this court, and is reported under the name of *Puryear & als. v. Cabell & als.*, 24 Gratt. 260.

In the record now before us, a single question is presented for our consideration. After the case was sent back to the circuit court, that court proceeded to convert the estate into money, and by its decree rendered on the 30th April 1875, directed a distribution thereof among the legatees. The only error now complained of is that in directing the several legatees to be charged with advancements made by the testator in his lifetime, and by his widow in her lifetime, no interest is charged on the amount of said advancements.

The appellants insist that the death of the widow was the period fixed by the testator for the division, that that was the date at which all these advancements were to be brought into hotch-pot and accounted for, and that if this division was postponed for any cause, equality could only be attained by charging each legatee with interest from the period fixed by the will for division, to wit: the date of the death of the widow of the testator.

The circuit court refused to allow interest upon any of the advancements made to the legatees either by the testator or by the widow, without respect to the excess or deficiency of the advancements made to the different legatees. The appeal was allowed to bring up for review here this single question.

In the consideration of this question we are first met by the objection of the appellees, that it is already *res adjudicata*.

905 *It is insisted that the same question was definitely settled by the opinion of this court in *Puryear v. Cabell*, supra. To sustain this contention, an extract from the opinion of Judge Staples, concurred in by the other judges, is relied on by the appellees' counsel, and which is as follows: "In regard to the charge of interest upon advancements, no exception was taken in the court below to the report of the commissioner for the failure to allow it; and it may be a question how far it is competent to urge the objection in this court. However this may be, the general rule is that the legatee or distributee is to be charged with the value of the advancement without interest. There is nothing in the will of Mr. Wilson or the circumstances of this case which requires the application of a different rule." 24 Gratt. 266-7.

This is the only declaration or allusion made in the opinion to the subject of interest. In the decree of this court nothing is declared on the subject.

But a reference to the record in the case of *Puryear and Cabell* (24 Gratt.) will make it perfectly apparent that neither Judge Staples' opinion nor the decree of the court in that case had the remotest reference to the question raised upon the record now before us. In that case the proposition of the counsel of the Cabells (the question not being raised by any exception to the commissioner's report) was that, on advancements made by the testator in his lifetime interest should be charged from his death.

and on advancements made by his widow (the life-tenant) interest should be charged from the time they were respectively received by the legatees. It was in reference to this proposition that Judge Staples expressed the opinion (undoubtedly correct) that "the general rule is that the leg-
 906 atee or distributee *is to be charged with the value of the advancement without interest."

The question now before us is a very different one. In the former case, the question was, if made at all by the pleadings, whether interest should be charged from the death of the testator on advancements made by him, and from the date of their receipt on advancements made by the widow. In the case before us the question is, if the death of the widow is the date of distribution, must not interest be charged from that date to the day of actual distribution among the legatees. This is wholly a different question, and it is one which not only did not arise but could not have arisen in the former case. At that time the fund for distribution was not in the hands of the court. That fund was made up of sales of real estate which had not been collected, if indeed it had been sold, and of rents and profits of the same for a very brief period. The death of Mrs. Wilson, the time fixed by the will for the distribution, and accounting for the respective advancements, had occurred only a few months before the filing of the bill in the former case; and therefore the question of charging interest as now raised could not and did not arise in that case.

The court is therefore of opinion that the question raised in this appeal is not res adjudicata, not having been before raised or passed upon in this case.

The court is further of opinion, that the decree of the circuit court is erroneous, so far as it fails to charge interest on any part of the advancements made to the legatees respectively, without respect to the excess or deficiency in such advancements, on the date when equal distribution was to be made.

The will of the testator, Nathaniel Wilson, contains the following clause:

907 *5th. "At the death of my said wife, Sarah, the whole of my estate, both real and personal, to be equally divided between my following named children, to wit:" (naming them) "to them and their heirs forever; such of them as have already received or who may hereafter receive a part of my estate to account for it upon a division." In a former clause of his will the testator had given to his wife for life, subject to certain bequests, all his real and personal estate, to be held, controlled and managed by her, at her entire discretion; and he authorized her, as her children became of age or married, to give them or either of them such part of her estate as she might think she could spare: she being the sole judge of it in every respect.

Advancements had been made by Mrs. Wilson in her lifetime of large amounts to

all of the children, except to Mrs. Cabell. Mrs. Puryear had received her full share of the estate; and the other children had received—some over \$12,000, others over \$13,000, while Mrs. Cabell had received only \$3,458. Now the testamentary scheme of Mr. Wilson was, that his whole estate should be equally distributed among the legatees at the death of Mrs. Wilson. That was the time fixed as the period of distribution, and at that time they were to account for the advancements which had been made prior to the death of Mrs. Wilson to each of the legatees respectively. If on that day the distribution could have been made, the mode of distribution would have been that adopted by the circuit court—that is, making each party equal by reducing the excess and making up the deficiency between the legatees without interest. But the distribution was not made until more than six years after Mrs. Wilson's death, and for that period six or seven of the legatees held in their hands large amounts
 908 in excess of what *they were entitled to upon an equal distribution. This plainly was not their property, but belonged to the estate, and having enjoyed the use of it they ought to be charged with interest. The principle upon which the general rule stated by Judge Staples in Puryear v. Cabells (supra) rests is this, that the party advanced is not to be charged with interest, because the advancement in his hands is no part of the estate; it belongs to him, and he cannot be charged interest on his own, unless there be something in the will subjecting it to such a charge.

In the case before us, the excess held by the several legatees over and above the amount they were entitled to on the date fixed by the testator as the period of distribution was the property of the estate, in which all the distributees were equally interested, and upon this excess in their hands they must be charged with interest from the 5th February 1868, the date of Mrs. Wilson's death, to the 15th October 1874, the date on which the fund was in a condition to be distributed, as shown by the alternate statement made by the commissioner.

The court is therefore of opinion that the said decree of the said circuit court be reversed with costs, and the cause remanded to said circuit court for further proceedings to be had therein in accordance with the principles herein announced.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the said decree of the said circuit court is erroneous, so far as it omits to charge with interest those legatees whose advancements, made prior to the death of Mrs. Wil-
 909 son, were in *excess of the amounts they were respectively entitled to upon an equal distribution of the whole estate of the testator, if it could have been made on that day; this court being of opinion that the period of distribution fixed by the testator was the date of the death of Mrs. Wil-

son; and that all the legatees who on that day held an excess of the amounts advanced to them over what was an equal share of the advancements made prior to the death of Mrs. Wilson, should be charged with interest on such excess from the period of Mrs. Wilson's death, to wit: the 5th of February 1868, to the 15th October 1874, the period when the fund arising from the sale of the real estate may be considered as in the hands of the court for distribution, and that interest be allowed on the deficiency of advancements to Mrs. Cabell, according to the principles of the alternate statement made by commissioner.

It is therefore decreed and ordered that for this error the said decree of said circuit court be reversed and annulled, but be affirmed in all other respects, and that the appellants recover against the appellees their costs expended in the prosecution of their appeals here. And the cause is remanded to said circuit court, to be further proceeded in in accordance with the principles herein declared.

Decree reversed.

910 *Jeter v. Board & als.

November Term, 1876, Richmond.

Commissioner's Report—Objections to.—Upon the petition of B and others for the establishment of a road, the county court, in February 1871, made an order that M, road commissioner, do view the route proposed for the road and report, &c. In July, T, the road commissioner of the township in which the road would lie, made a report, stating, that as to a part of the road there was no objection, and only J claimed damages. There was an order of court establishing that part of the road not objected to, and a summons to J, who appeared and asked for a writ of *ad quod damnum*; which was ordered and executed and returned. The case was then continued on motion of J. At a subsequent term J moved the court to quash the return of the commissioner, which was done; and then, at the same term, B and the other petitioners applied again for the road, and there was an order for a view, &c. And B, &c., appealed from the order quashing the report.—**Held:**

1. **Same.**—M having been the commissioner when the order directing the report was made, and he having been succeeded in that office by T, the name of M in the order was surplusage, and it was proper for T to make the report.
2. **Same—Same—Waiver of Objections.**—But if the objection would ever have been a good one, it was not made at the proper time, and was waived by J's applying for a writ of *ad quod damnum*, moving for a continuance of the case, and contesting it on other grounds.
3. **Same—Same—Same.**—The provisions of the statute in relation to yards, gardens, &c., and as to a map or diagram of the route, are merely directory, and if any of them are not complied with, objection to the report on that ground must be made in due time, or it will be considered as waived. In this case it was not made in due time, and was, in effect, waived.

4. Appeals—From Interlocutory Order—Roads.—There may be an appeal as of right from an interlocutory order of a county court in a controversy concerning the establishment of a road.

911 *5. Judgments—Finality.—The judgment of the county court was final. As to much the larger part of the road, it had been established by a previous order of the court, and the order quashing the report put an end to the cause in that court. The order for another view of the route was a new proceeding.

The case is fully stated in the opinion of the court.

J. F. Johnston, for the appellant.

Griffin, for the appellees.

Moncure, P., delivered the opinion of the court.

This is a writ of error and supersedeas to a judgment of the circuit court of Bedford county, reversing a judgment of the county court of said county in a controversy concerning a roadway. The following is a statement of the case:

On the 28th day of February 1871, James G. Board and fourteen others filed their petition in said county court for the establishment of a public road in said county (which petition is copied in the record); and on the same day, on their motion, it was ordered "that Michael T. Mattox, road commissioner, do view the route proposed for said road, and make report thereof to court, together with all matters required by law."

On the 25th day of July 1871, Thomas J. Thomasson, the road commissioner in the township of Chamblissburg, in which the proposed road was to run, he having qualified as such since the said order of February term was entered, made a report in pursuance of the said order (which report is also copied in the record). After setting out therein the route of the proposed road, and recommending that it be established accordingly, the commissioner makes

***Appeals—From Interlocutory Order—Roads.**—As to whether or not an appeal lies from an interlocutory order there is some conflict in the Virginia authorities. In *Trevilian v. L. R. R. Co.*, 3 Gratt. 336 and 3 Hancock v. R. & P. R. R. Co., 3 Gratt. 328, an appeal was held not to lie from an interlocutory order. The principal case distinguishes from these, and is a *dictum* the court says that an appeal will lie from an interlocutory order. But again in the following cases, citing the principal case, the old rule was adhered to, and an appeal held not to lie from an interlocutory decree: *Tucker v. Sandridge*, 82 Va. 534; *Ludlow v. City of Norfolk*, 87 Va. 322, 12 S. E. Rep. 612; *Postal Tel. C. Co. v. N. & W. R. R. Co.*, 87 Va. 312, 12 S. E. Rep. 618. In West Virginia, this latter doctrine is followed, and the principal case cited but distinguished in *Wheeling B. & T. Ry. Co. v. Wheeling S. & I. Co.*, 41 W. Va. 752, 24 S. E. Rep. 502, and in *Yates v. West Grafton*, 33 W. Va. 516, 11 S. E. Rep. 11. See further, 4 Min. Inst. (2d Ed.) 245, 259; *Barton's Ch. Pr.* (2d Ed.) 827.

912 the following statement: "Clement

L. Dickerson, Green B. Meador, John A. Watson, David S. Rininger and J. G. Board claim no damages. A. M. Jeter does claim damages. And William A. Wingfield, one of the parties owning the Kasey tract, being unable to attend, sent a note directing me to place the road on the best location, from which I infer that there is no claim for damages on their part; and there is none as to the mill tract belonging to Meador, Wingfield and Kasey. The road is nearly two-and-a-half miles long, and runs through the lands of Mr. Jeter, a little more than one-half mile. I think fifty dollars would be a sufficient allowance to him for damages." The commissioner then proceeds to assign his reasons for thinking that "the road is a great public necessity." And he concludes his report by saying, that "at the request of the landholders on the route it is recommended that the route from the mill to the Carter's island road be immediately located, as there is no objection on that part, and it could thus be opened with the labor due on roads."

On the same day on which the report was made, it was "ordered that the road be established according to said report, from the mill of Meador, Wingfield and Kasey, to the Carter's island road, and that a summons be awarded against A. M. Jeter, proprietor of the residue of the land through which said road is proposed."

On the 28th day of November 1871, the summons theretofore awarded against A. M. Jeter having been returned, on his motion it was ordered that a writ of ad quod damnum be awarded him in this case, to be executed by the sheriff of this county on the 16th day of December next."

The writ was accordingly issued 913 and executed; and *on the 18th day of December 1871 the sheriff returned the writ with the inquisition thereto annexed, from which it appears to have been found that the road "will be of the damage of ninety-six dollars and twenty-five cents to the said A. M. Jeter."

The next order in the case was made on the 26th day of November 1872, when on the motion of the defendant, A. M. Jeter, the case was continued until the next term of the court, but at his costs.

On the 24th day of December 1872, for reasons appearing to the court, it was ordered that the case be continued until the next term.

On the 28th day of January 1873, an order was made in the case in these words: "This day came again the parties by their attorneys, and the said defendant moved the court to quash the report of the road commissioner made on this petition, because he says the same does not report upon the matters and things required by law. On consideration of which motion the court doth quash the said report, and it is considered by the court that the defendant recover against the petitioners his costs by him about his defence in this behalf ex-

pendent since the report of commissioner was returned. And on motion of said petitioners, it is ordered that the commissioner of roads in the township of Chamblissburg, in this county, do make another view of the route for road proposed by said petitioners, and report to court the conveniences that will result as well to individuals as to the public, in case said road is established as proposed, and especially whether any yard, garden, orchard, or any part thereof will in such case have to be taken.

During the same term, and on the 7th day of February 1873, the petitioners moved the court to set aside its said judgment 914 against them and grant them a *new hearing; which motion the court overruled. And on the motion of the petitioners, they were allowed an appeal from the said judgment upon their giving bond as required by law in the penalty of \$100, with good security, conditioned according to law.

On the 6th day of May 1873, the appeal came on to be heard in the circuit court of said county, when the said court was "of opinion that the appellees after having appeared to the said motion, and moved for and obtained a writ of ad quod damnum, and after having obtained a continuance of the cause upon the return of the inquisition, had no right to make a motion to quash for any defect in the report or proceedings before that time; but by his appearance to make defence, and asking for a writ of ad quod damnum, and again appearing and asking for a continuance after the inquisition was returned, he waived his right of objection to the report of the view of the road, or to the proceedings had on the case for any defect therein up to that time; and moreover, if it had been proper to quash at all in that state of the proceedings, the report ought not to have been quashed as to that part of the road which had already been established by the consent of the landholders, through whose lands it passed, and therefore the county court erred in quashing the said report." And therefore it was considered by the court that the said judgment of the county court be reversed and annulled, and that the appellants recover against the appellee their costs by them about their said appeal in that behalf expended. And the circuit court proceeding to render such judgment as the county court ought to have given, it was considered by the court that the said motion to quash the said report be overruled; and by consent of the parties, and for reasons appearing to the court, it was "ordered that the

915 *said cause be remanded to the said county court for further proceedings to be had therein in the case on the said inquisition; but this consent to remand the case to the county court is without prejudice to the right of either party to appeal from this decision if so advised."

To the said judgment of the said circuit court the said A. M. Jeter applied to a judge of this court for a writ of error and supersedeas, which were accordingly

awarded. And that is the case which this court has now to dispose of.

Three errors are assigned in the petition, which the court will consider in their order of assignment.

1. The first assignment of error is, that "on the motion of the petitioners for the road, Michael T. Mattox, road commissioner, was ordered to view the route proposed and report to court. No other person was directed or had any authority from the court to make such view or report. Upon this order Thomas J. Thomasson undertook to act, and made the report in this case, so that there was really no report upon which the county court could base any proceedings."

The court is of opinion that the judgment of the circuit court is not erroneous in that respect. It seems that Mattox was road commissioner in Chamblissburg township, where the route of the proposed road is situate, on the 28th of February 1871, when the order was made for the view of the route; and therefore he was directed to make the view and report. But he did not make them during his term of office, after the expiration of which, Thomas J. Thomasson, who was elected and qualified as his successor, made the said view and report, which it was proper for him to do under the order which had already been made;

and there was no necessity for a new order, or an amendment*of the order, substituting his name for that of Mattox. The name of Mattox was inserted in the order, because he happened to be road commissioner in the township when the order was made. Had his name not been mentioned, but the order had directed the road commissioner of the township to make the view and report, the meaning of the order would have been precisely the same—Mattox being then the road commissioner for that township. If the order had been in that form, it would not have been contended that it could only be executed by the road commissioner who happened to be in office at the date of the order, and not by one who came into office a month or two thereafter. The name of Mattox in the order was mere surplusage. He was named therein, not because of his peculiar fitness to perform the duty therein mentioned, but because he was road commissioner of the township. When he ceased to be such commissioner, he ceased to have power to perform the duty; and when Thomasson became his successor, it became proper for him to perform the duty as he did. But if the objection would ever have been a good one, it was not made at the proper time, and was waived by the appellant by applying for a writ of ad quod damnum, moving for a continuance of the case, and contesting it on other grounds.

The cases cited by the counsel for the appellees fully sustain this view, viz.: *Carpenter & als. v. Sims*, 3 Leigh 675; *Lewis v. Washington*, 5 Gratt. 265; and *Mitchell v. Thorntons & als.*, 21 Gratt. 164.

2. The second assignment of error is, that

"if the said Thomasson had the authority, the report made by him is fatally defective, and ought to have been quashed. The act makes it the duty of the commissioner to report especially whether any yard, garden, *orchard, or any part thereof will be taken if the road is established. The report is wholly silent as to this, and is therefore fatally defective. The act further provides that a map or diagram of the route shall be returned with the report. No map or diagram was returned with the report made in this case. This is another defect. The county court therefore could not have done otherwise than quash the report; and the circuit court erred in reversing that judgment."

The provisions of the law in regard to the matters referred to in that assignment of error are directory merely, and if any of them be not complied with, objection to the report on that ground must be made in due time, or it will be considered as having been waived. *Id.* In this case it was not made in due time, and was in effect waived. The report was returned on the 25th of July 1871, whereupon the appellant was ordered to be summoned to appear on the first day of the next term of the county court to show cause, if any he could, why the said road should not be opened as proposed. He was accordingly summoned, and appeared on the 28th day of November 1871. But he made no objection to the report. On the contrary a writ of ad quod damnum was on his motion, awarded him in the case, which was duly executed and returned. And the controversy seems to have thereforward proceeded solely on the matter of the inquisition, the case having been twice continued, and once on the motion of the appellant, until the 28th day of January 1873, when for the first time a motion was made by the appellant to quash the report, because, as he said, it did not report upon the matters and things required by law, and the report was accordingly quashed. No doubt the defects in the report now

complained of by the appellant were unimportant to him, or he would have made the objection on that ground in due time. No part of his yard, garden or orchard may have been in any danger of being taken if the proposed road should be established. And the route of the proposed road may have been well defined and understood without the aid of a map or diagram. And therefore he may have made no objection on that ground, but moved at once for a writ of ad quod damnum.

3. The third and last assignment of error is, that "the order of the county court from which the appeal was taken was interlocutory and not final. The appeal was therefore prematurely taken, and ought to have been dismissed by the circuit court. See *Trevilian v. Louisa Railroad Co.*, and *Hancock v. Richmond & Petersburg Railroad Co.*, 3 Gratt., pp. 312, 313; and *Bohn v. Sheppard*, 4 Munf., p. 403."

The court is of opinion that the judgment of the circuit court is not erroneous on that

ground, for two reasons: 1st, because there may be an appeal of right from an interlocutory order of a county court in a controversy concerning a roadway; and 2dly, the order appealed from in this case was in fact final and not interlocutory in its character.

1st. There may be an appeal of right from such an order. Neither in the first, nor in the second section of chapter 178 of the Code, page 1136, is it required that the order in a controversy concerning a roadway shall be "final," in order that a person may appeal therefrom; but in each section a right of appeal is given to any person who thinks himself aggrieved by any order in such a controversy; while the word "final" is in the second section expressly applied "to any civil case wherein there is a final judgment, decree or order," which words could not have been intended to embrace the case of an appeal of right

919 in a controversy concerning a roadway, and which had been expressly and separately mentioned and provided for in the previous part of the section.

There would seem to be no room for doubt in regard to the correctness of this construction, unless the cases referred to and relied on by the counsel for the appellant in the petition for a writ of error and supersedeas in this case are to the contrary. The court is of opinion that those cases are not to the contrary. Two of them are—*Trevilian v. Louisa Railroad Co.*, 3 Gratt. 312, and *Hancock v. Richmond & Petersburg Railroad Co.*, Id. 313. The reporter's marginal abstract of the decision in the former case would seem to indicate that the decision was as contended for by the appellant. That abstract is in these words: "In controversies concerning roads, no appeal or supersedeas lies to an interlocutory order of the county court." But if we consider that case in connection with the latter, which immediately follows it in the report, we can have no difficulty in seeing that they do not apply to this case. In the case of *Hancock v. Richmond & Petersburg Railroad Co.*, Baldwin, J., in delivering the opinion of the court (which he also did in the former case) said: "The court is of opinion that the law authorizing appeals, as of right from orders of the county courts in controversies concerning roads, is applicable only to a controversy concerning the establishment of a road, and not to a collateral controversy concerning the damages occasioned by a road already established; and that in such collateral controversy the order of the county court can be revised by the circuit court only by means of a writ of supersedeas; and that where the order of the county court is not final, but interlocutory only, it cannot be revised by the circuit court in any mode of proceeding." In neither of those cases

920 was the controversy concerning the establishment of a road; but in each of them there was a collateral controversy concerning the damages occasioned by a road already established. And therefore

an appeal of right did not exist in either of them. The only mode of reversing the judgment in either case was by a supersedeas, and that remedy did not exist in the then state of the case, because the judgment was not final. In the case under consideration, the controversy is concerning the establishment of a road, and the law authorizing appeals as of right unquestionably applies to it. The only other case relied on is that of *Bohn v. Sheppard*, 4 Munf. 403. In that case, it was held that an appeal from an order of court granting administration of an estate, being taken before the court has proceeded to direct bond and security to be given, or to prescribe the amount of the bond, is premature, and ought to be dismissed, as improvidently allowed. The only question was, whether the order appealed from (considered either as interlocutory or final) was sufficiently perfected for an appeal at the time it was taken. But,

2dly, the order appealed from in this case was, in effect, final, and not interlocutory in its character. Certainly it was final as to all of the proposed road, except that part of it which was to run through the land of the appellant, for all of it except that part, in other words, about four-fifths of the whole proposed road was established by the order of the county court made on the 25th day of July 1871. And though the controversy was continued thereafter as to the residue of the proposed road, it was ended in the said court by a final order made in the proceeding at January term 1873, from which order the appeal to the circuit court was taken. To be sure, an order for another view of the route of the road was at

921 the same time made on the motion of the petitioners, but that was a new proceeding, and did not affect the finality of the order which had ended the former proceeding.

The court is therefore of opinion that there is no error in the judgment of the circuit court, and that it ought to be affirmed.

Judgment affirmed.

922 *Simmons v. Lyles & als.

November Term, 1876, Richmond.

I. Vendor's Lien—Dower—Rights of Creditor's Vendee.*

—A vendor of land, who has retained the title, files a bill against the widow and infant children of the vendee, for a sale of the land to satisfy his debt. The widow answers, claiming dower in the land subject to the vendor's lien. Judgment cred-

*Suits in Equity—Parties.—To a suit in equity brought by a creditor to satisfy his debt, other creditors of the defendant may be admitted as parties. For this rule the principal case is cited in the following: *Piedmont, etc., Ins. Co. v. Maury*, 75 Va. 518; *Preston v. Aston*, 85 Va. 114, 7 S. E. Rep. 244; *Karn v. Rorer, etc., Co.*, 86 Va. 760, 11 S. E. Rep. 481; *Patterson v. Eakin*, 87 Va. 58, 12 S. E. Rep. 144. See further, 4 Min. Inst. (2d Ed.) 1248; *Barton's Ch. Pr.* (2d Ed.) 187.

itors of the vendee may make themselves parties to the cause, and have the land, subject to the vendor's lien and the widow's dower, applied to the payment of their debts.

II. Same—Same—Same—Commissioner of Sale.—In such case the debt of the vendor is ascertained, and a commissioner is appointed to sell the land. He reports that a friend of the widow and children of the vendee has paid to the vendor his debt, and therefore he did not sell the land. The vendor then ceases to be interested in the case, and it becomes the suit of the creditors of the vendee.

III. Same—Same—Same—Same.—In such a case a commissioner is directed to settle the account of the administrator of the vendee, to take an account of the vendee's debts and their priorities, and also of the present value of the widow's dower in the land; and before the commissioner makes report the court decrees a sale of the land. **HELD:**

1. **Same—Same—Same—Same—Sales—Priorities.***—It was premature to decree a sale of land before the debts of the vendee and their priorities were ascertained, and a settlement of the administration account was made.

2. **Same—Same—Same—Same—Same.**—It was also error to decree a sale of the land until the widow's dower was assigned to her in kind, or it was ascertained that it could not be so assigned, and a moneyed compensation to her in lieu of her dower had been ascertained.

IV. Dower—Assignment of.†—A widow is entitled, as against creditors of her husband, by lien created since her marriage, to have her dower in his real estate assigned in kind, if it can be done, without regard to its effect upon the interest of his creditors. If from the nature of the property, or of the husband's interest in it, the dower cannot

923 not be assigned in kind, the court may sell the whole property, and make to her a moneyed compensation.

V. Appeal—Parties.‡—In this case the vendor having acquiesced in the decree for the payment of the amount ascertained to be due to him, and received the money; upon appeal by the widow and children of the vendee from a subsequent decree for the sale of the land for the payment of creditors, the appeal does not bring up the first decree, so as to entitle him as an appellee to have that first decree reviewed and reversed for error against him.

In July 1868 James Jamieson filed his bill in the circuit court of Danville, alleging in substance that, in 1862, he had sold a lot of land, improved by valuable houses upon it, and situate in the said town of Danville, at public auction, for one-half cash, and the balance by bonds at one and two years,

retaining the title as security for the payment of the purchase money; that William T. Simmons became the purchaser, and paid the half cash, and gave his bonds at one and two years for the residue of the purchase money, each bond being for \$2,062.50, with J. M. Walker and H. W. Cole as his sureties; that Simmons was dead, and his estate insolvent; that said Walker was his administrator; that the said bonds were due, and had not been paid, except a small sum of \$; that Mary A. Simmons was his widow, and she and her infant children were in possession of the said lot of land and houses. And making the said Walker, as administrator and also as surety, the said widow and infant children, and the other surety, Cole, parties defendant to the bill, prayed that unless the whole balance of purchase money, according to the face of the two bonds, with interest, were fully paid off before a day to be given by the court, the said lot of land and houses might be sold, and the proceeds subjected to the payment of the said bonds, and for general relief, &c.

924 *The cause was proceeded in against the said Walker as administrator, &c., as an absent defendant by publication, and the bill taken for confessed as to him and the other surety, Cole. The widow answered the bill sometime prior to the 13th March 1869, and admitted the allegations of the bill to be generally true, but said that one hundred dollars had been paid on said bonds; and she insisted that the purchase money of the house was, by the terms of the contract of sale, payable in confederate money, and ought to be scaled accordingly. She also claimed her dower in the land to be assigned to her before any sale of the property, and to be allowed the value of permanent improvements put upon the land, and submitted her rights to the protection of the court. Richard W. Lyles was her counsel, and signed this answer as such counsel, and he was also appointed guardian ad litem for the infant defendants, and filed their answer to the bill.

The only real question in controversy in this suit was, whether the purchase money was liable to be considered and scaled as confederate money. Accordingly at the March term, 1869, the court ordered an account to be taken of the real amount of purchase money remaining due to the complainant, with any special statements required by any of the parties, &c.

No report having been made in obedience to this order, at the March term 1870 the said Richard W. Lyles filed his petition in the cause, alleging that he was a creditor of the said William T. Simmons, deceased, by two judgments, and by virtue of his judgments had a lien on the land, the subject of the suit; and admitting that his judgment lien was subordinate to the vendor's lien of the complainant, Jamieson, and to the widow's dower, he claimed that the surplus, after satisfying the vendor's lien and the widow's dower,

925 *was liable to the payment of his

***Judicial Sales—Premature.**—See, on this subject, *Kendrick v. Whitney*, 28 Gratt. 646, and *note*; *Schultz v. Hansbrough*, 33 Gratt. 567, and *note*; *New v. Bass*, 92 Va. 387, 23 S. E. Rep. 747, citing principal case.

†**Assignment of Dower.**—For the rules governing the mode of assigning to a widow her dower, see citation of principal case in *Parrish v. Parrish*, 88 Va. 531, 14 S. E. Rep. 325; *Reinhardt v. Reinhardt*, 21 W. Va. 81; *Hoback v. Miller*, 44 W. Va. 637, 29 S. E. Rep. 1014. See also, 2 Min. Inst. (4th Ed.) 159 *et seq.*

‡**Appeals—Parties.**—The ruling set out in the fifth headnote is followed in *Burkholder v. Ludlam*, 30 Gratt. 255, and *note*, citing principal case.

udgments; that another suit was pending in the same court between the said Lyles and one Cheek, Tredway and other defendants, in which said Lyles was seeking to subject other lands of the said Simmons to the payment of his said judgments, and that the two suits ought to be heard together; and praying to be admitted a party to the suit of Jamieson in respect of his interest.

Upon the hearing of this petition, the court, March term 1870, admitted the said Lyles as a defendant in this suit, and disallowed him as guardian ad litem for the infants aforesaid, and appointed J. T. Elam guardian ad litem in his stead; and said Lyles having filed his answer in this suit, in which he repeated in substance only the allegations of his petition aforesaid, the court, upon the hearing of the answer, ordered that in addition to the matters required to be reported by the previous order, the commissioner should also ascertain and report in what kind of money the purchase money was payable, and what lands belonging to said W. T. Simmons, the judgments of said Lyles constitute a lien on, if any, and in what order; and what was the actual value of the property at the time of the sale thereof by Jamieson to Simmons; and what is the present value hereof. No order was ever made for hearing this suit with the other suit, and they were not tried together.

At the August term, 1870, the cause was heard upon the report of the commissioner Blackwell and exceptions thereto, made in obedience to the orders of March 1869 and March 1870, and, without deciding any other question in the cause, the court ordered further accounts to be taken, viz: of all the transactions of Walker as administrator of Simmons; and of all the indebtedness of said Simmons at the time of his death, classifying said debts according to their respective priorities, *and showing whether said debts were individual debts, or debts due by him as a partner with others, with any other matter required by any of the parties to be specially stated.

At the March term 1871, the court (without waiting for the report ordered at the August term 1870) heard the cause upon the above mentioned report of commissioner Blackwell (filed July 22, 1870), and overruled the exceptions taken thereto, and decided that the purchase money was payable in Confederate money, and that the bonds ought to be scaled down to the sum of \$106.08, with interest from the 29th of July 1870; and decreed that unless the heirs of said Simmons, or some one for them, paid that sum of \$106.08, and interest, within sixty days, the property should be sold at auction by R. W. Peatross, who was appointed a special commissioner for that purpose. And the court further ordered that commissioner Moseley should take an account of the present value of the dower interest of Mary A. Simmons, after the payment of the said sum due to the com-

plainant, Jamieson, and report at the next term. And the court further decreed that the defendant, Lyles, was entitled to have payment of his debt out of any surplus that may remain after the payment of the vendor's lien and the dower to said widow.

On the 15th day of September 1871, special commissioner Peatross made and returned his report, showing that Sydney M. Simmons, on behalf of the heirs of W. T. Simmons, deceased, had paid the debt decreed to be paid to the complainant, Jamieson, and that therefore he had not sold the property as required to do by the decree of March term 1871.

At a special term of the court held 927 on the 18th day of *November 1871,

the cause was further heard "upon the papers formerly read," not including the said report of special commissioner Peatross made and returned September 15th, 1871, and the court expressing "the opinion that it will be necessary to sell the property in the bill and proceedings mentioned, to pay the debts of the estate of W. T. Simmons," ordered and decreed that R. W. Peatross, who was again appointed a special commissioner for the purpose, should advertise for four weeks and sell the property on the premises (requiring cash enough to pay the costs of suit and the expenses of sale, and for the residue taking bonds payable in one, two and three years). And the court again ordered that one of the commissioners of the court should take an account of the indebtedness of the estate of Wm. T. Simmons, deceased, stating the debts in the order of their priority, &c. And thereupon Mrs. Simmons, and the two infant children by their guardian ad litem, J. T. Elam, applied to this court for an appeal from the decree of the 18th of November 1871; which was allowed.

Jones & Bouldin, Robertson & Green, for the appellants.

Ould & Carrington and E. Barksdale, for the appellees.

Staples, J., delivered the opinion of the court.

The court is of opinion that no error was committed by the circuit court in permitting the appellee, Lyles, to file his petition and make himself a party to the cause. Although the bill of Jamieson was merely to enforce the vendor's lien, and although 928 it did not profess to be *filed on behalf of the other creditors of Simmons, still it was competent for the creditors, or any of them, to make themselves parties to the suit, and claim the balance of the fund remaining after the satisfaction of the vendor's lien for the purchase money. Such a course of proceeding is proper and beneficial whenever the object of the suit is a sale of the decedent's real estate for the payment of his debts. All the parties interested in the property, or asserting liens thereon, being before the court, a multiplicity of suits is

prevented, conflicting claims to priority adjusted, all difficulties in respect to the title cleared away, and the property placed in a position to command the most advantageous price. Without undertaking now to decide, whether in any case a decree can be made against the real estate of a deceased debtor unless an account is asked on behalf of all the creditors, it is sufficient to say, that such an account was ordered with the consent of the vendor, the only person who could have been heard to object. He has been paid the amount due him, and is no longer interested in the subject matter of controversy. So soon as a decree for a general account is entered it is to be deemed for the benefit of all the creditors who may come in and prove their demands.

It is not necessary that a creditor should formally be made a party plaintiff or defendant. It is not necessary he should even file a petition. After a decree for a general account, even at the suit of a single creditor, all the other creditors may come in under the decree and prove their debts before the master to whom the cause is referred, and obtain satisfaction of their demands; and under such circumstances they are all treated as parties to the suit.

It was therefore competent for Lyles 929 to come in by *petition, or to prove his debt before the commissioner, and Jamieson, the vendor, being no longer interested, the suit may be carried on in behalf of Lyles and other creditors of Simmons.

The court is further of opinion that the circuit court was premature in directing a sale of the house and lot in question by its decree of 18th November 1871. That decree contained a provision that one of the commissioners of the court should take an account of the indebtedness of the estate of William Simmons, stating the several debts in the order of their priority. This account ought to have been taken before the execution of the decree for the sale of the property. This court has repeatedly held that it is premature to decree a sale of the realty before adjudicating the claims of creditors and their respective priorities, in order to ascertain the precise amount chargeable upon such realty. *Cralle v. Meem et als.*, 8 Gratt. 496; *Buchanan v. Clarke*, 10 Gratt. 164. There is nothing in the present case justifying a violation of this rule.

It is impossible to say whether there are other debts against the estate, or to what extent they constitute liens upon the realty. And although it is very probable there is no personal assets applicable to the payment of such debts, it cannot be positively affirmed that such is the fact. At all events, as the case is to go back to the circuit court upon other grounds, there can be no impropriety in directing also an account of the personal property if required by either of the parties.

The court is further of opinion, that dower is to be assigned of one-third of the real estate, whereof the husband was at any time seized during the coverture; that such

assignment must be in kind by metes and bounds if required by the widow.

930 *When an assignment in kind is impracticable, from the nature of the husband's interest, or from the nature and quality of the property itself, it will of course be dispensed with, and some other mode adopted. But the court is not authorized to substitute a commutation or a compensation in money, merely because dower in kind may prove to be injurious to the interests of heirs or creditors. The right of the widow is a legal one, and is paramount to any and every claim or lien created by the husband after the marriage. In *White v. White & als.*, 16 Gratt. 264, this court laid down the rule on this subject in the strongest possible manner. It was there held, that unless it was made to appear that it was impossible to assign dower in the real estate, it was not competent for a court of equity, in the exercise of its general jurisdiction, to decree a sale of the whole property, and to provide a compensation in money in lieu of dower against the consent of the widow, however much it might be to the interest of the heirs to have a sale of the whole, and a moneyed compensation to the widow."

It is very true that the appellant made no resistance to a sale of the property; but it is to be remembered such resistance would, in the then attitude of the case, have been unavailing, as at the time of her answer filed the suit was merely to enforce the vendor's lien for unpaid purchase money. The petition of Lyles was filed at a subsequent period, asking for a sale of the property to satisfy his judgment. The lien of the vendor has been discharged, and he is no longer interested in the prosecution of the suit. The controversy is now between the judgment creditor and the appellant. She has never consented to a sale in his favor. She has never agreed, so far

931 as the record discloses, to *accept a moneyed compensation. There is nothing to show that an assignment of dower in kind is impracticable. We have no information on the subject, except that the property consists of a dwelling house and lot in the town of Danville. There may be outhouses for aught that we know, in which the dower may be assigned. The lot itself may be susceptible of a division; or as is not unfrequently done, where there is a single edifice, the dower may be assigned of so many rooms. 1 *Roper on Husband & Wife*; 1 *Scribner on Dower* 343.

This court is unable to say which of these modes, or whether either of them should be adopted. The case must be remanded to the circuit court for an inquiry upon these points. If an assignment in kind is found to be impracticable, the court may decree a sale of the whole property, and a moneyed compensation to the appellant in lieu of dower; or, it may adopt such other mode of adjustment as will produce the greatest equality with the least inconvenience. 1 *Tucker's Com.* 66; 1 *Wash. on Real Prop.* page 236.

This disposes of all the material questions between the appellant and Lyles, the judgment creditor. It remains only to consider his application of Jamieson, the vendor, who is also an appellee, to correct the decree of the 29th March 1871. His objection is, that the amount due him was reduced by an improper application of the scale of depreciation. The court is of opinion, he cannot be heard to make that objection here in the present aspect of the case. So far from complaining of the decree in question, he accepted the amount directed to be paid him. This payment and acceptance were reported to the court by the commissioner, and the sale of the property abandoned so far as he, Jamieson, was concerned.

132 By the decree of November 1871, the property was ordered to be sold for the benefit of Lyles, the judgment creditor. It is from that decree the appeal was taken by the widow to this court, and is now the subject of inquiry. In this latter decree Jamieson has no concern. He was no party to it, and he does not complain of it. The case comes directly within the operation of the rule laid down by this court in Walker's ex'or v. Page, 21 Gratt. 636, 652; in which it was held, that where the parties stand upon distinct and unconnected grounds; where their rights are separate and not equally affected by the same decree; then the appeal of one will not bring up for adjudication the rights or claims of the other." See also Burton v. Brown's ex'or, 2 Gratt. 1, 14.

The court is therefore of opinion, that he appellee, Jamieson, having failed to make any appeal in this case, but, on the contrary, having acquiesced in the decree adjudicating his rights, by accepting the amount awarded him thereunder, cannot, as such appellee, be heard to complain of his errors, if any, in that decree to his prejudice.

For the reasons stated, the decree of the circuit court pronounced on the 18th day of November 1871, must be reversed, and the cause remanded to the circuit court for further proceedings in conformity with the views herein expressed.

The decree was as follows:

The court is of opinion that the circuit court erred in decreeing a sale of the house and lot in the proceedings mentioned, without first taking an account of the indebtedness of the estate of William T. Simmons, as directed by the decree of the 18th November 1871; *and said circuit court also erred in decreeing said sale, before it was ascertained whether dower in kind could be conveniently assigned to the appellant, the widow of said Simmons.

It is therefore ordered and decreed, that so much of the decree aforesaid of the 18th November 1871, and of the decree of the 1st of March 1871, as is in conflict with the foregoing, be reversed and annulled, and as to the residue thereof be, and the same is hereby affirmed, and that the appellee, R. W. Lyles, do pay, &c.

It is further ordered and decreed, that the

cause be remanded to the said circuit court with directions to make the inquiry and take the account aforesaid; and also an account of the personal estate of which the said Simmons died possessed, if desired by either of the parties.

If upon such inquiry it shall be ascertained that an assignment of dower in kind is practicable, then such assignment is accordingly to be made if required by the appellant. If, on the other hand, it shall appear that an assignment in kind is impracticable, the entire property shall be sold on such terms as to the circuit court may seem proper, and a moneyed compensation awarded the appellant in lieu of dower.

Decree reversed.

934 *Burress v. Commonwealth.

November Term, 1876, Richmond.

Absent, BOULDIN, J.

1. *Forgery—Variance between Writing and Indictment.*—In a commitment by a justice, of a person for forging an order, in setting out the order he writes out some words in full, which in the order as set out in the indictment are abbreviated, as Thomas for Thos., 23 cents for 23 c. Respectfully for Resp'ty. These are not such variances as require that the accused should be sent back to a justice for examination.

2. *Same—Same—New Indictment.*—To a plea of *autrefois acquit*, upon an indictment for forgery, the attorney for the commonwealth craves oyer of the former record, and demurs to the plea. The record shows that the indictment was for forging an order for forty-seven dollars and twenty-five cents, and that the order was for forty-seven dollars and twenty-three cents. This was a variance which entitled the accused to acquittal on that indictment; and therefore the acquittal on that indictment does not forbid the prosecution of the accused on another indictment for the same forgery, setting out the order correctly.

3. *Same—Same—Second Prosecution after Acquittal.*—By the Code of 1873, ch. 106, § 15, p. 1218, a person acquitted by the jury on the facts and merits, on a former trial, may plead such acquittal in bar to a second prosecution for the same offence, notwithstanding any defect in the form or substance of the indictment or accusation on which he was acquitted. But it must appear from the record of the first case, or be averred in the plea and proved, that his acquittal was on the merits.

4. *Same—Same—Immaterial Variance—Presumption.*—The act does not make a variance between the indictment and the forged paper immaterial. The accused must be acquitted on that ground, if no other. And if acquitted, the presumption, in the absence of evidence to the contrary, is, that he was acquitted on that ground.

5. *Same—Same—Evidence.*—The difference between "account" as set out in the indictment and "acct" as written in the order, is not a material variance, which will exclude the order as evidence.

6. *Same—Evidence—Irrelevant Documents.*—A genuine order by the same drawers upon the same party, which had been paid to the accused, as the order

which the accused was charged with having forged, is not competent evidence for the accused.

7. *Same—Same—Opinion as to Handwriting.**—A witness who states that he is perfectly familiar with the handwriting of the accused, and states the circumstances which made him so familiar with it, expresses the confident opinion from his knowledge of the accused's handwriting, that he was incapable of writing the order. This opinion is incompetent testimony, and properly excluded.

This was an indictment in the hustings court of the city of Richmond, against Roger D. Burress, for forgery. He was tried at the June term 1875, and was found guilty, and sentenced to imprisonment in the penitentiary for two years. And he thereupon applied to this court for a writ of error; which was awarded. The case is fully stated by Moncure, P., in his opinion.

Cosby and Guy & Gilliam, for the prisoner.

The Attorney General, for the commonwealth.

Moncure, P., delivered the opinion of the court.

This is a writ of error to a judgment of the hustings court of the city of Richmond, rendered on the 17th day of June 1875, convicting the plaintiff in error, Roger D. Burress, of the forgery of a certain order, and sentencing him therefor to confinement in the penitentiary for the term of two years; the period by the jurors in their verdict ascertained.

The said order is described in the indictment as being of the following purport and effect, to wit:

"Messrs. Parker & Co. will please pay to Thomas *Moore, or order, the sum of forty-seven dollars and 23c., and charge to my account.

Resp't'y, Allen & Bro.
Feb. 24th, 1875."

There were two counts in the indictment, the first was for the forgery of the order, the second for uttering the forged order, knowing it to be forged. The conviction was of the offence charged in the first count.

Several questions arose and were decided in the progress of the case in the court below, to most of which decisions exceptions were taken, the bills of exceptions so taken being four in number. The plaintiff, in his petition for a writ of error, assigns six errors in the judgment; which assignments of error we will notice in their order.

1. The first is, that it was error not to have remanded the prisoner for examination for the felony charged in the indictment.

This assignment of error is founded on the first bill of exceptions; which states that upon the calling of the case, the prisoner "moved that he be sent back to be examined for the felony for which he is

indicted; to which the attorney for the commonwealth objected by vouching the certificate of the police justice in the case, and claimed that the prisoner had been examined before a justice of the peace, which certificate is in the words and figures following to-wit:

"City of Richmond, to-wit:

To the clerk of the hustings court of said city:

I, J. J. White, police justice of the said city, do hereby certify, that I have this day committed to jail R. D. Burress, for his appearance before the hustings court of said city, on the first day of the June term thereof, to answer in the said court for a felony by him committed, in this, that he did, on or about the 24th day of February 1875, in the said city, feloniously forge, utter and attempt to employ as true, a certain forged order in writing for money, purporting to be the order of Allen & Bro. on Parker & Co., for the sum of forty-seven dollars and twenty-three cents, and of the following words and figures, to-wit:

"Messrs. Parker & Co. will please pay to Thomas Moore, or order, the sum of forty-seven dollars and twenty-three cents, and charge to my account.

Respectfully, Allen & Bro.
Feb'y 24th, 1875."

with intent to defraud. Given under my hand, this 7th day of June 1875.

J. J. White, police justice."

"And the court thereupon sustained the objection of the commonwealth's attorney, and overruled the motion of the prisoner, to which ruling of the court" the prisoner excepted.

We are clearly of opinion that there was no error in the said ruling of the court. Even the record of an examining court when that court was in existence, was not required to be as special as an indictment. See 3 Rob. Old. Pr. pp. 121-124, and the cases cited, especially *Halkem's case*, 2 Va. Ca. 4; and *Mabry's case*, Id. 396; in which latter case R. E. Parker, J., delivering the opinion of the court, states the law on the subject very fully and clearly. Certainly the proceedings before an examining justice under the present law, cannot be required to be more special than were the proceedings before an examining court

938 *under the former law. The only variances between the forged order as set out in the certificate, and as set out in the indictment, if variances they can be called for any purpose, consist of the following: that "Thos." in the latter is written "Thomas" in the former; "23c." in the latter is written "twenty-three cents" in the former; and "Resp't'y" in the latter, is written "Respectfully" in the former." Now these are certainly immaterial variances in regard to the question whether the prisoner had been examined before a justice for the offence for which he was indicted, and it clearly appears that he had been so examined.

**Forgery—Evidence as to Handwriting.*—The principal case is cited in *Hanriot v. Sherwood*, 82 Va. 14, and in *State v. Henderson*, 29 W. Va. 158, 1 S. E. Rep. 238.

2. The second assignment is, that "it was error in the court to have sustained the commonwealth's demurrer to the prisoner's plea of a former acquittal, and to have rejected the plea."

This assignment of error is not founded on any bill of exceptions, but upon proceedings otherwise had in the case, which sufficiently appear in the record. After the court had overruled the motion of the prisoner to remand him as aforesaid, and also his motion to quash the indictment, and his demurrer to said indictment and each count thereof, (on the decisions of the court in regard to which two latter motions no errors are assigned or complained of), the prisoner tendered to the court a special plea in writing (verified by his affidavit) of former acquittal of the same offence; and the said plea being seen and inspected, the attorney for the commonwealth cravedoyer of the record in the said plea mentioned, and demurred to the said plea, which demurrer was sustained by the court; and the court rejected the said plea, which plea is set out in words and figures in the record of this case. From which it appears that, on the 12th day of May 1875, the prisoner

was acquitted on another indictment 939 for felony, which *had been found against him, and which is set out in the said record as a part thereof. The plea, after setting out the record on the judgment of acquittal, which was on a verdict of not guilty, rendered on the plea of not guilty, states that the "said judgment still remains in full force and effect; and the said Roger D. Burress avers, and in fact says, that he, the said Roger D. Burress, and the Roger D. Burress, so indicted and acquitted as aforesaid, are one and the same person, and not other and different persons; and that the felony of which the said Roger D. Burress was indicted and acquitted as aforesaid, and the felony of which the said Roger D. Burress is now indicted, are one and the same, and not different felonies. And this the said Roger D. Burress is ready to verify," &c.

There can be no doubt but that the two indictments were intended to be for the same felony, and that the prisoner was acquitted on the first indictment, upon the ground of a variance between the order described and set out in that indictment, and the order exhibited on the trial as the subject of the forgery charged in the indictment. That variance consisted only in this: that in the order set out in the indictment, the amount is specified as "forty-seven dollars and 25 c.;" whereas in the order offered as evidence in support of the charge, the amount is specified as "forty-seven dollars 23 c." Now this appears to be, and in fact is, a very small difference; but it is a difference, and in contemplation of law, and as to the case under consideration, it stands on the same footing, and is governed by the same principles, as if the difference were ever so large in amount. An order for 25 c. is not an order for 23 c., and the prisoner was therefore entitled to

his acquittal under the former indictment, upon the ground of a fatal variance between the allegata and the probata; 940 and *he was accordingly acquitted upon that ground. But the acquittal not being a bar to another indictment, correctly setting out the order, the prisoner, instead of being discharged from custody on his said acquittal, was, on the motion of the attorney for the commonwealth, who stated that he desired to prefer another bill of indictment for felony against him, before the grand jury to be in session at the next June term of the court, remanded to jail to answer the said indictment. And the witnesses were recognized accordingly.

The question of variance between the two indictments was properly raised by the commonwealth by cravingoyer of the record of the first indictment, and demurring to the plea of former acquittal. For although the plea avers that the felonies charged in the two indictments are one and the same, the record shows that they are, as charged and in contemplation of law, not one and the same, but different felonies. The verity of the record in this respect cannot be denied by plea, and a demurrer to a plea, containing such denial, is an admission of the plea only in subordination to the record, which is paramount and conclusive.

For the law on this subject of former acquittal, reference may be had to Archbold's Criminal Practice and Pleading, Waterman's notes, vol. 1, pp. 111-113 marg., and the cases there cited.

In *Hite v. The State*, 9 Yerger R. 357, a case very ably argued by counsel, and very well considered by the court, "it was held, that to entitle the prisoner to the benefit of the plea of autrefois acquit, it is necessary that the crime charged in the last bill of indictment be precisely the same with that charged in the first, and also that the first indictment is good in point of law; that

the true test to ascertain whether a 941 plea of autrefois *acquit is a good bar, is whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first; and that where the offence charged in the first and second indictments are, upon the face of the pleadings, legally distinct, no averment that they are one and the same offence can make them so; therefore if the variance is in a thing material, the plea of autrefois acquit cannot be sustained. See also *Price v. The State*, 19 Ohio R. 423.

In *Mortimer's case*, 2 Va. Ca. 325, it was held that if a prisoner be acquitted of burning the barn of Josiah Thompson, he cannot plead this acquittal in bar of an indictment for burning the barn of Josias Thompson. That is a very strong case, and very much like the one under consideration. Indeed, they seem to be identical in principle as to the question we are now considering. See also *Vaughan's case*, Id. 273.

But it is contended that two recent provisions of our statute law create a difference

in this respect. Those provisions are sections 15 and 16 of chapter 195 of the Code, page 1218, which are in these words:

"15. A person acquitted by the jury upon the facts and merits on a former trial may plead such acquittal in bar of a second prosecution for the same offence, notwithstanding any defect in the form or substance of the indictment or accusation on which he was acquitted.

"16. A person acquitted of an offence on the ground of a variance between the allegations and the proof of the indictment or other accusation, or upon an exception to the form or substance thereof, may be arraigned again upon a new indictment or other proper accusation, and tried and convicted for the same offence, notwithstanding such former acquittal."

942 *Those provisions were introduced into our statute law for the first time by the act of 1847-'8, called the criminal code, and constituted sections 10 and 11, on page 122, of the acts of that year. They were probably derived from the Massachusetts code, in which we find similar provisions. See General Statutes of Massachusetts, 1860, part iv, title 1, ch. 158, §§ 6 and 7; although there appear to be similar provisions in some of the other states. See Waterman's notes to Archbold, cited supra.

It is contended that under the first of those provisions of the Code, to wit: § 15, the prisoner may have been acquitted upon the facts and merits on the former trial, and that upon the demurrer to the plea of autrefois acquit in this case, it must be considered that he was so acquitted.

Conceding, at least, for the purposes of this case, that the prisoner might have been acquitted upon the facts and merits on the former trial; certainly he might have been acquitted, and was entitled to be acquitted, on the ground of a variance between the allegations of the indictment and the proofs, and as it does not appear in the record, and is not averred in the plea, that he was acquitted upon the facts and merits on the former trial, it must be inferred, in considering this demurrer to the plea, that he was acquitted on the ground of the variance. If he had been acquitted upon the facts and merits, the fact would, no doubt, have so appeared upon the record, and could easily have been made so to appear. And at all events, as it does not appear, it ought to have been averred in the plea. Section 15 gives a right to plead an acquittal on a former trial in bar of a second prosecution for the same offence, notwithstanding any defect in the form or substance of the

943 indictment on *which he was acquitted, provided, or on condition that, the acquittal was upon the facts and merits of the case. To show himself entitled to the right, he must, by the averments of his plea, if the fact do not otherwise appear in the record, bring his case within the terms of the section; that is, aver that his acquittal was upon the facts and merits.

The section does not make the variance immaterial. The accused must be acquitted upon that ground, if no other. And if acquitted, the presumption, in the absence of evidence to the contrary, is, that he was acquitted on that ground. But section 15 authorizes an acquittal in such case upon the merits, instead of upon the ground of variance; and if acquitted upon the merits, makes the acquittal a bar to a second prosecution for the same offence. The accused, however, to be entitled to the benefit of the bar, must affirmatively show that this case comes within the meaning of the section. Section 16 does not vary the case. It does not relate to pleading, but is merely declaratory of the common law, that an acquittal on the ground of variance is not a bar to a second prosecution for the same offence; and therefore declares that a person acquitted upon that ground may be arraigned upon a new indictment, &c.: that is, it merely declares that the common law on this subject remains in full force, except so far as section 15 creates an exception. And a person, to get the benefit of that exception, must show that his case comes within its terms.

We are therefore of opinion that the court did not err in sustaining the demurrer to the plea of former acquittal and rejecting the plea.

3. The third assignment is that "the court erred in not excluding from the jury, on the ground of variance, the paper set forth in the second bill of exceptions."

944 *The paper here referred to is the same with the order set forth in each count of the indictment except that the last word in the body of said order is "account," and the last word in the body of said paper is "act," which is obviously a contraction for "account;" and except that at the foot of the said paper are written these words:

"Richmond, March 5th, 1875, received of T. A. Parker & Co. forty-seven 23-100 dollars in full of this order.

Thomas Moore."

We think there was, clearly, no variance between the said paper and the said order. Certainly the difference between the word "account" and the contraction "act," aforesaid is no variance, or at least is wholly immaterial. And certainly the receipt at the foot of the said paper, and the absence of such a receipt at the foot of the said order, constitute no variance. The receipt is no part of the forged paper. The receipt is not charged to be forged. In fact it is a genuine instrument.

We therefore think the court did not err in not excluding from the jury the paper set forth in the second bill of exceptions.

4. The fourth assignment is, that "the court erred in excluding from the jury the alleged genuine order with the receipt upon it, mentioned in the third bill of exceptions, which the witness said had been presented to him on a former occasion by the prisoner."

The third bill of exceptions states, "that on the trial of the cause, after the common-

wealth had introduced as a witness one Truman A. Parker, who gave evidence tending to prove that the prisoner **945** had presented *to Parker & Co. the order marked 'A' set forth in the said bill of exceptions, and which is made part hereof, and that the said order was false and forged, and that the prisoner had been paid the money thereon by Parker & Co.; and after the attorney for the commonwealth had turned the witness Parker over for cross-examination to the prisoner's counsel, he was asked by them whether he had ever seen the prisoner before the interview at which said forged order was presented, and the witness replied that he had; that on one occasion before, to-wit: in September 1874, the prisoner had presented an order on Parker & Co., drawn by Allen & Bro., in favor of R. D. James, which had been paid by witness; but that at the time of the presentation of the second draft, the witness did not remember prisoner as the person who received the money for the first draft; and being asked by prisoner's counsel, if the said James' order was a genuine one, said it was. Witness was then asked by prisoner's counsel to produce the said James' order, and they then tendered it in evidence, said order having upon it a receipt in prisoner's proper name for the amount thereof; but the attorney for the commonwealth objecting to the introduction of said draft in evidence before the jury, the court sustained the objection and ruled the draft out as evidence; to which opinion of the court, refusing to allow the said James' draft to be given in evidence, the prisoner by his counsel excepted."

The draft referred to seems to have been wholly irrelevant to the case before the court, and was therefore inadmissible. The draft had on it a receipt in prisoner's proper name for the amount thereof. There was no specific tender by the prisoner of **946** his said receipt *in evidence; but he may have supposed that if the draft was admitted as evidence the receipt endorsed thereon would necessarily be in evidence also, and he may have intended to use the receipt for the purpose of comparison of handwriting. Even if the receipt can be considered as having been offered in evidence and excluded, was it properly excluded? We are of opinion that it was. As a general rule, certainly, documents irrelevant to the issues on the record cannot be received in evidence at the trial to enable the jury to institute a comparison of hands, or to enable a witness so to do. This is clearly the rule in England, especially according to the modern cases, and although it is said that the American decisions on the subject are far from being uniform, yet it cannot be said that in this state the correctness of the rule has ever been questioned by any decision of this court. It has been uniformly received and acted on with us as a settled general rule. If there be any exceptions to it this case is not one of them. For the cases on this subject reference may be had to 1 Greenleaf on Ev., §§ 579-581,

and notes; and Roscoe's Criminal Evidence, page 164 and notes.

5. The fifth assignment is, that "the court erred in excluding from the jury the testimony referred to in the fourth bill of exceptions, as to the incompetency or inability of the prisoner to have written the paper with the forgery of which he was charged."

The fourth bill of exceptions states, "that upon the trial of this cause the prisoner offered a witness, Dr. Otho W. Kean, who proved that he was a resident of Goochland county, and had lived in the same neighborhood with the prisoner for many years; that he was a practising physician of **947** many years standing, and *also superintendent of public schools of the county; that the prisoner was a teacher of public schools in his employment; that, as superintendent of the schools, it was his duty to inspect all the reports of the said Roger D. Burress as teacher for about four years; and that he had had other correspondence with him; that in this way his opportunities for acquiring a knowledge of his handwriting were very superior; that, in addition to this, he had inspected the reports of the said Roger D. Burress, and his correspondence with him, running through a period of four years, and terminating about a year ago, since this charge was brought against him, with the view of determining whether he could detect any variation in his writing, done at different times, or want of uniformity in his handwriting during the whole of this period, or any resemblance to the paper purporting to be an order drawn by Allen & Bro., which the witness had carefully examined before that time; and that, in his opinion, the order and signature is not the handwriting of this prisoner; that he wrote a good, plain, round hand, remarkably uniform, and fixed and well defined; and that from his knowledge of the prisoner and his handwriting, he did not believe that he could have written the order or the signature to the receipt, or either of them, if he had tried to do so. The attorney for the commonwealth objected to the introduction of that portion of the evidence of the said witness which states that "he did not believe that the prisoner could have written the order and the signature, or either of them, if he had tried to do so," and moved the court to exclude the same; and the court sustained this objection, and ruled out the evidence." To which action of the court the prisoner excepted.

948 *We know of no principle of the law of evidence which would make the statement of the witness, excluded in this case, admissible evidence. It is a statement, not of facts, to which a witness generally testifies, but of mere matter of opinion, to which he rarely testifies, and only in special cases and for peculiar reasons. This is not such a case, and such reasons do not apply to it. An expert is sometimes called upon to give his opinion, which is evidence in a court of justice; but

certainly the witness in this case was no expert. He had no peculiar knowledge of handwriting, or of the capacity of men to write. He seems to have had a very good opportunity of becoming acquainted with the prisoner's handwriting, and to have been very well acquainted with it. But certainly his opinion that the prisoner could not have written the order or the signature, if he had tried to do so, would be very unsafe and improper evidence to go before a jury. He proves that the prisoner "wrote a good, plain, round hand, remarkably uniform, and fixed and well defined;" in other words, that he wrote an excellent hand. And how the witness could form an opinion from these facts, that the prisoner could not have written the order or signature if he had tried to do so, we cannot perceive. Why could he not have done so as well as any other man, skilled as he was in the use of the pen? Almost every good writer writes a uniform hand, ordinarily. But that does not show that he cannot write a feigned hand. Of course he would write a feigned hand if he attempted to commit a forgery. From the facts stated by the witness, others would no doubt form a different opinion from the one expressed by him as to the capacity of the prisoner. But

the law in its wisdom excludes all
 949 such opinions from the *jury, as calculated not to enlighten, but to mislead them. 1 Greenleaf on Ev., § 440 and seq. and notes; Roscoe's Crim. Ev., p. 135 and seq. and notes.

The only remaining assignment of error was waived and abandoned by the learned counsel for the prisoner, and therefore will not be further noticed by us.

We think there is no error in the judgment, and that it ought to be affirmed.

Judgment affirmed.

950 *Smart & McKinsey v. The Commonwealth.

January Term, 1876, Richmond.

Toll-Gates—Destruction of—Misdemeanor.—The county court authorizes W to erect a toll-gate on a turnpike road in the county, and take toll thereon at a rate fixed, he being bound to keep the road in order. S & M came with their teams to the gate, which they found shut and fastened. They demanded that the gate should be opened, and the gate-keeper demanded the usual tolls before opening the gate. S & M refused to pay the tolls, and the gate-keeper refused to open the gate. Thereupon S & M broke down and destroyed the gate, and passed through without paying tolls. **Held:**

1. **Same—Same—Same.**—W having erected the gate under the authority of the county court, whether or not the court had authority to make the order, S & M were guilty of a misdemeanor under the statute. Code of 1873, ch. 188, § 28.
2. **Same—Same—Same.**—If the toll-gate was such an obstruction on the highway as could be regarded as a nuisance, S & M could only be justified in removing it peaceably, and not in destroying it,

and having destroyed it they were guilty of misdemeanor.

This was an information for a misdemeanor in the county court of Floyd against James M. Smart and Allen McKinsey. The case is fully stated by Judge Christian in his opinion.

Penn, for the appellants.

The Attorney General, for the commonwealth.

Christian, J., delivered the opinion of the court.

The plaintiffs in error were indicted 951 under the 28th *section, chapter 188,

Code of 1873, which declares that "if a person unlawfully, but not feloniously, take and carry away, or destroy, deface or injure, any property, real or personal, not his own. * * * he shall be deemed guilty of a misdemeanor."

The plaintiffs in error having waived their right to a trial by jury, demurred to the evidence offered by the commonwealth; which demurrer was overruled by the court; and judgment entered against each of the defendants for a fine of five dollars in each case.

The commonwealth's evidence to which the demurrer was tendered was as follows:

At a county court held for Floyd, on the 10th day of February, 1868:

On motion of R. W. Whitlow, he is authorized to take charge of that portion of the Floyd and Patrick turnpike lying between Floyd courthouse and the Patrick county line, and put the same in order, and receive for his services and labor done on the same in making repairs, the tolls collected on said road for the next five [years], he putting the said road in good order before he is authorized to receive tolls on the same.

At a county court held for the county of Floyd, on the 11th day of December, 1872:

On motion of R. W. Whitlow, it is ordered that the turnpike leading from Floyd courthouse, to Patrick county be let to the said Whitlow for the term of five years, F. C. House to the Patrick line, to be kept up by the tolls arising therefrom, which said Whitlow is authorized to collect at one gate, that he may erect on said road at such place as suits his convenience, said tolls to remain at present rates charged on said — by A. Booth; but before the said

952 Whitlow shall be entitled *to any benefit from said tolls—this order he shall enter bond in the sum of \$1,500, with good security, to be approved by the court, payable to Jacksonville township, to keep said road in the condition required by law for turnpike roads, for the term of five years.

And it is further ordered and expressly understood, that this court reserves to itself the right to annul and discontinue this contract at any time, upon ten days' notice to said Whitlow, or his assigns, in case he fails to keep said road in the order required by law.

And it is further ordered, that the said Whitlow shall not take any toll on said road until William Campbell, S. Dobyns, Thomas L. Nixon, Eden Epperly and Mason Jenkins, or any three of them, who are hereby appointed to act as commissioners for that purpose, shall certify that said road is in the condition required by law. And the court reserves the right to alter the tariff of tolls at any time he may deem proper upon ten days' notice to the said Whitlow or his assigns.

Robert W. Whitlow had erected a toll-gate on that part of the Jacksonville and Christiansburg turnpike lying in the county of Floyd, between Floyd courthouse and the Patrick line, and was keeping the road in repair for tolls received at the gate under the last order. He had never taken or received tolls under first order, said road being kept in repair by surveyor and hands assigned to work same until Whitlow's last contract was made with county court. Toll-gate was the personal property of the said R. W. Whitlow. At the date set out in the information, defendants, with their teams, drove up to the toll-gate in the county of Floyd, and found the same closed and fastened. They demanded that the gate-keeper should open the gate; the gate-keeper demanded the usual tolls before opening

953 *the gate; the defendants refused to pay tolls, said they did not intend, and would not pay tolls, and the gate-keeper refused to open gate. Thereupon, then and there, the defendants by force broke down, removed, injured and destroyed the gate, and passed over said road without paying tolls.

The court is of opinion, that there was no error in the judgment of the court in overruling the demurrer and assessing a fine against the plaintiffs in error. They were certainly guilty of the offence which the statute defines. They unlawfully injured and destroyed personal property not their own. The toll-gate was the personal property of Whitlow. It was not only injured but destroyed by the plaintiffs in error. The toll-gate was erected by Whitlow under an order of the county court of Floyd. It may be that such order was without authority, (on that question we express no opinion,) and that being without authority it was a nuisance to erect a toll-gate across a public highway. But that question the plaintiffs in error had no right to decide for themselves, except at their own peril.

But if the toll-gate was such an obstruction on the highway as could be regarded as a nuisance, the plaintiffs in error could only be justified in removing it peaceably, not in destroying it. The evidence shows that they not only removed the gate, but destroyed it. This was an unlawful act which was indictable under the statute. The court is therefore of opinion, that there is no error in the judgment of said circuit court, and that the same be affirmed.

Judgment affirmed.

954 *Page v. The Commonwealth.

January Term, 1876, Richmond.

1. **Trial for Felony.**—A person examined by a justice for a felony, may be sent on for trial to the circuit court of the county then in session, and may be arraigned and tried at that term of the court.

2. **Same—Pleading—Replication—Rejoinder.**—On the arraignment of a prisoner on a charge of felony, he files a special plea, to which the attorney for the commonwealth files a special replication; and to this replication the prisoner demurs. The demurrer being overruled, the prisoner cannot rejoin to the replication without withdrawing his demurrer.

3. **Same—Same—Autrefois Acquit—Replication to.**—A prisoner indicted for felony files a plea of *autrefois acquit*, and makes the record of his former trial a part of his plea; and he avers that the offence for which he had been before tried is the same offence for which he is then on trial; and the evidence necessary to convict him on the present indictment, if introduced, would have convicted him on the first trial. The attorney for the commonwealth replies that there is no record of the trial of the prisoner for the same identical felony and offence charged in the indictment on which the prisoner is then arraigned. The replication denies one of the essential averments of the plea, viz: that the offence was the same as that for which the prisoner had been before tried; and is therefore a good replication to the plea.

4. **Same—Same—Same.**—In such a case it would not have been proper to traverse the allegation that the evidence necessary to convict him, &c. The two indictments being for similar offences, and in the same words, except as to time, which is immaterial, of course the same facts which sustain the one would, standing by themselves, sustain the other. But when it is averred and shown that the two offences, though similar, are not in fact the same, but different offences, all foundation for the plea is taken away.

5. **Same—Same—Same—Instructions.**—Upon the trial of the issue on the plea of *autrefois acquit*, an instruction to the jury, that if they believe, &c., that the house named in the indictment for the burning of which the prisoner was arraigned

955 and *tried at a previous term of the court, is not the same house, nor the same burning charged in the indictment upon which he now stands arraigned, then they must find against the prisoner on the issue joined is correct. And it makes no difference that the offences charged in the two indictments are described as the burnings of the dwelling house of R, if the jury believe that in reality distinct houses and distinct burnings are referred to in the two indictments.

6. **Same—Same—Same—Evidence.**—On the trial of the issue on the plea of *autrefois acquit*, R, whose dwelling house was in both indictments alleged to have been burned, and who was the principal witness for the commonwealth as to the burnings on both trials, may be asked, and may state whether or not the verdict of the jury on the first trial had relation to the house charged to have been burned in the indictment on which the prisoner was then arraigned. The enquiry is as to fact, not an opinion.

7. **Same—Summoning Jurors from Another County.**—Under the act, Code of 1873, ch. 202, § 10, the court may direct jurors to be summoned from another

county or corporation for the trial of a prisoner upon the issue on the plea of *autrefois acquit*, as well as on the general issue.

8. *Same-Same*.—Discretion of Court.*—Whether it is a case in which a jury should be summoned from abroad, is for the court of trial to determine; and the appellate court will presume that the court of trial acted rightly in the matter unless the contrary plainly appears.

9. *Same*.—Confessions.—Competency of Jurors.†—The issue on the plea of *autrefois acquit* having been found against the prisoner, and he being on his trial on the plea of "not guilty," eight of the jurors who had tried the first issue were called and examined on their *voir dire*, when they stated that, during that trial, they had heard R. in his testimony while speaking of the burning of the house, say that the prisoner had confessed; but as he used the last word he was interrupted, and told to say nothing about the confession; but that they believed they could give the prisoner a fair and impartial trial on the evidence, notwithstanding anything they had heard, having no impression on their minds on the question as to the guilt or innocence of the prisoner, which it would require evidence to remove. They are competent jurors.

10. *Same-Same*.‡—That admissions and confessions of a prisoner may be given in evidence against him. The rule in *Smith's case*, 10 Gratt. 734, and *Shelley's case*, 14 Id. 652, reaffirmed.

This was an indictment in the circuit court of Chesterfield, against Hillary Page, 956 for burning the dwelling *house of Frank G. Ruffin in the night time. The prisoner was tried, convicted and sentenced to be hung at the May term of the court for 1875. And he thereupon applied to this court for a writ of error; which was allowed. The case is stated in the opinion of Judge Moncure.

S. Page and E. C. Cabell, for the prisoner.

The Attorney General, for the commonwealth.

Moncure, P., delivered the opinion of the court.

In March, April, May and July 1874, and January 1875, many houses on the land of Francis G. Ruffin, in the county of Chesterfield, were at different times, burned or set fire to, generally in the night time, by some person then unknown; and it being afterwards discovered, or supposed to be discovered, that a colored boy named Hillary Page, living with his mother on the said land, was the author of all these fires, he was accordingly charged therewith and arrested therefor, and indictments were, at different times, found and tried against him for some of these offences, in the circuit court of said county; on three of which

indictments he was, at different times, convicted and condemned to death. The first conviction took place in February 1875, and was on an indictment containing three counts, charging the offence in different forms. In the first count, the house was described as "a certain dwelling house of one Francis G. Ruffin." In the second, it was described as a certain dwelling house of "Phillip Epps" and four other persons therein named. And in the third, it was described as a certain other house called a barn and stable of one F. G. Ruffin.

957 "the same being an outhouse, not adjoining the dwelling house nor under the same roof, but some persons usually lodging therein at night, to-wit: Phillip Epps," and four other persons therein named, as aforesaid. The prisoner was found guilty under the third count, the jury saying nothing in their verdict about the first or second counts. And sentence of death was pronounced against him on that conviction. This court awarded a writ of error to the judgment; and upon argument and consideration of the case, being of opinion that the finding by the jury of a verdict of "guilty as charged in the third count of the indictment," was, in effect, a finding of not guilty, as charged in the first and second counts of the indictment, on which two counts the prisoner was therefore entitled to a judgment of acquittal; and being further of opinion that he was not charged in the third count with any offence punishable with death; but at most only with an offence under the fifth section of chapter 188 of the Code, which section concerns the burning of "any barn, stable," &c., and makes the offences therein mentioned punishable by confinement in the penitentiary; it was considered that the said judgment was erroneous, and should be reversed and annulled. And this court proceeding to enter such judgment as the said circuit court ought to have entered, it was further considered that the prisoner should be acquitted of the charges contained in the first and second counts of the indictment. And it was ordered that the verdict of the jury against him on the third count should be set aside, and the cause remanded to the said circuit court for a new trial to be had therein on the said third count, for the offence of feloniously and maliciously burning a barn and stable, as therein charged and as described in the said fifth section of chapter 188 of the

958 *Code. But it was declared in the judgment of this court, that it would be competent for the court below, if deemed best to do so, to have a nolle prosequi entered as to the said third count, and to proceed to the trial of the prisoner on one or more of the other indictments for felony which appear to have been found against him, in the same court and at the same time with the indictment on which he had been tried as aforesaid, or any other indictment which might have been, or might be found against him for felony in the same court. Accordingly it appears that after

*Summoning Jurors—Discretion of Court.—See citation of principal case in *State v. Hudkins*, 35 W. Va. 251, 18 S. E. Rep. 668.

†Competency of Jurors.—This subject is exhausted in *Shinn v. Com.*, 32 Gratt. 900, and *note*.

‡Confessions.—See monographic note on "Confessions Generally" to *Swartz v. Com.*, 27 Gratt. 1025.

the said cause was remanded to the circuit court as aforesaid, it was not further prosecuted therein, but the prisoner was tried, convicted and sentenced to death on each of two other indictments found against him in the same court on the 12th day of May 1875, in each of which he was charged with a like offence to that charged in the first count of the indictment on the third count of which he had previously been convicted as aforesaid; the said offence being described in all of the said indictments as the felonious and malicious burning of a certain dwelling house of one Francis G. Ruffin, in the said county, in the night, and being charged in one of the said two indictments last found, which one was marked by the clerk when presented No. 5, as having been committed on the 26th day of April 1874, about the hour of one o'clock in the night of that day, and in the other of the said two indictments last found, which was marked by the clerk when presented No. 7, as having been committed on the 31st day of March 1874, about the hour of three o'clock in the night of that day. It appears that the indictment on which the prisoner had previously been convicted as aforesaid was marked No. 1, and in it the offence is charged as having been 959 committed on the 29th day of *July, about the hour of two o'clock in the night of that day. The prisoner was convicted on one of the said two indictments last found, to-wit: the one marked No. 5, on the 21st day of May 1875; and on the other, to-wit: the one marked No. 7, on the 1st day of June 1875; and he was sentenced to death in each case on the 2nd day of June 1875. To each of the judgments in these two cases a writ of error was awarded by this court.

A great many errors were assigned in the petition for a writ of error in each case. The two cases were argued together, but we will consider them separately as a decision of one of them may render it unnecessary to decide or consider the other. We will, therefore, proceed now to consider the case in which the indictment is marked No. 7.

All, or nearly all, of the questions arising in this case are presented by the bills of exceptions which were taken during the progress of the trial, and which are fifteen in number, including No. 2, which is not in the record and was not filed, as appears by a note of the clerk of the court below, at the foot of the record. We will consider and dispose of these questions in the order in which they are presented by the bills of exceptions; some of which will require very brief notice, and seem not to be relied on, and are not noticed in the assignment of errors, unless it be under the general head at the end of the petition, of "numerous other errors which are apparent in the record."

1. Bill of exceptions No. 1 was taken to the ruling of the court in refusing the petition of the prisoner to grant him a mandamus nisi to the justice of the peace of the

county by whom the prisoner was examined and remanded to answer for the felony 960 for which *he was indicted, to appear before the court forthwith and show cause why a peremptory mandamus should not issue, commanding him to remand the said Hillary Page to the next term of the circuit court to answer for a felony for which he was indicted and arrested, instead of remanding him to the present term of the said court.

The question, no doubt, intended to be presented by this bill of exceptions was, whether a person remanded by an examining justice for trial for felony in the circuit court, could be arraigned and tried at a term of the court then in session, or only at a term of the court commencing after such examination. Conceding, for the purposes of this case, that the question was presented in a proper way, we are of opinion that it was properly solved by the court below, and that a person remanded for trial as aforesaid could be tried at any time after he was so remanded, even though at a term of the court which was in session at the time of his examination before a justice. The Code, it is true, provides that the commitment for trial, &c., "shall be in the next term of the circuit court for such county;" but that does not prevent a trial from being had at an existing term of the court, if one be then in existence. The object of the law is to have a speedy trial of a felony, and it therefore provides that the accused shall, unless good cause be shown for a continuance, be arraigned and tried at the first term of the court to which he is remanded or sent on for trial. Code, ch. 202, §§ 1 and 2. It might be very inconvenient and injurious, as well to the accused as to the commonwealth, to delay a trial necessarily to a future term of the circuit court, when there was one in existence at which it might just as well be had.

961 *2. Bill of exceptions No. 2 is not in the record, as before stated.

3. Bill of exceptions No. 3 states that the prisoner tendered to the court his plea of autrefois acquit, and sets out the plea, in which the arraignment, trial, and judgment had on indictment marked No. 1, as aforesaid, are relied on as an acquittal of the offence charged in the indictment in this case, marked No. 7, as aforesaid. To which plea the attorney for the commonwealth filed his replication, which is also set out in the bill; the said replication being, "that the offence charged in the indictment for which he is now arraigned, is another and distinct offence from that for which the said Hillary Page was tried and acquitted, as stated in said plea." To this replication the prisoner, by his counsel demurred generally; and the court overruling his demurrer, the prisoner asked leave to join issue on the replication; which leave the court refused to grant, unless he would withdraw his demurrer to the replication; but offered to permit him to join issue on the replication if he would withdraw his demurrer thereto; which he refused to do;

whereupon the court refused again his motion to join issue. And to this opinion and ruling of the court the prisoner excepted.

The court is of opinion that there is no error in the said opinion and ruling of the court below. The prisoner had no right to demur and rejoin to the same replication at the same time. He had his election to do either. He elected to demur; when his demurrer was decided against him, all he could then ask was to withdraw his demurrer and rejoin, and this the court offered to permit him to do; but he refused. He has therefore no just cause of complaint in this respect. He says in his petition,

962 that "the demurrer being *overruled by the court, the judgment should have been respondeat ouster." He did answer over, by pleading not guilty, after his special plea of autrefois acquit was disposed of. The right of respondeat ouster does not authorize a party whose demurrer to a replication has been decided against him to put in a rejoinder without withdrawing his demurrer. That would be a case of palpable duplicity; and would be the same thing as if he had offered to demur and rejoin at the same time to the replication. He may plead double in the first step in a line of pleading. For example, he may plead autrefois acquit and not guilty. But he cannot plead double in any subsequent step in that line.

But in this case there was a second plea of autrefois acquit, founded on the same ground of acquittal, in the line of which pleading the prisoner rejoined, instead of demurring to the replication; and thus had all the benefit he could have derived from being allowed to rejoin without withdrawing his demurrer to the first replication. In no view, therefore, can he have been injured by the action of the court below in this respect.

The first assignment of error may here properly be noticed. For though it does not present the same question presented by the third bill of exceptions, it is founded on what is set forth in that bill. That assignment is, that the court erred in overruling the demurrer to the replication to the plea of autrefois acquit tendered by the prisoner. That plea was clearly demurrable in not showing by the record an acquittal of any offence, but on the contrary a conviction. The prisoner, however, was not injured by the action of the court in this respect, even if it had been erroneous, for he put in a second plea of former acquittal, under *which he would have had the full benefit of his former acquittal if it had in fact been for the same offence.

4. The third assignment of error is founded on bill of exceptions No. 4, and in that the court erred in refusing to reject the replication to the second plea of autrefois acquit, on the ground that it was not responsive to every part of the plea.

The plea and replication are set out in the bill of exceptions, and are in substance as follows:

The prisoner for plea says, that he has been heretofore, to wit: in the circuit court, &c., in February 1875 indicted, for that he on the 29th day of July, in the year 1874 about the hour of 2 o'clock in the night of that day, in the county aforesaid, a certain dwelling house of one Francis G. Ruffa there situate, feloniously and maliciously did burn against the peace, &c., as will be seen from the first count of an indictment herewith filed, and prayed to be taken as a part of this plea; that on this indictment he was, at the said term, arraigned and tried for the said offence by a jury of his country, and by said jury acquitted of said charge, as may be seen from the record and judgment of said court, entered at its February term 1875. And the said Hillary Page further says, that the said offence of which he was thus acquitted, is the same offence of which he is now indicted, and that he is the same Hillary Page mentioned in the said record and judgment, and that the evidence necessary to convict him on the present indictment would have convicted him if properly introduced on the previous trial and indictment when he was by the jury acquitted; and this he is ready to verify. Wherefore he prays, &c.

To which plea the attorney for the commonwealth filed his replication in substance as follows: that by reason of anything in the said last plea alleged, the 964 *commonwealth ought not to be precluded, &c., because the said attorney says, that while admitting that the prisoner is the same Hillary Page who was tried, as is alleged in said plea, &c., there is no such record in the said court referred to in the said plea of the said acquittal in due manner of law of the said Hillary Page, of and from the same identical felony and offence charged in the said indictment upon which he, the said Page, is now arraigned, as is by the said Page in his said plea in that behalf alleged; and this the said attorney for the commonwealth prays may be enquired of by the country.

This replication the prisoner moved the court to reject, as not being responsive to the plea; but the court overruled the motion; and to this opinion and ruling of the court, the prisoner excepted.

We think there is no error in this opinion and ruling of the court. The replication is responsive to the plea. It traverses a vitally important allegation of the plea, that the offences charged in the two indictments were one and the same offence. The prisoner may have been acquitted a thousand times of offences precisely like the offence charged in this indictment, and yet if none of them was this identical offence, such acquittals would be no bar to a prosecution under this indictment. The plea rests upon two grounds: 1st, that there was a former acquittal of an offence—that is matter of record; and, 2dly, that such offence was the same which is charged in the present indictment. That is matter of fact to be proved. The prosecutor need not take issue on both of these grounds. He may admit

the former, and traverse the latter; and that is what in effect he did in this case.

The counsel for the prisoner seem to suppose that the replication should have
965 traversed the allegation in *the plea, "that the evidence necessary to convict him on the present indictment, would have convicted him if properly introduced on the previous trial and indictment when he was by the jury acquitted."

Now certainly such a traverse was not necessary, and would have been very improper. The two indictments being for similar offences, and in the very same words, except as to time, which is immaterial, it follows, as a matter of course, that the same facts which sustain the one, would, standing by themselves, sustain the other. But when it is averred and shown that the two offences, though similar, are not in fact the same, but very different offences, all foundation for the plea is thus completely taken away. Surely it cannot be necessary to cite authority, or say anything more in support of this view.

The next questions presented by the bills of exceptions in this case are in regard to instructions asked for by the prisoner and the commonwealth respectively, on the trial of the issue joined on the second plea of autrefois acquit. These instructions are the subjects of bills Nos. 5, 6 and 7, which will be considered together.

5. Bill of exceptions, No. 5, states that the prisoner tendered to the court the following instructions numbered from one to four, which are to the following effect:

1. If the jury believe that the evidence necessary to support a conviction on the present indictment would also have supported a conviction on the previous indictment, then they must find that he has been heretofore acquitted of the same offence.

2. The issue before them is, not whether
966 or not the offences charged in the two indictments are one and *the same, but whether an acquittal under one is an acquittal of the other.

3. On the trial of an indictment for a felony, the day and year are not material; and on the trial of a felony, on an indictment charging an offence to have been committed on the 28th day of July 1874, a prisoner may be legally convicted if the evidence shows that the offence was committed on the 31st day of March 1874.

4. If the jury believe from the evidence before them, that the prisoner was tried and acquitted of burning the dwelling house of Francis G. Ruffin on the 29th day of July 1874, and that the present indictment charges him with burning the dwelling house of Francis G. Ruffin on the 31st day of March 1874, then they must find that he has been acquitted of the offence charged in the present indictment, unless they believe from the evidence that there was also a dwelling house burned on the 29th day of July 1874, and that he was tried for that burning on his previous trial.

Which instructions the court refused to give, to which ruling the prisoner excepted.

6. Bill of exceptions No. 6 states that the commonwealth tendered to the court the following instructions to the jury:

"That if the jury believe from the evidence that the offence for which the prisoner is now arraigned is another and distinct, and not the same offence for which he has been heretofore tried and acquitted, then they must find against the prisoner upon the issue joined.

"And if they believe from the evidence that the house named in the first count of the indictment, for the burning of which the prisoner was arraigned and tried at the February term of the court, is not the same

house nor the same burning charged
967 in the indictment *upon which he now stands arraigned, then they must find against the prisoner on the issue joined. And it makes no difference that the offences charged in the indictments are described as the burnings of the dwelling house of Francis G. Ruffin, if the jury believe that in reality distinct houses and distinct burnings are referred to in the two indictments."

Which instructions the court gave; to which ruling the prisoner excepted.

7. Bill of exceptions No. 7 states that the prisoner tendered to the court the following instruction to the jury:

"That if they believe that the evidence necessary to support a conviction on the present indictment would also have supported a conviction on the previous trial, then they must find that he has been heretofore acquitted of the same offence.

Which said instruction, as it was tendered, the court refused to give; but gave it with the following addendum made thereto by the court.

"But if the jury, from the evidence, believe that the prisoner, on the former trial, was tried for a separate and distinct offence, occurring at a separate and distinct time, involving a separate and distinct act, then the jury may find for the commonwealth on the issue joined."

To which ruling of the court, in refusing to give the said instruction as asked for, and in giving it with the addendum aforesaid, the prisoner excepted.

We think that the circuit court did not err, at least to the prejudice of the prisoner, in regard to the said instructions. Certainly the court did not err in refusing to give the instructions numbered 1 and 2 in bill of exceptions No. 5; nor in giving the instructions named in bill of exceptions No. 6; nor, (to the prejudice *of
968 the prisoner) in refusing to give the instruction asked for, but giving it with an addition as mentioned in bill of exceptions No. 7. The instructions numbered 3 and 4 in bill of exceptions No. 5, would have been true enough, standing by themselves, and as abstract propositions. But standing as they were, and without any evidence to support them, they would have misled the jury, or were calculated to do so; and the court was warranted in refusing to give them. No evidence is set out in either of the three bills of exceptions which relate

to the instructions. And if we look to the facts certified in a subsequent bill of exceptions, No. 11, we find that there was not a particle of evidence in the case tending to prove that the offences charged in the two indictments were the same; but on the contrary there was ample evidence that they were totally distinct, committed at different times and places, and upon different buildings. Taking all the instructions given by the court to the jury together, the law was thereby correctly and fully laid down on the subject, and if there was any error therein, it was certainly not to the prejudice of the prisoner.

8. Bill of exceptions No. 8, states that on the trial of the issue, on the plea of autrefois acquit, Francis G. Ruffin, a witness for the commonwealth, was asked to "state whether or not the verdict rendered by the jury sworn for the trial of Hillary Page at the February term of the said circuit court, had relation to the house charged in the indictment upon which he is now arraigned, as having been burnt on the 31st day of March 1874;" to which question the prisoner objected as illegal. But the court overruled the objection, and permitted the question to be asked and answered: when the witness answered that it did not. To this question and answer the prisoner excepted.

969 *The ground of this exception, as stated in the assignment of error is, that the testimony objected to, is "simply the opinion of a witness on a question of law and record evidence."

The only meaning and effect of this evidence was, that the two indictments were for different offences. The witness was the owner of both houses, the burning of which was the subject of the two prosecutions respectively. He was the principal, if not the only witness in regard to the burning in each case. He knew perfectly well that the former trial was for burning his barn and stable on the 29th day of July 1874, and the latter trial was for burning his dwelling house on the 31st of March 1874; and he could and did therefore state as a fact, that the verdict rendered at the February term of the court in 1875, for burning a house on the 29th day of July 1874, did not have relation to the house charged in the indictment on which he was then arraigned as having been burnt on the 31st day of March 1874.

9. Bill of exceptions, No. 9, seems to have been waived by the prisoner's counsel.

10. Bill of exceptions, No. 10, states that the jury on the trial of the issue on the plea of autrefois acquit, after hearing the evidence, were about retiring to their room to consider of their verdict, when the court gave them, to carry with them to their room, the plea of the prisoner, with the replication thereto, the instructions of the court in writing, and the indictments No. 1 and No. 7, but failed to give the jury the written opinion of the court of appeals defining and declaring the legal force and effect of the verdict of the jury, who for-

merly tried the prisoner on indictment No. 1. all of these papers having been offered in evidence and read to the jury. After their retirement the jury returned into

970 *court and rendered their verdict; and the prisoner thereupon moved the court to set aside the verdict, because the jury had been permitted to carry the said indictments, Nos. 1 and 7, with them to their room without taking with them the opinion of the court of appeals aforesaid: which motion the court overruled; and to this ruling of the court the prisoner excepts.

It was no doubt well understood by the jury, and not denied by the commonwealth, that the prisoner was acquitted of the offence charged in indictment No. 1, and that was all that the opinion of the court of appeals could show in favor of the prisoner. The circuit court, if it had been asked, would have instructed the jury as to the meaning and effect of the said opinion, and would no doubt have handed it to the jury, to take into their room with the other papers aforesaid on their retirement, but it was not asked to do so. And after their return into court with their verdict, it was too late to make the objection, if it ever could have been properly made; and the court did not err in overruling the motion to set aside the verdict on the ground aforesaid.

11. Bill of exceptions, No. 11, states that the jury, having heard the evidence on the issue joined on the plea of autrefois acquit, retired to their room, and after some time returned into court with their verdict in these words: "We, the jury, find that the said Hillary Page had not been tried and acquitted for the offence charged in the indictment. Thomas Woodfin, Foreman." Whereupon the prisoner moved the court to set aside the verdict, because of its being contrary to law and the evidence; which motion the court overruled; and to this ruling of the court the prisoner excepts, and the court certifies the facts proved on the trial of the said issue to be as follows:

971 *Then follows the certificate of facts, including the warrant of arrest dated the 15th, and mittimus dated the 16th day of February 1875, in which Hillary Page is charged with feloniously burning in the night time, on different days, sundry houses, the property of F. G. Ruffin, Sr., in the county of Chesterfield, among which was one barn and stable charged to have been burnt on the 29th of July 1874, and one dwelling house on the 31st of March 1874; also including indictment No. 1, and copy of the record of the trial thereon at February term 1875, and of the record of the case in this court, including the opinion of the court in the case as aforesaid. After which follows a certificate in these words:

"And for the commonwealth it was proved by a witness that the two houses described in the two indictments, numbered 1 and 7, were totally distinct houses, situated one mile apart; that the house burned in July was just one mile from the house burned on the 31st of March; that there had not

been only one burning, but several; that the house burned on the 29th day of July 1874, was really his barn;" being charged in the first count of indictment No. 1 to be his dwelling house, in the second count to be the dwelling of Philip Epps and others, and in the third to be his barn, in which Philip Epps and others named therein usually lodged at night; that the house Hillary Page is charged in the present indictment, No. 7, to have burned "on the 31st of March is his mansion house, in which himself and family then resided, and the house burnt on the 29th day of July was his barn, in which some of his laborers usually lodged at night. He had the following fires as given in his evidence on the other trial: March 13th 1874, the first fire occurred; it was his son Frank's house:

On the 23rd of March, his, the witness's, "stable and carriage house, including three horses; 31st March his dwelling house was set on fire in the night; 26th of April (four weeks lacking one day) same dwelling house was set fire to at the same place; on the 2d of May, Lucy's house (the mother of the boy,) was set fire to in the night time; on the 8th of May the same house was set fire to; on the 8th of May the smoke house was set fire to; on the 14th of May, Lucy's house was set fire to in roof in the day time (at 11 o'clock). At that time he commenced guarding the premises at night, and continued to guard the premises, himself and his sons, up to the 12th of January 1875; on the 29th of July the barn, stable and contents were burned; on the 13th of January 1875, a new stable and new carriage, three valuable horses, &c., were burned, between 7½ and 8 o'clock at night; they were all at supper at the time. That he had been examined at every trial of Hillary Page, and has never been examined on the charge against Hillary Page for burning his dwelling house on the 31st of March, the offence for which he is now arraigned. No one has been examined against him as a witness on that charge. The verdict of the jury on the trial at February term, had no reference to the burning of the house charged in this indictment. And on cross-examination, this witness proved that at the trial of the prisoner in February, on indictment No. 1, he gave the same evidence as regards the different fires, that he has given to-day; that he read the dates and different fires from the report of the evidence on that trial as published in the Richmond Dispatch, and that the report of his evidence was correct as given in on that trial. And the court certifies that no other fact was proven on the issue on the prisoner's plea of autrefois acquit."

We are clearly of opinion that the 973 circuit court did "not err in overruling the motion to set aside the verdict on the issue on the plea of former acquittal. It is perfectly clear from the evidence, that the offence, and the only offence tried, or intended to be tried at the first trial, in February 1875, was the burning of the barn

and stable on the 29th day of July 1874. That is the offence, and the only offence described, or intended to be described, in indictment No. 1, and in each count thereof, though described in the first count as the dwelling house of F. G. Ruffin, in the second as the dwelling house of Philip Epps and others, and in the third by its true name, of barn and stable, and as "an out-house, not adjoining the dwelling house, nor under the same roof, but some persons usually lodging therein at night, to wit: Philip Epps," &c. We know very well that in practice but one felony can be charged in one indictment, though it can be charged in different forms, in different counts of the same indictment, which is upon the theory that they are different offences. The pleader supposed, and perhaps correctly, that the house, though a barn and stable, was in law the dwelling house of the owner, Colonel Ruffin, as part of his family, to wit: some of his servants lodged therein at night, or the dwelling house of Philip Epps and others, as they lodged therein at night; and he also supposed, but in that he was mistaken, that the offence of burning a barn and stable, as described in the third count of the indictment, was a felony punishable with death, as was the offence described in each of the first and second counts of the indictment. The jury being thus misled, found the prisoner guilty under the third count, which truly described the house in point of fact, saying nothing in their verdict about the first and second count; and thus the prisoner was, by

974 construction of law, acquitted "under the first and second counts. And this constructive acquittal of an offence, of which the prisoner was in fact convicted under the third count, he has endeavored to convert into an actual acquittal of another and totally distinct felony, committed at a different time and place. We cannot read the facts certified in bill of exceptions No. 11, without seeing plainly that the only offence intended to be charged in indictment No. 1, and tried in February 1875, was the burning of the barn and stable; and no body better understood that fact than the prisoner himself. In the warrants of arrest and commitment, which bear date on the 15th and 16th of February 1875, just before the first trial, which was had in the same month, the most important of the different burnings of the property of Colonel Ruffin, charged to have been perpetrated at different times by the prisoner, were enumerated and described, one of them being described as the burning of "one barn and stable on the 29th July 1874," and another being described as the burning of a dwelling house on the 31st of March 1874. At the February term of the circuit court, which seems to have been in session at the date of the warrant of commitment, indictment No. 1 was found against the prisoner for the offence charged to have been committed on the 29th of July 1874. There was no indictment then found for any of the other offences charged to have been committed

by the same offender on other days named in the warrants. At subsequent terms of the court other indictments were found for other offences named in the warrants, and among them the indictment in this case, No. 7, for burning the dwelling house of Colonel Ruffin on the 31st of March 1874. It is true, as said by the counsel for the prisoner, that a mistake in the day, in the description of an offence in an indictment, is *immaterial; but here there was no mistake. The different offences were in fact committed on the different days named in the warrants, and were truly described by those dates in the different indictments. We have said so much on this branch of the case, because it seems to be the most important; but we will now leave it.

12. Bill of exceptions, No. 12, states that a venire of thirty-six persons having been summoned from the city of Petersburg, the prisoner by his counsel moved the court to quash the venire facias, by and on which the said jury were summoned, for errors apparent on the face of said writ, and because there is no authority for summoning such jury at this time; which motion the court overruled; and the prisoner excepted.

The writ is not embodied in the bill of exceptions, nor elsewhere in the record, and we cannot therefore see whether there be any errors apparent on the face of it. None are pointed out by the prisoner, unless it be by the ninth assignment of errors, which is that "the court erred in sending out of the county for jurors to try his plea of autrefois acquit, there being no provision for such action. The common law provides, that the plea may be tried by the jury summoned to try the general issue, or by a jury made up of bystanders."

The Code, chapter 202, section 10, provides, that "in a criminal case in a circuit court, if qualified jurors, not exempt from serving, cannot conveniently be found in the county or corporation in which the trial is to be, the court may cause so many as may be necessary of such jurors to be summoned from any other county or corporation by the sheriff or sergeant thereof, or by its own officer."

We are of opinion that the venire facias in question was issued by authority 976 of the provision just quoted *from the Code. That provision does not discriminate between jurors for the trial of the general issue and jurors for the trial of an issue or special plea, and there seems to be the same necessity or propriety for sending out of the county for jurors in the one case as the other. The letter and the spirit of the law therefore equally apply to both. The same jury, we are told, may try both issues, though not at the same time. The right to send out of the county for a jury to try one, seems to involve a right to send out for a jury to try the other, in the absence of anything in the law to the contrary. The law gives to the court of trial a very large discretion in this mat-

ter, mainly, if not entirely, for the protection and security of the prisoner. "If qualified jurors, not exempt from serving, cannot be conveniently found in the county," &c., is the language of the law which prescribes the condition on which this authority is to be exercised. But who is to judge in this matter? Of course, the court of trial, which knows all the circumstances of each case before it, and knows what convenience requires in regard to sending out of the county for jurors. This court will presume that the circuit court acted rightly in any such matter, unless the contrary plainly appears; as it certainly does not in this case. Looking to the extraordinary number of similar felonies charged about the same time, against the prisoner, it is not strange or unreasonable that the circuit court should have considered it proper to send out of the county for jurors to try him, or any issue in his case.

13. Bill of exceptions No. 13 states that the prisoner challenged the whole array of thirty-six jurors summoned from Petersburg for the trial of the issue on his special plea, because he says there appears no evidence in this case, except the opinion 977 of the judge, to show *that a jury cannot be conveniently found in the county of Chesterfield, and because the law does not authorize such jury from another county wherein he stands indicted for the trial of this issue; but the court overruled the challenge and the prisoner excepted.

We think there was no error in this raising of the court, for reasons assigned in regard to the thirteenth bill of exceptions.

14. Bill of exceptions No. 14 states that the prisoner being on his trial (on the plea of not guilty), the following named jurors (eight in number, whose names are given in the bill) were called and examined on their voir dire, when they stated that they had tried the last issue joined between the prisoner and the commonwealth (being the issue on the plea of former acquittal), and that during that trial, they had heard Mr. Ruffin in his testimony, while speaking of the burning of the house, say that the prisoner had confessed, but that as he used the last word he was interrupted and told to say nothing about the confession; but that they believed they could give him a fair and impartial trial on the evidence, notwithstanding anything they had heard having no impression on their minds as to the question of the guilt or innocence of the prisoner which it would require evidence to remove. Whereupon the prisoner challenged the said jurors as being incompetent, and moved the court to exclude them; but the court overruled the motion; and the prisoner excepted.

We are of opinion that the said jurors were not incompetent, and therefore the court did not err in overruling the said motion.

15. Bill of exceptions No. 15, which is the last in the case, states "that on the trial of the cause, the commonwealth

called as a witness one C. H. Flournoy, *who testified that he was the sheriff of the county of Chesterfield; that one day during the previous trial of the prisoner he went to prisoner and asked him, 'Where did you get the rope used in the burning of Mr. Ruffin's house?' That the prisoner made a statement to him then about the rope; that the next day being the day of his sentence, and after his sentence, while he was on his way to jail with prisoner, the prisoner called him and said that 'he wanted to tell him that the statement he had made the day before about the rope was false, and he wanted to tell him all about it; and he then proceeded to make another statement to him.' On cross-examination Mr. Flournoy said, 'that he had heard of another confession, said to have been made by the prisoner before he asked him about the rope; he had heard such a confession testified to in court by a Mr. Wren and Mr. Lampson, and others.' He was then asked by the commonwealth to state the admissions made to him by the prisoner; to which the prisoner by counsel objected, because they were obtained illegally and improperly, and because the commonwealth has not yet shown that the first or former confession of prisoner was legally and properly obtained. The commonwealth then called Mr. John Wren, who testified that when he obtained a confession from the prisoner, he was a suspended policeman, but drawing his pay as a policeman, and acting as a private detective; that he had a colored boy following the prisoner about for two weeks, who brought him to a detective's office, up stairs, corner Main and Eleventh streets; that he told him, the prisoner, that he and his partner were commission merchants, and had a house they wanted burnt, for which they would give \$150; that he agreed to do it; that he told him this was a job that required

979 *secrecy, and no blab-mouth would do for it; that the prisoner then told him that he need have no fear of him, for he had burned twelve or thirteen houses on one farm; that he then told him to tell Mr. Lampson, his partner, all about it, which he did; that he offered him no inducement or reward; that he was not dressed in police clothes, nor had on any badge or insignia of office; the prisoner had no acquaintance with me, and did not know me. Mr. Lampson stated that at the time of the confession made to Mr. Wren he held no office whatever; that he went to Mr. Wren's office; when he went in he heard Mr. Wren say nothing about being a partner of his, but Wren said to the prisoner, 'I want you to tell this gentleman all about those burnings or fires;' knew nothing about money being offered to the prisoner. And thereupon the prisoner moved the court to exclude the admissions made to Flournoy; but the court overruled the motion, and permitted the admissions to Mr. Flournoy to be given as evidence to the jury; and to this opinion and ruling of the court the prisoner excepted."

We think there is no error in this opinion and ruling of the circuit court. The evidence of Flournoy, which was excluded, is not set out in the bill of exceptions, and we do not therefore know what it was, or whether it related to any confession by the prisoner of the offence with which he was charged, much less any inducement held out to the prisoner to make such a confession. We suppose the ground of the objection was, that the admissions made to Flournoy had some connection with the confession made to Wren and Lampson, referred to and set out in whole or in part in the bill of exceptions. It does not appear what interval of time there was between the said confession and the admissions made to Flournoy, or whether

980 there *was any connection between them, or any such connection as to make the admissions liable to any objection which might have been made to the confession as evidence against the prisoner. But conceding that there was such a connection between them, and that if the confession was inadmissible, so also were the admissions, then was the confession, as proved by Wren and Lampson, inadmissible?

There is perhaps no branch of the law of evidence which has given rise to more controversy than that concerning the admissibility of confessions of a person charged with a criminal offence as evidence against him on such charge. The cases on this subject are collected in 2 Russell on Crimes, chapter the 4th, page 824; and Roscoe's Criminal Evidence, title Confessions, pp. 37-50. But it will not be necessary to comment upon or state any of these cases, since the law, as it now stands, is laid down in two cases lately decided by this court, viz: Smith v. The Commonwealth, 10 Gratt. 734; and Shifflet v. The Commonwealth, 14 Id. 652, 658. In the former case the court came to the following conclusion: "The rule that may be fairly deduced from authoritative decisions upon the subject is, that a confession may be given in evidence, unless it appear that it was obtained from the party by some inducement of a worldly or temporal character, in the nature of a threat or promise of benefit, held out to him in respect of his escape from the consequences of the offence or the mitigation of the punishment by a person in authority, or with the apparent sanction of such a person." The same conclusion was reaffirmed in the latter of the said two cases, in an opinion in which the whole court of five judges concurred. We may therefore regard it as well settled law in this state.

Applying that conclusion of law to

981 the case, there *cannot be a doubt as to the admissibility of the admissions and confession in question, whatever may have been the weight of the evidence, which is another question, and of which the jury were to judge. Certainly whatever promise of benefit, if any, was held out to the prisoner to obtain the confession in this case, it was not "held out to him in respect of his escape from the consequences of the

offence or the mitigation of the punishment by a person in authority, or with the apparent sanction of such a person.

We have now considered and disposed of all the questions arising in this case, and are of opinion that there is no error in the judgment, and that it must be affirmed. And this disposes of the case of indictment No. 7. The other case, indictment No. 5, will not be disposed of for the present.

Judgment affirmed.

982 *McCready v. The Commonwealth.

January Term, 1876, Richmond.

Statutes—Planting Oysters—By Nonresidents.—The act of March 14, 1872, in relation to oysters, was repealed by the act of April, 1873, on the same subject. And by this last act nonresidents of the state were not prohibited from planting oysters in the waters of Virginia.

At the March term 1874 of the county court of Gloucester, J. W. McCready was indicted, for that he did on the 1st of June 1873, and from that day forward until the 1st of March 1874, in the said county, he being then and there other than a resident of this state, unlawfully plant oysters in the waters thereof, against the statute, &c.

The defendant appeared and moved the court to quash the indictment; but the motion was overruled. He then demurred; but the court overruled the demurrer. And he then, with the leave of the court, withdrew his demurrer, and pleaded not guilty; on which issue was joined.

On the trial the jury found the defendant guilty, and assessed his fine at five hundred dollars; and the court rendered a judgment thereon. He then obtained a writ of error to the circuit court, where the judgment was affirmed; and he thereupon applied to this court for a writ of error which was awarded.

Ould & Carrington, for the appellant.

The Attorney General, for the commonwealth.

983 *Anderson J., delivered the opinion of the court.

This is an indictment against the plaintiff in error, being other than a resident of this state, for unlawfully planting oysters in the waters thereof against the statute, on the 1st day of June 1873, and on divers other days, from that day forward, until the 1st day of March 1874.

By section 2, of the act approved March 14, 1872, no person, other than a resident citizen of this state, shall catch, take, or plant oysters in the waters thereof, &c. And if any person other than such citizen of this state, shall catch, take or plant oysters in the waters thereof, he shall be

*Statutes—Construction.—See Somers' Case, 97 Va. 731, 33 S. E. Rep. 881; and Boggs v. Com., 76 Va. 995, both citing the principal case with approval.

deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than \$200 nor more than \$500, &c.

By the 22nd section of the act in force April 1st, 1873, it is enacted that it shall not be lawful for any non-resident of this state to take or catch oysters or other shell fish: and penalties are denounced against the offender. But it is not made unlawful by this statute for a non-resident of the state to plant oysters in the waters thereof; nor is any penalty imposed on a non-resident for planting them in the waters of the state. And it is provided that this act shall take effect and be in force from and after the 1st day of May 1873. The offence charged in the indictment is charged to have been committed on the 1st of June 1873, and days subsequent: consequently while the act aforesaid was in force. And by virtue of this act, as we have seen, the planting of oysters by a non-resident of the state is not an offence. And unless the previous act of 1872 was in force, the indictment could not lie.

The court is of opinion that the act of 1873 was evidently designed to cover 984 the whole oyster subject, *as is shown by the title, and by the 1st section thereof; and that the act of 1872 comes within the purview of the act of 1873, and is therefore expressly repealed by the 5th section of the latter act. Especially is this so with regard to so much of the 2nd section of the act of 1872 as has been referred to—which declares what shall be an offence with regard to oysters by a non-resident, to wit: catching, taking and planting. The 22nd section of the subsequent act relates to the same subject, but drops planting, and only makes taking and catching a public offence.

The court is of opinion, therefore, to reverse the judgment of the circuit court. And proceeding to enter such judgment as ought to have been rendered by the circuit court, it is considered that the judgment of the county court in this cause against the plaintiff in error be reversed and annulled, and that he go thereof without day.

Christian, J. did not concur in the opinion that the act of March 14th, 1872 was repealed by the act of April 1st, 1873.

Judgment reversed.

985 *McCready v. The Commonwealth.

January Term, 1876, Richmond.

1. **Statute—Constitutionality.**—The act of April 1, 1874, Sess. Acts of 1874, ch. 214, s. 22, p. 361, which forbids the planting of oysters in the waters of the state by any person not a resident of the state, is a constitutional act; not in conflict with either article 1, section 8, or article 4, section 2, of the constitution of the United States.

2. **Navigable Waters—State Control.**—The navigable waters and the soil under them within the territorial limits of the state are the property of the state, to be controlled by the state at its own discretion for the benefit of the people of the state; only *

as not to interfere with the authority of the government of the United States in regulating commerce and navigation.

3. **Constitutional Privileges.**—The immunities and privileges secured to all citizens of the United States by the constitution, are the right to protection by the government; the enjoyment of life and liberty; to acquire and possess property of every kind; and to pursue happiness and safety. But they do not include the right to share the property belonging to the people of the state.

At the November term, 1874, of the county court of Gloucester, the grand jury indicted J. W. McCready, for that on the 1st of September 1874, in the said county, the said J. W. McCready, being then and there other than a citizen of this state, did unlawfully plant oysters in the waters thereof, to wit: in Ware river.

Though McCready was regularly served with process, he did not appear; and after several continuances of the case, the court, at its July term 1875, directed the plea of not guilty to be entered for him; and on the trial the jury found him guilty, 986 and assessed his *fine at five hundred dollars; and the court rendered a judgment thereon. McCready thereupon applied to the circuit court of the county for a supersedeas to the judgment; which was allowed; but when the case came on to be heard in that court, the judgment of the county court was affirmed. He then applied to this court for a writ of error; which was awarded.

Ould & Carrington, for the appellant.

The Attorney General, for the commonwealth.

Anderson, J., delivered the opinion of the court.

By an act of assembly approved April 18, 1874 (§ 22, chap. 214, p. 243, Sess. Acts 1874), "If any person (other than a citizen of this state) shall take or catch oysters, or other shell fish, in any manner, or plant oysters in the waters thereof," &c., "he shall forfeit \$500 and the vessel, tackle and appurtenances." This is an indictment against the plaintiff in error, who is other than a citizen of this state, for planting oysters in the waters thereof, to wit: in Ware river, in violation of said 22nd section.

The prosecution is resisted upon the ground that the above section is an infringement of the constitution of the United States; because it is contrary, first, to article 4, section 2, "The citizens of each state shall be entitled to all privileges and immunities of citizens of the several states;" and second, to article 1, section 8, "The congress shall have power to regulate commerce with foreign nations and among the several states," &c.

It seems to be well settled, that the states respectively, are entitled to the navigable waters within their *several 987 territorial limits, including both the water and the land under the water. In

Martin v. Waddell, 16 Peters R. 367, 407, Ch. J. Taney, speaking for a majority of the court, says, "We do not propose to meddle with the point, as to the power of the king since Magna Charta, to grant to a subject a portion of the soil covered by the navigable waters of the kingdom; for when the revolution took place the people of each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters and the soils under them, for their own common use;" as expressed by Ch. J. Kirkpatrick, of the supreme court of New Jersey, "The people of the state since the revolution being invested with the regal rights as sovereign, and having themselves both the legal estate and the usufruct, may make such disposition of them, and such regulations concerning them, as they may think fit;" "subject only," Ch. J. Taney adds, "to the rights since surrendered by the constitution to the general government." We will after a while consider what they are.

In Smith v. State of Maryland, 18 How. U. S. R. 71, it was held by the supreme court of the United States, Mr. Justice Curtis delivering the opinion, that whatever soil below low-water mark is the subject of exclusive property and ownership, belongs to the state on whose maritime border and within whose territory it lies, subject to any lawful grants of that soil by the state, or the sovereign power which governed its territory before the declaration of independence." He goes on further to say: "The state holds the property of the soil in some sense in trust for the enjoyment of the public rights, among which is the common liberty of taking fish, as well shell fish as floating fish, and may regulate the modes of enjoyment, so that they may 988 not *render the public property less valuable, or destroy it altogether."

"And this power (he says) results from the ownership of the soil, the legislative jurisdiction of the state over it, and from its duty to preserve those public uses for which the soil is held." Among those public uses is the right of the people of the state to take and plant oysters subject to the regulations of law. Chief Justice Marshall says, speaking for the court, in Johnson v. McIntosh, 8 Wheat. R. 543, 584: By the treaty which concluded the war of our revolution, the powers of government and the right to soil, which had previously been in Great Britain, passed definitely to these states. Great Britain by that treaty relinquished all claim, not only to the government, but to the proprietary and territorial rights of the United States.

Chief Justice Taney, 16 Peters, supra, p. 416, says: "When the people of New Jersey took possession of the reins of government, and took in their own hands the powers of sovereignty, the prerogatives and regalities which before belonged either to the crown or the parliament became immediately and rightfully vested in the state." In the City of Mobile v. Esclava, 16 Peters R. 234, 254, Mr. Justice Catron said: "That the original

states acquired by the revolution the entire rights of soil and of sovereignty in the navigable waters within their territory is most certain." And "that each and all of the states have sovereign power over their navigable waters above and below the tide no one doubts." (P. 259.)

Mr. Justice Washington said, in *Corfield v. Coryell*, 5 Wash. C. C. R. 381, a several fishery, either as the right to it respects running fish, or such as are stationary, such as oysters, clams, and the like, is as much the property of the individual to whom it belongs, as dry land or land covered by water, and is equally protected by the laws of the state against the aggressions of others, whether citizens or strangers. Where those private rights do not exist to the exclusion of the common right, that of fishing belongs to all the citizens or subjects of the state. It is the property of all, to be enjoyed by them in subordination to the laws which regulate its use. They may be considered as tenants in common of this property, and they are so exclusively entitled to the use of it, that it cannot be enjoyed by others without the tacit consent or the express permission of the sovereign, who has the power to regulate its use. Grotius says (b. 2, ch. 2, sec. 5), the sovereign who has dominion over the land or waters in which the fish are, may prohibit foreigners from taking them.

It is the right to the use of land covered with water that is in question here, rather than the water which covers it—of land which may be applied to the planting and growing of oysters, and which may be used for that purpose, just as other lands are used for the purposes for which they are peculiarly adapted. The lands which may be used for the purpose of growing and cultivating oysters, as well as those upon which are her natural oyster beds, which underlie her navigable waters, Virginia claims not only sovereignty over, but also an ownership in the soil. If the state has the ownership in the soil, and the sovereign dominion over it, unquestionably she had the right to prohibit the deposit or planting of oysters upon it, or the use of it for any purpose, by non-residents or others than citizens of the state.

There seems to have been some diversity of opinion amongst learned judges upon the question, whether the title to the soil, covered by the navigable waters of the state, became absolutely vested by the revolution in the state, or only in trust for the benefit of the people of the state. It is a question of no importance, as far as this case is concerned, whether the people of Virginia were clothed with the legal title to the lands and waters in question, or only had a beneficial interest in them or right to their enjoyment. Have the people of Virginia a proprietary right in common in the soil flowed or covered by the navigable waters of the state? It matters not whether the soil under the navigable waters of Virginia, on which any person other than a citizen of Virginia is prohibited from planting oysters by the act

of assembly in question, is the absolute property of the state of Virginia, or whether it is held by the government in trust for the people of the state, who, in common, have an exclusive right to its enjoyment. It is a property in the enjoyment of which the people of other states have not a right to participate, unless the people of Virginia have conceded to them the right in the federal constitution.

From what has been said, it will appear that the people of each state had title to their navigable waters and to the soil under them, which was exclusive of the people of the other states and all others. Have the states parted with their sovereignty over, and their property in these waters and the soils under them? Or have the people of each state covenanted and agreed by that solemn compact that the people of other states shall participate with them or become tenants in common with them in the ownership and enjoyment of their navigable waters and the soils under them? It is true, as claimed by the learned counsel in argument, that Virginia subscribed that solemn instrument, and that she ought to be willing to abide her solemn act. There is nothing in her past history that can cause

distrust in her devotion to the principles of that sacred instrument, and never through our instrumentality can those solemn pledges be falsified. The states cannot be benefited by withholding from the central government any part of the power fairly delegated to it by the states in the federal constitution. Nor will it promote the welfare of the United States for the government thereof to encroach upon and to absorb the reserved rights of the states. Nothing would more surely in our opinion overthrow the republic and be destructive of the public liberty.

It is denied that Virginia has by any provision in the constitution, expressly or impliedly, surrendered her sovereign dominion over, or her ownership in her navigable waters and the soil under them, except only to the extent that it may be necessary to enable congress to execute the power and discharge the duty created or delegated by article 1, section 8, of the constitution, "to regulate commerce with foreign nations and among the several states." This clause has been construed to invest congress with a controlling power over the subject of navigation. And hence it follows that the states are so far restricted in the exercise of their reserved powers over their navigable waters, and in the use and enjoyment of their property in them, and in the soil under them, so as not to impede, obstruct, or interfere with navigation.

As was said by Mr. Justice Thompson in *Martin v. Waddell*, supra, "For the purpose of navigation, the water is considered a public highway to all; like a public highway on land. If land over which a public highway passes is conveyed, the soil passes subject to that use. So with respect to the land under water; the public use for passing and repassing, and all the purposes for

which a public way may be used are open *to the public; the owner retaining nevertheless all the rights and benefits of the soil that may not impede or interfere with the use as a public highway. Should a coal mine, for instance, be found under the highway, it would belong to the owner of the soil, and might be used for his benefit, preserving unimpaired the public highway. So with respect to an oyster bed, which is local and attached to the soil. But the use of the soil by the owner, which is consistent with the use of the water by the public, is reserved to the owner." The power to control or regulate navigation is not given as an express or substantive power; it is only incidental to, or resulting from the express power "to regulate commerce;" and can only be used and exerted so far as it is necessary and proper to enable congress "to regulate commerce with foreign nations and among the several states." And the sovereignty of the several states over, and ownership in their respective navigable waters and the soil under them is restricted only by the power which congress may exercise on the subject of navigation. And consequently their property in the oyster beds, and the soil under their navigable waters respectively, and their power to regulate and control the taking and catching oysters, and the planting of them on the soil which belongs to them respectively, is plenary and perfect, inasmuch as the full enjoyment of the right, and the exercise of the power, cannot interfere with the subject of navigation, nor with the power of congress to regulate commerce. The conclusion is therefore necessary that the act of assembly in question, is not incompatible with, and in violation of section 8, art. 1, of the federal constitution.

Is it incompatible with art. 4, and section 2? Did the people of Virginia in adopting the constitution, agree that the people of the other states should become *joint owners with them of their oyster beds, and their navigable waters, and of the soil covered by them? And is this title conferred on the citizens of other states by the declaration, that "the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states?" We think not. We have shown that this is a right of property, and we do not think that the clause in question was intended to transfer the rights of property of the citizens of one state to the citizens of the other states. In *Corfield v. Coryell*, Mr. Justice Washington says, (4 Wash. C. C. R. p. 382,) "That this exclusive right of taking oysters in the waters of New Jersey has never been ceded by that state, in express terms, to the United States, is admitted by the counsel for the plaintiff; (and we have, we think, shown that it has not been ceded by any of the states;) and (Judge Washington proceeds) having shown as we think we have, that this right is a right of property, vested either in certain individuals, or in the state, for the use of the citi-

zens thereof; it would, in our opinion, be going quite too far (and we are of the same opinion) to construe the grant of privileges and immunities of citizens, as amounting to a grant of a cotenancy in the common property of the state, to the citizens of all the other states."

What is meant by the privileges and immunities of citizens? Does it mean rights of property? An estate in the lands of the country—whether dry lands or those covered with water? The same eminent judge says, "We feel no hesitation in confining these expressions to those privileges and immunities which are in their nature fundamental." He proceeds then to explain what he means by fundamental privileges and immunities. He says such as "belong of

right to the citizens of all free governments, and which have, *at all times, been enjoyed by the citizens of the several states which compose this union, from the time of their becoming free, independent and sovereign." And he says, they may "be all comprehended under the following general heads: protection by the government; the enjoyment of life and liberty; the right to acquire and possess property of every kind, and to pursue happiness and safety." These are fundamental rights, and the citizens of any one of the states, by this clause of the constitution, are guaranteed the same privileges and immunities for their enjoyment in any other state that the citizens of that state enjoy. Whilst it guarantees to the citizen of one state the right to acquire and possess property of any kind in any other state, it does not give him the right to seize and hold the property belonging to the citizens of that other state, or to share with them in the enjoyment of property which belonged exclusively to them. Therefore, this eminent jurist justly says, "we cannot accede to the proposition which was insisted on by the counsel, that, under this provision of the constitution, the citizens of the several states are permitted to participate in all the rights which belong exclusively to the citizens of any other particular state, merely upon the ground that they are enjoyed by those citizens; much less, that in regulating the use of the common property of the citizens of such state, the legislature is bound to extend to the citizens of all the other states the same advantages as are secured to their own citizens." Again he says, "we hold that the power to regulate the fisheries belonged to the several states, and to punish those who should transgress those regulations was exclusively vested in those states respectively, at the time when the present constitution was adopted." And he adds that that power *was not surrendered to the United States, by the mere grant of admiralty and maritime jurisdiction, to the judicial branch of the government." And in the course of his opinion he holds, it was not surrendered at all.

If this opinion can be relied on as settling the law of the subject we think it is deci-

sive of this case. It is true that it is not binding authority upon this court. But when we consider by whom the opinion was delivered, an eminent judge of the supreme court of the United States, who was cotemporary and intimately associated with those who framed the constitution, and its contemporaneous expounders who were familiar with the prerogatives and powers of the states before the adoption of the federal constitution, and when we consider the time when the opinion was pronounced, so soon after the constitution was adopted, in connection with the surrounding circumstances, it may be regarded as itself a contemporaneous exposition of the constitution. And when we consider the intrinsic merit of the opinion, the support which its positions derive from reason and authority, and the reasonableness of its deductions, its repeated recognition as authority by the courts, state and federal, *nisi prius* and supreme, and the acquiescence of the country now for more than half a century in its doctrines, and the legislation of the states being in conformity thereto, we are disposed to regard it as authoritative, and as settling the law of the subject, especially as its exposition of the law is in conformity with our own views of what the law is.

Upon the whole, we are of opinion that the act of assembly, under which this indictment was found, is not an infringement of the constitution of the United States or of any of its provisions.

996 *The errors assigned, of a formal and technical character, in the petition to the circuit court for a writ of error, do not seem to have been relied on here, and are considered by the court as not showing ground for reversal. The judgment of the circuit court, affirming the judgment of the county court, must therefore be affirmed with costs.

Judgment affirmed.

997 *Williams v. The Commonwealth.

March Term, 1876, Richmond.

Absent, STAPLES, J.

Larceny—Evidence.—W was indicted for stealing \$150, the money of S. On the trial it was proved that J, a detective, arrested W, who made a confession, which was made under a promise, and was excluded as evidence. In this confession he directed J to go to certain gamblers and get the money back from them. J sent for the gamblers named, told them what W had said, and they paid over to J for S \$104, though one of them protested that W had not been at his house, and the others denied that he had lost the money claimed with them; the balance of the money, \$46, was paid over by the father of W. **Held:** It not being proved that the money paid to J was the same lost by S, the statement of W to J, and of what passed between J and the gamblers and the father of W, is not competent evidence.

At the January term 1876 of the hustings court of the city of Richmond, Reuben Wil-

liams was indicted for the stealing of \$150 of United States currency, the property of Peter Shields. He was tried at the same term of the court, was found guilty, and sentenced to three years' imprisonment in the penitentiary.

On the trial the prisoner took two bills of exception to the rulings of the court. The first was to the admission of certain testimony offered by the commonwealth; and the other was the refusal of the court to set aside the verdict and grant him a new trial, on the ground that the verdict was contrary to the law and the evidence.

On the trial, after evidence had been introduced as to the loss of the money

998 by Shields, and his employment of John Wren as a detective, and Wren had stated that the prisoner had made a confession, which the court had excluded, the attorney for the commonwealth asked the witness Wren, whether in consequence of the statement of the prisoner, and in pursuance of his direction, he took any action about the lost money and obtained it? To this question the prisoner by his counsel objected; but the court overruled the objection and allowed the question to be asked. The witness then stated, that in pursuance of the direction and statement of the prisoner, he sent for four gamblers, who came to his office, where they paid him the sum of \$104; but that this was not the identical money that Shields lost; and that the other \$46, making the sum of \$150 which was stolen, were paid to Shields by prisoner's father. To this question and answer the prisoner excepted.

Upon the second exception the court certified the facts, which, it will be seen, includes the facts spoken of by the witness Wren and objected to by the prisoner.

That on or about the 12th day of December 1875, the prisoner and one Peter Shields and another occupied the same bed room in the city of Richmond, all being stone cutters, and working at the same yard; that there were other persons living in the house; that on the night of that day, the said Shields having received his pay, one hundred and fifty dollars in United States currency, deposited it in his trunk, in an unoccupied room adjoining the bed room, which room had two doors, one opening into the bed room, and another into a rear porch; that he locked his trunk; that about two weeks afterwards Shields went to his trunk, and found that his money had been stolen, the trunk being still locked.

999 having been opened with a false key; that on the day after Shields deposited his money in the trunk, prisoner remained in their room after Shields and the other occupant had gone to their work; that prisoner did not go to his work or the yard that day; that on the evening of that day, prisoner purchased a new suit of clothes, costing sixty-five dollars, and for some time was spending money very freely, and neglecting his work; that upon ascertaining his loss, Shields took out a warrant for the arrest of prisoner, and placed it in the

hands of John Wren, who was appointed a special constable by the justice for the purpose of making the arrest of the prisoner on the warrant; that John Wren arrested the prisoner, and having offered him inducements, the prisoner made a confession, in which confession he directed Wren to go to certain gamblers and get back the money from them; that in pursuance of such instruction John Wren sent for the gamblers named, told them what prisoner had said, and they paid over to him for Shields the sum of one hundred and four dollars, though one of them protested that the prisoner had not been in his house, and the others denied that he had lost the money claimed with them; that the balance of the money, forty-six dollars, making the sum of one hundred and fifty dollars stolen, was paid over by the prisoner's father; that the prisoner also made a confession to Shields; that Shields was present at the interview between John Wren and the gamblers and said he meant to prosecute them; that prisoner was paid off at the same time Shields was, and he received three dollars and fifty cents per diem.

Upon the application of the prisoner, a writ of error was awarded by this court.

G. D. Wise and S. Page, for the prisoner.

1000 *The Attorney General, for the commonwealth.

Moncure, P., delivered the opinion of the court.

The court is of opinion, that the hustings court erred in overruling the motion of the prisoner to set aside the verdict upon the ground that the same was contrary to the law and evidence. The confessions made by the prisoner to the prosecutor Shields, and to the constable Wren, having been illegally obtained, were properly excluded by the court, as being inadmissible evidence. But the transactions which occurred between Wren and the gamblers, and the father of the prisoner, as set out in the second bill of exceptions, were admitted as evidence against the prisoner; no doubt upon the ground which is thus stated in 1 Arch. Crim. Prac. & Pl. p. 424 top, 134 marg., that "even in cases where the confession of a prisoner is not receivable in evidence, on account of it having been obtained by means of some threat or promise, any discovery made in consequence of it may be proved; and in such a case the counsel for the prosecution is merely allowed to ask the witness, whether, in consequence of something he heard from the prisoner, he found anything, and where, &c.; and the witness in answer can only give evidence of the fact of the discovery."

But the thing found, or the discovery made, in consequence of the confession, must be material in itself, and appear to have some connection with the crime or the charge, independently of the confession. The rule and the reason of it is thus laid down in 1 Greenleaf on Ev.

"§ 231. The object of all the care, which, as we have now seen, is taken to exclude confessions which are *not voluntary, is to exclude testimony not probably true. But where, in consequence of the information obtained from the prisoner, the property stolen, or the instrument of the crime, or the bloody clothes of the person murdered, or any other material fact is discovered, it is competent to show that such discovery was made conformably to the information given by the prisoner. The statement as to his knowledge of the place where the property or other evidence was to be found, being thus confirmed by the fact, is proved to be true, and not to have been fabricated in consequence of any inducement. It is competent, therefore, to enquire, whether the prisoner stated that the thing would be found by searching a particular place, and to prove that it was accordingly so found; but it would not be competent to enquire, whether he confessed that he had concealed it there."

"§ 232. If, in consequence of the confession of the prisoner, thus improperly induced, and of the information by him given, the search for the property or person in question, proves wholly ineffectual, no proof of either will be received. The confession is excluded, because being made under the influence of a promise, it cannot be relied upon; and the acts and information of the prisoner, under the same influence, not being confirmed by the finding of the property or person, are open to the same objection. The influence which may produce a groundless confession, may also produce groundless conduct."

The notes of Waterman to 1 Arch., supra, refer to many cases having an important bearing on this subject. And so have the following cases, some or all of which were cited by the counsel for the prisoner in this case. Griffin's case, 1 Russell and Ryan 151; Jones's case, Id. 152; and Jenkins's case, Id. 492. Also *the State v. Due, 7 Foster's R. 256. The first two of these cases seem to have been decided on the same day by the same judges, and yet they seem to be somewhat in conflict with each other. They were decided at the Winchester Lent assizes in 1809. In Griffin's case, a prisoner was charged with stealing a guinea and two promissory notes. The prosecutor told him that it would be better for him to confess. Held: That after this admonition the prosecutor might prove that the prisoner brought him a guinea and a five pound note, which he gave up to the prosecutor, as the guinea and one of the notes that had been stolen from him. The judge, Chambre, told the jury that notwithstanding the previous inducement to confess, they might receive the prisoner's description of the note accompanying the act of delivering it up, as evidence that it was the stolen note; and they found the prisoner guilty. A majority of the judges, to wit: seven of them, held the conviction right; two of them were of a contrary opinion.

In Jones's case, which was for the larceny of money to the amount of one pound eight shillings, the prosecutor asked the prisoner on finding him, for the money he, the prisoner, had taken out of the prosecutor's pack, but before the money was produced said, "he only wanted his money, and if the prisoner gave him that, he might go to the devil if he pleased." Upon which prisoner took 11s. 6½d. out of his pocket, and said it was all he had left of it. Held: That the confession ought not to have been received. The same judge, Chambre, left the whole of this evidence for the consideration of the jury, and they found the prisoner guilty. A majority of the judges present, to wit: five of them, held that 1003 the evidence was not admissible, *and the conviction wrong. Three of them contra. Lord Ellenborough dubitante.

In Jenkins's case, which was decided in 1822, the charge was stealing several gowns and other articles. The prisoner was induced by a promise from the prosecutor to confess his guilt, and after that confession he carried the officer to a particular house, as and for the house where he had disposed of the property, and pointed out the person to whom he had delivered it. That person denied knowing anything about it, and the property was never found. The evidence of the confession was not received; the evidence of his carrying the officer to the house as above mentioned was; but as Mr. Justice Bayley, before whom the prisoner was convicted, thought it questionable whether that evidence was rightly received, he stated the point for the consideration of the judges. They accordingly considered it, and were (it seems unanimously) of opinion that the evidence was not admissible, and that the conviction was therefore wrong. "The confession was excluded, because being made under the influence of a promise, it could not be relied upon, and the acts of the prisoner, under the same influence, not being confirmed by the finding of the property, were open to the same objection. The influence which might produce a groundless confession might also produce groundless conduct." This case is in direct accordance with Jones's case, and if they are in conflict with Griffin's case, they overrule it, as they were subsequent thereto; at least Jenkins's case. But Griffin's case seems to rest upon the ground (whether right or wrong) that the note delivered up was of the same denomination and of the same bank with one of the notes stolen, and that the act of delivering it up was accompanied by the declaration of the prisoner, that it was one of the stolen

1004 *notes. In Jones's case it does not appear that the money delivered up by the prisoner was admitted, or intended to be admitted by him, to be a part of the identical money he had stolen, though we do not mean to say that even such an admission would have varied the case. In the State v. Due, which was much relied upon by the counsel for the prisoner in the argument of this case, and in which most of the

authorities on this subject are reviewed, it was held that on a charge of larceny, the production of property by a prisoner, made in consequence of inducements held out to confess, will not be competent evidence against him, unless the property be identified by other evidence as that which has been stolen. The prisoner was charged with stealing two one hundred dollar bills and a wallet. On inducements held out to him to confess, he produced a hundred dollar bill, saying to the complainant "this is yours;" or, as another witness understood him, "this is one of the bills which I took with the wallet." It was held that the evidence was incompetent, unless the bill should be identified by other evidence as one of those which had been stolen. This case, as well as Jones's and Jenkins's, supra, seems to expound the law correctly. And now let us apply it as so expounded to this case.

Now if the money delivered up by the gamblers and the father of the prisoner to the constable, Wren, had been proved by independent evidence, other than the confession of the prisoner, to have been the identical money confessed to have been stolen by him, then the fact that the stolen property was thus discovered, and that the prisoner's confession led to such discovery, would have been admissible evidence in the case according to the law as just expounded.

But, so far from there being any 1005 independent evidence *of identity of the money delivered up to the constable, it is not pretended that it was the same money that was stolen, as it almost certainly was not. And the gamblers denied that the prisoner had lost the money claimed with them; and one of them protested that the prisoner had not been in his house. The prosecutor was present at the interview between the constable and the gamblers, and said he meant to prosecute them. It does not certainly appear what for. Though it is probable he meant, and they understood that he meant, for gambling; for they had been guilty of gambling, but do not appear to have been in any way implicated in the larceny. That such a menace to prosecute them for gambling, a highly penal offence, made at a time when there was a great effort to enforce the law against that offence, should have induced these gamblers to purchase an exemption from prosecution for it by paying up among them the sum of \$104, which they did under protest, is not at all strange, even supposing that they never won a dollar from the prisoner. In regard to the balance of forty-six dollars paid to the constable by the prisoner's father, there is no evidence whatever that that was a part of the money stolen, or that any part of the money stolen went into the hands of the father, who may have paid that sum out of his own money to save his son from a criminal prosecution.

Then all this evidence in regard to money received from the gamblers, and from the father of the prisoner, together with the confession which led to its discovery, is illegal and inadmissible evidence, and must

be excluded from the case, and being so excluded there is, certainly, not enough in the case to warrant the verdict of the jury. For all the evidence then remaining in

the case is, that the prisoner and 1008 another *were room mates of the prosecutor; that the prosecutor received \$150 for his work, and locked it up in his trunk, which he kept in an adjoining unlocked room, with two doors, one opening into their bed room, the other into a porch; that about two weeks afterwards, the prosecutor went to his trunk and found that his money had been stolen, the trunk being still locked, having been opened with a false key; that on the day after the prosecutor deposited his money in his trunk, the prisoner remained in his room after the prosecutor and the third occupant had gone to their work (all the said occupants being stone cutters and working at the same yard), that prisoner did not go to his work or the yard that day; that on the evening of that day, prisoner purchased a new suit of clothes, costing \$65, and for some time was spending money very freely, and neglecting his work; and that upon ascertaining his loss the prosecutor took out a warrant for the arrest of the prisoner and placed it in the hands of John Wren, who was appointed a special constable by the justice for the purpose of making the arrest of the prisoner on the warrant; that John Wren arrested the prisoner, and having offered him inducements, the prisoner made the confession which led to the transaction as aforesaid with the gamblers and the father of the prisoner.

Certainly this evidence, separate and apart from the said transactions and the said confession, which, as we have seen, are illegal and inadmissible evidence, can create no more than a mere suspicion of guilt in the prisoner, is altogether inconclusive, and is wholly insufficient to warrant the verdict of guilty against him, especially when considered in connection with evidence in the cause in behalf of the prisoner, that he received three dollars 1007 and fifty cents per diem for his *wages, and was paid off on the same day with the prosecutor. Why may we not presume, in favor of innocence, that the \$65 he laid out in clothes, and the other money he was spending very freely, was his own money? Certainly it was not the prosecutor's, according to the theory of the prosecution, which is that his money, some of it, went to the gamblers, and the balance was deposited in the hands of the prisoner's father.

We therefore think the court erred in not setting aside the verdict and granting a new trial, as mentioned in the second bill of exceptions.

We also think, for reasons already assigned, the court erred in not excluding from the jury the question and answer mentioned in the first bill of exceptions.

Therefore, the judgment of the hustings court is reversed, and the cause is remanded for a new trial to be had therein in conformity with the foregoing opinion.

The judgment was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the question and answer referred to in the first bill of exceptions were illegal and inadmissible evidence, and the court below erred in not excluding the same.

The court is further of opinion, that the confessions made by the prisoner to Shields and Wren, and the transactions of Wren with the gamblers, and with the prisoner's father, mentioned in the second bill of exceptions, were illegal and inadmissible evidence, and ought not to have been admitted; that the other facts proved in the case and certified in the said second bill 1008 *of exceptions, were insufficient to warrant the conviction of the prisoner, and that the court below erred in overruling the motion of the prisoner to set aside the verdict of the jury.

Therefore it is considered that the said judgment is erroneous, and be reversed and annulled; and that the verdict of the jury be set aside; and the cause remanded to the said hustings court for a new trial to be had therein in conformity with the foregoing opinion.

Which is ordered to be certified to the said hustings court.

Judgment reversed.

1009 *Pryor v. The Commonwealth.

August Term, 1876, Staunton.

I. **New Trials.**—The rules in relation to new trials, stated in *Grayson's case*, 6 Gratt. 712, and *Blosser v. Harebarger*, 21 Gratt. 214, approved and reaffirmed.

II. **Same—When Granted.**—A new trial will be granted.

1. **Same—Same—Verdict, against Law.**—Where the verdict is against law. This occurs where the issue involves both law and fact, and the verdict is against the law of the case upon the facts proved.

2. **Same—Same—Contrary to the Evidence.**—Where the verdict is contrary to the evidence. This occurs where the issue involves matter of fact only, and the fact proved required a different verdict from that found by the jury.

3. **Same—Same—Without Evidence.**—Where the verdict is without evidence to support it. This occurs where there has been no proof whatever of a material fact, or not sufficient evidence of the fact or facts in issue.

III. **Same—When Refused.**—Where some evidence has been given which tends to prove the fact in issue, or the evidence consists of circumstances or presumptions, a new trial will not be granted merely because the court, if upon the jury, would have given a different verdict. To warrant a new trial in such cases, the evidence should be plainly insufficient to warrant the finding of the jury.

IV. **Evidence—Circumstantial.***—A case in which the evidence being wholly circumstantial. It was held in the appellate court to be plainly insufficient to warrant the finding of the prisoner guilty of the offence charged in the indictment.

***Circumstantial Evidence.**—See *Johnson's Case*, 29 Gratt. 796, and *note*; also, *McDaniel v. Com.*, 77 Va. 283; *State v. Baker*, 33 W. Va. 385, 10 S. E. Rep. 645; *Black v. Thomas*, 21 W. Va. 713.

The case is stated by Judge Christian, in his opinion.

Fitzgerald, for the prisoner.

The Attorney General, for the commonwealth.

1010 *Christian, J., delivered the opinion of the court.

James Pryor was convicted of arson in the county court of Nelson, upon an indictment charging him with burning a barn, the property of Thomas H. Farrar. A motion for a new trial was made, and refused by the county court; and upon application to the judge of the circuit court of Nelson a writ of error to the judgment of the county court was refused. To this refusal by the judge of the circuit court a writ of error was awarded by one of the judges of this court.

This court has always acted with great caution in granting new trials in cases where the new trial is asked solely upon the ground that the verdict is contrary to the evidence; and great weight is always given, and justly so, to the verdict of the jury and judgment of the court in which the case is tried. The cases are very rare where this court interferes; and it is only in a case where the evidence is plainly insufficient to warrant the finding of the jury.

This court has laid down certain rules, affirmed in several cases, from which it has never departed, and which prove a safe guide in determining such questions.

In Blosser v. Harshbarger, 21 Gratt. 214, the rules established by the general court in Grayson's case, 6 Gratt. 712, are adopted and reaffirmed by this court. They are as follows:

A new trial will be granted:

1. Where the verdict is against law. This occurs where the issue involves both law and fact, and the verdict is against the law of the case upon the facts proved.

2. Where the verdict is contrary to the evidence. This occurs where the issue involves matter of fact only, and the fact proved required a different verdict from that found by the jury.

3. Where the verdict is without evidence to support it. This occurs where there has been no proof whatever of a material fact, or not sufficient evidence of the fact or facts in issue. Where some evidence has been given which tends to prove the fact in issue, or the evidence consists of circumstances and presumptions, a new trial will not be granted merely because the court if upon the jury would have given a different verdict. To warrant a new trial in such cases the evidence should be plainly insufficient to warrant the finding of the jury.

The case before us must be determined by these rules.

The certificate of facts certified by the county court is in these words:

"The following are the facts proven upon the trial of the prisoner upon the indictment aforesaid: That on the night of the

12th of December, 1874, being Saturday night, the barn of Mr. Thos. H. Farrar, in this county, was consumed by fire, together with one hundred and twenty-five barrels of corn, all his shucks and some fodder then therein, several stacks of wheat straw, and a threshing machine estimated in value at from \$700 to \$750 (seven hundred and fifty dollars)—that the fire was discovered by Mr. Farrar between ten and eleven o'clock; that the barn was of very light and dry material, and was very speedily consumed, at least by eleven o'clock, that being the time when Mr. Farrar returned to his house, by his clock. The next morning Mr. Farrar, in looking about the premises, discovered tracks leading to and from the barn.

through a small piece of ground 1012 around the barn, which had been cultivated in tobacco; that the land was light, and the footprints very plainly and perfectly made; as soon as he saw these, and there were no others either near the barn or going to or from it, to the public road, he recognized them as the tracks of Jas. Pryor, the prisoner at the bar.

That the prisoner was living with him on his farm up to the last of September or first of October theretofore; had a difficulty with his wife about that time, and had attempted to whip her, which was prevented by Mr. Farrar; he was told by Mr. Farrar that no such conduct would be permitted upon his farm, and that he must leave, which was done by the prisoner moving to a neighbor's, Mr. Wm. Currier's; that Mr. Currier's team removed his plunder from Farrar's farm; that while the wagon was being loaded the prisoner said to Mr. Farrar that he would have his revenge in spite of "Lize," meaning his wife, and all her protectors; that a few days thereafter he besought a justice and requested of him such process as would compel Mr. Farrar to deliver his wife—the justice took no steps in the premises, having no jurisdiction; that the shoes were quite noted on account of their peculiar shape, wrought in their wearing by the prisoner; that they were gaiters. No. 8 or 9's, and the heels had turned back, making them unusually long between the heel and ball of the foot, so that the instep had given away and the hollow of the foot or shoe coming down upon the ground like any other portion of the foot; that these shoes had been worn by the prisoner while on his, Farrar's farm.

That he had the same shoes on the Friday evening before the barn was burnt; that on said Friday evening he asked Geo. Brown, a negro who had worked with him on Mr. Farrar's farm, to give him a 1013 pair of shoes, described by witness as worn to a hull, "they looked like Sunday shoes—he thought they were the same shoes." The tracks were traced in the direction of prisoner's house for more than half a mile, going and coming through the farm to the public road and across the road up a bank into the woods, going in the direction of the prisoner's house, a mile or mile and a half from the road. The dis-

tance from prisoner's house to the barn being from two to two and a half miles; that it was nearer to the barn from where these tracks came into the public () by Mr. Farrar's house by about one hundred and fifty or two hundred yards, but he had a very bad dog which the prisoner knew, hence the digression around his house—his house being between the house of the prisoner and the barn. The barn did not belong to Mr. Farrar," but to one —, from whom Farrar had rented the premises.

The court then inserts into the bill of exceptions certain facts tending to prove an alibi, which were proved by witnesses introduced by the accused. But in considering the question of a new trial we can only look to the evidence offered by the commonwealth, and must reject that offered by the accused. The question we have to determine is, whether the facts certified as facts proved by the commonwealth are sufficient to warrant the finding of the jury. If they are plainly insufficient to warrant the verdict, then under the rules above cited the prisoner was entitled to a new trial. The bill of exceptions signed by the judge of the county court, shows that the evidence was wholly circumstantial, and that there are but two circumstances which can in any way connect the accused with the offence charged in the indictment, as to produce more than a strong suspicion of guilt. One is, that months before the burning,

the accused while in the employ
1014 (with his *wife) of Farrar, had a difficulty with his wife and attempted to whip her; which was prevented by Mr. Farrar, who told him that no such conduct would be permitted on his farm, and that he must leave. He did leave, but his wife refused to go with him. Upon leaving he said he would have his revenge in spite of Lize (meaning his wife) and all her protectors; and that a few days afterwards he applied to a justice of the peace, and requested of him such process as would compel Mr. Farrar to deliver his wife—which the justice refused, because he was of opinion that he had no jurisdiction in the case. Six months afterwards, (this declaration having been made in September, and the burning of the barn having been done in March,) this statement of the accused is regarded as a threat of revenge against Mr. Farrar, and as the motive which influenced the accused in burning the barn of Farrar. This must be all mere presumption, and is not even a reasonable presumption.

In this declaration of the accused (which is construed to be a threat against Mr. Farrar) he might have referred to his purpose to get possession of his wife. His declaration was, "he would have his revenge in spite of Lize and all her protectors." In furtherance of this purpose, he did apply to a justice of the peace to compel his wife to go with him. This conduct following immediately after the refusal of his wife to go with him, tends to show that he was, or might have been, excited and exasperated because of his wife's refusal to accompany

him, and the threat he made might have been directed against his wife's refusal to go with him, and not of any purpose of revenge against Mr. Farrar. This hypothesis is certainly not inconsistent with his conduct. His declaration "that he would have his revenge in spite of Lize and 1015 her *protectors," does not necessarily, mean a threat of vengeance against Mr. Farrar; but may have meant that he would regain the possession of his wife; and that the threat was against her, and not against Mr. Farrar. At least it cannot be said upon the facts certified, that this threat was directed against Farrar, and that this constituted the motive of the accused to burn the barn of Farrar, with which he is charged.

The only other circumstance in the case which tends to raise a suspicion against the accused, is that a track was found on the morning after the barn was burned, which Farrar says he recognized as the tracks of the prisoner. This was only the opinion of the witness, that the tracks he saw were the tracks of the prisoner. I say it is only the opinion of the witness, and is not proof that the tracks seen by him were the tracks of the accused, because the witness goes on to give his reasons for that opinion; and they are, that when the accused left his farm in September he wore gaiter shoes, No. 8 or 9, and the heels had turned back, making them unusually long between the heel and ball of the foot; so that the instep had given way, and the hollow of the foot or shoe coming down upon the ground like any other portion of the foot. Now this is the description of the shoes worn by the prisoner three months before the track was made.

George Brown, another, and only other, witness for the commonwealth, says he saw the accused on Friday evening, the day before the barn was burnt, and the shoes he had on were worn to a hull, and he thought they were the same shoes described by Farrar as worn by the prisoner in September. All this evidence is mere matter of opinion. No witness proved that the track discovered was the track of the prisoner. There is this noteworthy fact,

1016 that the track discovered near *the barn was not traced to the house of the prisoner, but to a point which was only within at least a mile and a half of the prisoner's house. Nor was, as is usual in such case, the track measured and compared with the prisoner's track; but the track seen in the tobacco lot of Farrar is declared by him as the track of the prisoner simply because the prisoner in September before had a pair of gaiter shoes, the heels of which projected behind. All this is a mere matter of opinion, and in that respect is not sustained by the commonwealth's evidence; for it is certainly very doubtful, if not impossible, that the gaiter shoes worn by the prisoner in September would have made the same track in December when the shoes were worn to a hull. The shoes spoken of by Brown are not identified as the same

shoes of which Farrar speaks as worn by the prisoner in September. The shoes are not produced, the foot of the prisoner is not measured, and there is no proof that the prisoner had in March, when he was indicted, or in December, when the barn was burnt, a pair of shoes corresponding with those described by Farrar as being worn by him in September. Such evidence as this is too conjectural and too uncertain upon which to convict a man of felony.

It is a fact too, worthy of note, that the prisoner was not arrested for several months after the burning, though he was in the immediate neighborhood. As was well said by the counsel for the accused: "If the liberty of the citizen, however humble, is to be taken away upon such evidence as this, and an infamous offence fastened upon him, the tenure by which the citizen holds his liberty and good name is slender indeed."

The court is of opinion that the facts proved by the commonwealth are plainly insufficient to warrant the 1017 verdict of the jury, and that the judgment of the county court refusing to grant a new trial must be reversed. The judgment was as follows:

This day came again as well the plaintiff in error by counsel, as the attorney general on behalf of the commonwealth, and the court having maturely considered the transcript of the record of the judgment aforesaid, and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the judgment of the county court of Nelson county, "that the said James Pryor be imprisoned in the public jail and penitentiary house of this commonwealth for the term of nine years, the period by the jurors in their verdict ascertained to hard labor" is erroneous, and that the same be reversed and annulled; this court being of opinion that the facts proved by the commonwealth, as certified by the said county court, are plainly insufficient to warrant the finding of the jury, and that the said county court ought to have set aside the verdict of the jury, and awarded to the prisoner a new trial. And this court now proceeding to enter such judgment as the said county court ought to have rendered, it is therefore adjudged and ordered that the said verdict of the jury be set aside, and a new trial be awarded to the plaintiff in error.

Which is ordered to be certified to the said county court of Nelson county.

Judgment reversed.

1018 *Morgenstern v. Commonwealth.

Jackson v. Same.

November Term, 1876. Richmond.

Indictments—Evidence Sustaining.—On an indictment under the statute for selling liquor to minors without the consent of their parents or guardian, the indictment is for selling to minors whose names

are unknown to the grand jury. If it appears from the evidence that in fact the name of the minor to whom the liquor was sold, was known to the grand jury, the evidence does not sustain the indictment.

These cases were heard together in this court. They are the same in their character, and the questions involved in them. They were indictments in the hustings court of the city of Richmond, found in March 1876, one against Otto Morgenstern, for that, on the within twelve months last past, in the years eighteen hundred and seventy-five and seventy-six, at, &c., he then and there being a licensed keeper of an ordinary, did unlawfully sell and barter, and cause to be sold and bartered, and did unlawfully permit his clerks, agents and salesmen to furnish and dispose of wine, ardent spirits and mixtures thereof to certain minors, the names of whom are to the grand jurors unknown, without the consent of their parents and guardians, he, the said Morgenstern, and his said clerks, agents and salesmen, well knowing the said minors to be minors, against the peace, &c. The indictment in the case of Jackson was, in all respects, like this, except the name of the person indicted.

The parties appeared and moved the 1019 court to quash the indictments; but the court overruled the motion; and they excepted. They also demurred to the indictments; but the court overruled the demurrer.

On the trials the jury found verdicts in both cases against the defendants; in the first case for a fine of ten dollars, and in the second case for a fine of twenty dollars; and the court rendered judgments against them upon the verdicts.

In each of the cases there was a motion for a new trial; which was overruled, and an exception; and the court certified upon the record the facts proved; from which it appeared that the defendants were licensed keepers of ordinaries in the city of Richmond; and each of them had within the twelve months sold ardent spirits to the witness, upon whose testimony the indictment was found, and that the witness was a minor; and the grand jury in fact knew the name of the witness.

Upon the applications of the defendants, writs of error to the judgments were awarded.

Young and George Wise, for the appellants.

The Attorney General, for the commonwealth.

Christian, J., delivered the opinion of the court.

These two cases were heard together in this court. The questions we have to determine are the same in both cases.

They are prosecutions against the plaintiffs in error respectively, for a violation of the statute making it a penal offence "if any person shall sell or barter or cause to

be sold or bartered, or being a merchant or tradesman, or keeper of an eating house or ordinary, *shall directly or indirectly give or furnish or dispose of, or shall permit to be sold or bartered or given or disposed of, by his clerk or agent or salesman, to any minor knowing him to be a minor, without the consent of his parent or guardian, any wine or ardent spirits or mixture thereof," &c.

Under this statute the plaintiffs in error were indicted in the hustings court of the city of Richmond for selling ardent spirits "to certain minors the names of whom are to the grand jurors unknown." The plaintiffs in error we found guilty, and a fine assessed by the jury at \$10 in the one case and \$20 the other. Whereupon it was ordered and adjudged by said hustings court that the plaintiffs in error be confined in jail until the fines are paid, and that each enter into bond with good security "to be of good behavior towards all the citizens of this commonwealth for the space of one year." To this judgment writs of error were awarded by one of the judges of this court.

The court is of opinion, that there is no error in the judgment of the said hustings court in overruling the motions to quash the indictments, this court being of opinion, that the said indictments set forth with sufficient distinctness the offence punished by the statute; and that said indictments do not contain charges of two distinct offences. See *Young's case*, 15 Gratt. 664.

But the court is further of opinion, that the record shows that there was a variance between the charges made in the indictments and the proof upon the trial, as certified by the court, for which the verdicts ought to have been set aside and new trials ordered, upon other indictments to be found against the plaintiffs in error.

The variance consisted in this, that while the indictments charged the defendants 1021 (plaintiffs in error here) *with having sold and furnished ardent spirits to certain minors, "the names of whom are to the grand jurors unknown," the proof is clear that in both cases the names of these minors were known to the grand jury. It is a well settled rule of criminal law, that in that class of offences, where the act constituting the offence is an injury to the person, the name of the injured party must be stated, when known. If the name of the party injured be unknown, he should be described as "a person to the jurors aforesaid unknown." But this is a material allegation, and if it turns out in the trial that the name of the person so described in the indictment was known to the grand jury, the variance will be fatal, and the accused must be discharged from that indictment and tried upon another charging the name of the person injured. 1 Arch. Cr. Pl. 80-81 (marg.), and cases there cited; 1 Whar. Am. Cr. Law, § 251; 1 Bishop Cr. Pro. (2nd ed.) § 541-552; 1 Chitty Cr. Law 213-214 (marg.).

The case before us comes within the rules

above stated. The offence punished by the statute is the selling or furnishing ardent spirits to minors without the consent of the parent or guardian. The offence denounced by the statute is a direct injury to third persons.

It is very manifest that the object and aim of the statute was to protect the young against the evils of the bar room and the grog shop. It was enacted to guard and defend the minor against an injury to him, an injury it may be as fatal and deadly as the hand of the robber or the knife of the assassin.

In these cases it may be further said, that the offence punished by the statute is an offence against the person in a double sense. It is not only an offence against the minor, but an injury against the 1022 "parent or guardian." *Surely no more grievous injury can be perpetrated against a parent or guardian than that which entices the son or the ward at the early age of minority to become the frequenter of a bar room, and to contract in early life the habit of indulgence in strong drink. The statute was enacted not only for the good of society in general, and the maintenance of order and good morals, but for the protection of both the minor and the parent or guardian.

The cases before us are therefore brought within that class of cases where the act constituting the offence is an injury to third persons. In such cases, it is well settled that the name of the person if known must be stated, and if described as "a person to the jury unknown," and it turns out upon the proof that the names were known, this will be a fatal variance.

The cases relied on by the attorney general are not in conflict with the authorities above cited, or the views herein stated.

The case of *Commonwealth v. Smith & Burwell*, 1 Gratt. 553 (of which we have a very meagre report, no opinion being given, but simply a resolution of the general court), was a prosecution for selling ardent spirits to slaves without the consent of their masters, &c. The indictment in that case charged the defendants with selling ardent spirits "to slaves whose names or whose owners' names were to the jurors unknown." The case came up on a demurrer to the indictment. The indictment was held good. This was the only question made by the record. If it had been proved in that case that the names of the owner and of the slaves were known to the grand jury, the question would have been a very different one. Then the question raised would have been, was there a variance between the allegations and the proof? But no 1023 such *question was raised, and the decision must be taken to be confined to the demurrer, as the only question raised on the record.

The other case relied on by the attorney general is *Hulstead's case*, 5 Leigh 724. That was a prosecution for selling ardent spirits without license. The indictment charged the sale without license "to persons

to the jurors unknown." Evidence was offered at the trial tending to prove that the persons to whom the sale was made was known to the grand jury. The defendant moved the court to instruct the jury, that if they should find that the person to whom he sold the spirits in the indictment mentioned was in fact known to the grand jury at the time the indictment was found, the commonwealth could not sustain this indictment. The court refused to give this instruction. The general court affirmed the decision of the county court, and held that this was not a material variance between the proof and the charge in the indictment; that it was not necessary in indictments for such offences (i. e., for selling ardent spirits without license), to name the person to whom the liquor was sold, and that the words in that indictment "to persons to the jurors unknown," are surplusage.

But in that case the court said: "The offence of retailing spirits is distinguishable from that class of offences where the act constituting the offence is an injury to a third person, such as murder, larceny, &c., in which the name of the injured party ought to be stated when known. The reason of that rule does not apply to that class of offences to which retailing ardent spirits without license belongs,—offences in which the act constituting the offence is not an injury to third persons."

This case is entirely consistent with 1024 the rules of *Criminal Law above stated, and is not at all in conflict with the authorities above cited.

The offence of selling ardent spirits without license, is not an offence against third persons; but an offence against the revenue laws, and it may be against social order and public morals. The offence is the selling without license. It matters not to whom or to what person it is sold; and therefore the name of the person is immaterial to be stated. But under the statute upon which the indictments before us are found, the offence is not the mere selling of ardent spirits; but selling or furnishing the same to a minor without the consent of the parent or guardian.

In such a case the act constituting the offence, is an injury to third persons, and therefore the person, if known, must be named in the indictment; and if charged as "a person to the jurors unknown," when in fact he is known, this will be a fatal variance.

The court is therefore of opinion, that the judgment of the said hustings court in both cases be reversed, and the defendants be discharged from further prosecution under said indictments: subject, however, to be tried under other indictments, (if any be so found against them,) setting forth the names (if such names be known), of the minors to whom ardent spirits were sold or furnished.

Judgments reversed.

1025 *Schwartz v. Commonwealth.*

November Term, 1876, Richmond.

[21 Am. Rep. 365.]

Rape—Confessions.—S is examined as a witness against T charged with the crime of rape. He is asked if he and T had not agreed to commit the rape, and if he did not hear the cries of the girl whilst T had her in the bushes; and he denies both. The examination is interrupted for a few minutes, and the witness is retired into another room, when he states to two of the officers and another person, that to help T he had sworn falsely; and when his examination is resumed he says that he and T had agreed to commit the rape, and that he did hear the cries of the girl. S is then indicted for perjury in making his first statement. There is no evidence against him but his own statements. **HOLD:** His statements are not sufficient to convict him.

This was an indictment for perjury in the hustings court of the city of Manchester. On the trial the jury found the prisoner guilty, and assessed his fine at one dollar, and the court sentenced him to imprisonment in the jail of the city for one year. There were a number of exceptions taken by the prisoner to rulings of the court; but this court only considered the question on the motion for a new trial on the ground that the verdict was not sustained by the evidence. The facts are set out in the opinion of Judge Staples. On the application of the prisoner this court awarded him a writ of error.

G. Wise, for the prisoner.

The Attorney General, for the commonwealth.

1026 *Staples, J. The prisoner was indicted for perjury in the hustings court of the city of Manchester, and was convicted and sentenced to confinement in the jail of the city for one year. After the verdict was rendered, he moved the court to grant him a new trial, upon the ground that the verdict of the jury was contrary to the law and the evidence. His motion was overruled, and the prisoner excepted. His bill of exceptions contains all the facts proved on the trial, from which it appears that the prisoner was examined as a witness upon the trial of Joseph Turner, before the mayor of Manchester, upon the charge of rape, and upon the examination the prisoner testified that he had no conversation or plot with the said Joseph Turner, before they left Manchester, to commit a rape upon Pallas Boyd; that he and Turner went to the locality of the alleged offence for the purpose of getting flowers, and that he heard no screams from the girl, Pallas Boyd, whilst Turner had her in the bushes; that the commonwealth's attorney asked that his testimony be written down; that a pause in his examination of two or three minutes ensued, during which time the prisoner was

*For monographic note on Confessions, see end of case.

retired from the witness stand; that the prisoner during this interruption stated to Mr. Fitzgerald, a police officer, to Mr. Redford, a bystander, and to the commonwealth's attorney, that he had sworn falsely in his testimony just given; that he had done so to screen Turner, and that when he went back on the stand he would tell the truth; that the prisoner was then put on the stand again as a witness, no other witness intervening, and testified that he and Turner had had a bargain and conversation about the girl before they left Manchester, and that he did hear screams from the girl while Turner had her in the bushes; and thereupon the said mayor refused to

1027 hear him further. *It was further proved that the prisoner was not warned by said mayor that he had a right to refuse to answer questions put to him; that he had no counsel; that he appeared somewhat confused, but not more so than is usual with witnesses; and that he is in the fifteenth year of his age. And these were all the facts proved on the trial.

The charge in the indictment is of perjury in the first statement before the mayor; and the evidence relied on to establish the perjury is the contradictory statement before the same officer at a subsequent period of the same examination. As will be seen from the bill of exception, this contradictory statement was the sole and only proof adduced by the commonwealth in support of the indictment.

The question we are to determine is, was he properly convicted upon that evidence?

No rule is perhaps better settled than that to authorize a conviction of perjury there must be two witnesses testifying to the falsity of the statement, or one witness with strong corroborating circumstances of such a character as clearly to turn the scale and overcome the oath of the party and the legal presumption of his innocence. This rule is founded upon the idea that it is unsafe to convict in any case where the oath of one man merely is to be weighed against that of another. Lord Tenterden is reported to have said that corroborating circumstances are not sufficient, but that the contradiction must be given by two witnesses. But the rule is now settled otherwise; the confirmatory evidence however must be of a strong character, and not merely corroborative in slight particulars.

It was at one time held that when the same person has by opposite oaths asserted and denied the same fact, he may be convicted on either; for whichever of

1028 *them is given in evidence to disprove the other, the defendant cannot be heard to deny the truth of that evidence, inasmuch as it came from him. But this doctrine has been long since exploded, and it is now held that the prosecuting attorney must elect which of the two oaths he means to rely upon as false, and he must prove the perjury in that particular statement. Two early English cases are sometimes cited as holding that the perjury may be established by proof of the contradictory

oath merely, without other evidence. One of these is an anonymous case decided by Yates, J., at the Lancaster assizes in 1764, and the ruling approved by Lord Mansfield. The other is the case of *Rex v. Knill*, a short report of which is found in a note in *Barnwell & Alderson R.*, page 929. It is shown, however, in 2 *Russell on Crimes*, 652, that in each of these cases there were corroborating circumstances in addition to the contradictory oath. But if these cases even go to the extent which is claimed for them, they are overruled by the later English decisions. And it is now held by those courts that the defendant's own evidence upon oath is not sufficient of itself to disprove the evidence on which the perjury is assigned.

In *Regina v. Wheatland*, 8 Car. & Payne R. 238, Mr. Baron Gurney held that it was not sufficient to prove that the defendant had on two different occasions given directly contradictory evidence, although he might have wilfully done so; but that the jury must be satisfied affirmatively, that what he swore at the trial was false, and that would not be sufficiently shown to be false by the mere fact that the defendant had sworn contrary at another time; it might be that his evidence at the trial was true, and his deposition before the magistrate false. There must be such confirmatory evidence of the defendant's deposition
1029 before the magistrate *as proved that the evidence given by the defendant at the trial was false.

In *Regina v. Hughes*, 1 Car. & Kerwan, 519, Tindall, C. J., said: If you merely prove the two contradictory statements on oath, and leave it there, non constat which statement is the true one. See also *Mary Jackson's case*, 1 Lewin 270; 2 *Russell on Crimes* 651-652; *Roscoe Crim. Evidence*, 767-768.

In the United States there are but few decisions bearing upon the question. The writers on criminal law, however, lay down the rule in conformity with the English cases. 3 *Wharton*, sec. 2275; 2 *Bishop Cr. Law*, sec. 1005; 1 *Greenl. Ev.* 259.

The only opposing case is that of the *People v. Burden*, 9 Barb. R. 469. There Johnson, J., delivering the opinion of the court, enters into an elaborate discussion of the whole subject, and arrives at the following conclusions: That where a defendant by a subsequent deposition expressly contradicts and falsifies a former one made by him, and in such subsequent deposition expressly admits and alleges that such former one was intentionally false at the time it was made, he may be properly arrested upon an indictment charging the first deposition to be false, without any other proof than that of the two depositions." To maintain his position, the learned judge relies upon the two English cases already mentioned, not adverting, however, to the fact that there were corroborating circumstances in each of them. The distinction he seeks to establish is not recognized by any adjudicated case, or by any writer on criminal law. This proposition is, that the first oath

of the prisoner must be held to be false because in the second he admitted it to be so. In other words, when the prisoner has made two contradictory statements under oath, and in the second he *has acknowledged the intentional falsity of the first, that acknowledgment is sufficient to establish the perjury of the first without further evidence. And it is asked why may not the prisoner be convicted of perjury upon his mere confession, as in other cases.

It is not denied that a full judicial confession is perhaps sufficient to found a conviction upon in any case. It is substantially the same as a plea of guilty to the indictment. But it is denied that a mere admission, not judicial, of having sworn falsely, dispenses with all further proof of the fact. As before stated, when there are two conflicting statements under oath the prisoner cannot be convicted upon either, for the reason, say the judges, it is not possible to tell which is the true and which is the false. In such case, it is agreed on all hands, that strong confirmatory evidence is essential. It is gravely insisted that this confirmatory evidence is fully supplied by the prisoner's acknowledgment of the falsity of the first statement. Why may not the acknowledgment itself be false.

If the second oath, deliberately taken, is insufficient to overcome the first, why should a mere admission have that effect? When a witness deliberately asserts a fact to be true as within his knowledge, and in a few minutes thereafter deliberately and intentionally asserts the very reverse as within his knowledge, all ground of innocent mistake being excluded, he thereby indirectly but unequivocally affirms the falsity of the first. Do we discredit the first any sooner, or believe the second the more readily, because the witness tells us that one was intentionally false and the other true? We believe neither of them. We place no confidence in either statement, from an absolute inability to determine which is true, or whether either is true. If the witness is afterwards put on his trial for per-

jury, our *difficulties are in no wise removed. We are still in doubt which is the true and which is the false. It is very true that a witness making two palpably conflicting statements may sometimes by his demeanor satisfy the hearer that one is to be credited rather than the other. But when those statements are repeated to a third person, it is very difficult, if not impossible, to detect the false without some aid from surrounding circumstances. And no mere asseveration of the witness will assist the mind in arriving at a just and accurate conclusion. If the witness is to be convicted of perjury upon his bare declaration that the first statement is false, it is not because we believe his declaration is necessarily true, but upon some idea that it is in the nature of a confession, and therefore to be believed. A deliberate confession of guilt is generally credited, because it is presumed to flow from the

highest sense of guilt? It must be remembered, however, that there are two statements upon oath, and if the prisoner is to be concluded from denying one to be true, the same reason would conclude him from denying the other, and the prosecutor might select either as the ground of his proceeding. In this very case the commonwealth might have elected to proceed upon the second statement made by the prisoner. In that event all will concede he must have produced other testimony in addition to the contradictory statement first made. Is it possible that the principle is so reserved and is of so little value that the prisoner may be convicted of perjury upon the first, merely because upon his second examination he admitted the first did not contain the truth.

If this be so, the rule laid down that in case of two conflicting statements there can be no conviction unless there is corroborative evidence is not of the *slightest value. When we speak of corroborative evidence, we do not mean such as emanates from the mouth of the prisoner himself, but evidence aliunde, evidence which tends to show the perjury independently of his own declarations. The whole law in reference to perjury is based upon the idea that when there is witness against witness, oath against oath, there must be other evidence to satisfy the mind.

The rule is thus laid down in 1 Greenleaf, sec. 265: If the evidence in proof of the crime of perjury consists of two opposing statements of the prisoner, and nothing more, he cannot be convicted. * * * If both the contradictory statements were delivered under oath there is nothing to show which of them is false, where no evidence of the falsity is given." See also Dodge v. State, 4 Zabriskie 455. This is a sound rule, and ought not to be departed from to meet particular cases. In this connection it may be mentioned that the decision in the New York case was made by two judges in a court of three—Judge Selden dissenting.

The case now in hand is a strong illustration of the value of the rule in question. The prisoner was a youth of fifteen, charged before the same magistrate with being implicated in the crime of rape, and acquitted but a few minutes before. Upon his examination he was without counsel or advice, and was not cautioned that he was not bound to criminate himself. His examination had not been completed, but merely suspended; and during this interval he is said to have made to officers of the government the statements upon which his conviction is founded. Before he had concluded he was stopped by the mayor, in the midst of his narrative, and forbade to say more.

What he would have further said we cannot even conjecture. *So great is the abhorrence of the crime of rape, that the passions and suspicions of men are more easily excited than by any other accusation. When, therefore, the prisoner confessed his complicity in the crime, ready credence was given to the statement. If in

his first statement he had made the same confession, and in his subsequent examination denied it, it is easy to see that the perjury would have been charged in the last and not in the first. And yet without the aid of other evidence the one statement was entitled to no greater consideration than the other. Upon the whole, I think the prisoner was improperly convicted upon the facts as presented to the jury.

With respect to the instructions, my opinion is, that no error was committed by the court either in refusing those asked for, or in giving those that were given. Upon the points presented by the second bill of exception, it is unnecessary to express any opinion, as the question will probably not again arise.

Judgment reversed.

CONFESSIONS.

A. Admissibility of Confessions.

1. What Will Exclude a Confession.
 - a. West Virginia.
 - b. Exception to the Rule.

B. Alarm or Agitation Alone Will Not Render Confession Inadmissible.

C. Persons in Authority—Defined.

1. Instances.
2. Master or Mistress Such Person—When.
3. Private Detective Not Such Person.

D. Whole Confession Must Be Given.

1. Jury May Disregard Part.

E. The General Rule as to Repeated Confessions—Although First Inadmissible, Second May Be Admissible.

1. Instances.

F. Commonwealth Must Show Confession to Be Voluntary—Condition Precedent.

G. Confession Inadmissible until *Corpus Delicti* Proven.

H. Confession of Accomplice Inadmissible.

I. Confessions Obtained by Fraud.

K. Accused Not Allowed to Prove His Own Declarations.

1. Instances.

L. Weight and Degree of Credit to Be Given Confessions.

M. Although Confession Inadmissible Facts Disclosed by It May Be Proven.

N. Admissibility of Confessions a Question for the Court.

O. Credit to Be Given Confessions a Question for the Jury.

A. ADMISSIBILITY OF CONFESSIONS.

The general rule is that a confession of a prisoner may be given in evidence against him. Smith's Case, 10 Gratt. 739; Shiffet's Case, 14 Gratt. 652; Thompson's Case, 20 Gratt. 724; Page's Case, 27 Gratt. 954; Wolf's Case, 30 Gratt. 833; State v. Morgan, 35 W. Va. 260, 18 S. E. Rep. 385; Hite's Case, 96 Va. 494, 31 S. E. Rep. 895.

1. What Will Exclude a Confession.—But when it appears that the confession was obtained from the prisoner by some inducement of a worldly or temporal character in the nature of a threat, or promise of benefit, held out to him in respect of his escape from the consequences of the offence, or the mitigation of the punishment, by a person in authority, or with the apparent sanction of such person, then such confession is inadmissible. Smith's Case, 10 Gratt. 739, cited and approved in Shiffet's Case, 14 Gratt. 652; Thompson's Case, 20 Gratt. 724; Page's Case, 27 Gratt. 954; Wolf's Case, 30 Gratt. 833; State v. Morgan, 35 W. Va. 260, 18 S. E. Rep. 385; Hite's Case, 96 Va. 494, 31 S. E. Rep. 895.

a. West Virginia.—To exclude a confession, it must not only be made under inducements of favour or fear, but such inducements must come from one in authority. State v. Morgan, 35 W. Va. 260, 18 S. E. Rep. 385.

b. Exception to the Rule.—The confessions of the accused, made under inducements, to officers in whose custody he was at the time, are not to be excluded on the trial when the confession is accompanied with the surrender and restoration of the stolen property. Fredrick v. State, 8 W. Va. 695.

B. ALARM OR AGITATION ALONE WILL NOT RENDER CONFESSION INADMISSIBLE.

"No degree of alarm or agitation will, of itself, render confessions made during its existence inadmissible." The court, in Venable's Case, 24 Gratt. 643, citing Smith's Case, 10 Gratt. 734, as a striking instance of this fact.

C. PERSONS IN AUTHORITY—DEFINED.

Persons in authority, within the meaning of the rule, are such as are engaged or concerned in the apprehension, prosecution or examination of the accused. Smith's Case, 10 Gratt. 743, approved in Thompson's Case, 20 Gratt. 730; Early's Case, 86 Va. 928, 11 S. E. Rep. 795.

1. Instances.—A person committed on a charge of larceny by a justice, is sent in charge of a special constable and the prosecutor to jail, and on the way this constable says to him, "you had as well tell all about it." After they had rode about a mile after this remark, without any other remark being addressed to the prisoner, he voluntarily says to the prosecutor, "I will tell you all about it;" and proceeds to tell how and by whom the breaking and larceny was committed. The constable was one in authority over him; and the statement is not admissible in evidence. Vaughan v. The Commonwealth, 17 Gratt. 576.

A young man living in the jailor's family, and who occasionally, in the absence of the jailor, attended the prisoners and kept the keys of the jail, is not a person in authority, whose threat or promise will exclude a confession made in jail by the prisoner awaiting trial. Shiffet's Case, 14 Gratt. 652.

A person to whom a free negro is bound as apprentice, though a justice of the peace, if not acting as such, and no way affected by the offence, is not a person in authority in the sense of the rule which excludes confessions made to persons in authority. Smith's Case, 10 Gratt. 734.

2. Master or Mistress Such Person—When.—It is only where the offence concerns the master or mistress that their holding out threats or promises to the prisoner, will render his confession inadmissible. Otherwise the confession will be admitted. Smith's Case, 10 Gratt. 746.

3. Private Detective Not Such Person.—A private detective, employed to work up the case, is not such a person as comes under the rule of persons in authority. *Early's Case*, 86 Va. 921, 11 S. E. Rep. 795.

D. WHOLE CONFESSION MUST BE GIVEN.

If the commonwealth uses the accused's statement against him, they must give such statement as a whole, and not select parts for the jury and omit the rest. *Parrish v. Commonwealth*, 81 Va. 1.

1. Jury May Disregard Part.—Where the confession of a prisoner is given in evidence, the whole must go to the jury; but the whole is not necessarily to be taken as true; on the contrary, if, from opposing evidence or the confession itself, facts appear which are sufficient to satisfy a rational mind that a part is not true, it ought to be disregarded. *Brown v. Commonwealth*, 9 Leigh 633.

E. THE GENERAL RULE AS TO REPEATED CONFESSIONS—ALTHOUGH FIRST INADMISSIBLE, SECOND MAY BE ADMISSIBLE.

"The court is further of opinion, that though a confession may be inadmissible because not voluntary, it may become admissible by being subsequently repeated by the accused, when his mind is perfectly free from the undue influence which induced the original confession, *Prima facie*, the undue influence will be considered as continuing; though the presumption may be repelled by evidence, which, however, must be strong and clear. The rule on this subject has been well stated to be, 'that, although an original confession may have been obtained by improper means, yet subsequent confessions of the same or like facts may be admitted, if the court believes, from the length of time intervening, or from proper warning of the consequences of confession, or from other circumstances, that the delusive hopes or fears, under the influence of which the original confession was obtained, were entirely dispelled. In the absence of any such circumstances, the influence of the motives proved to have been offered, will be presumed to continue, and to have produced the confession, unless the contrary is shown by clear evidence, and the confession will therefore be rejected.' 2 Russ. on Crimes 888; Greenl. Ev. 257; and cases cited. It follows that the burden of showing the contrary devolves on the commonwealth, as the condition on which the confession will be admissible." The court, in *Thompson's Case*, 20 Gratt. 731, approved in *Venable's Case*, 24 Gratt. 639. See also, *Mitchell's Case*, 33 Gratt. 845.

1. Instances.—If a threat be made or a promise held out, to a person in custody on a charge of felony, to induce him to make confession, and he denies his guilt at the time, but afterwards makes a confession, which appears, from the time and circumstances, not to have been induced by such previous threat or promise, this confession, so afterwards made, is a voluntary one, and proper evidence against him on his trial. *Moore v. Commonwealth*, 2 Leigh 701.

Prisoner charged with murder, makes a confession to a police officer on the morning of the day he is examined by the police justice. Before that examination he has employed counsel, and he is warned, both by his counsel and the police justice, against making any statement or confession. Being committed by the justice, on getting to the jail he appears to be very much frightened and agitated; and upon getting there he makes a confession, and again on the same day confesses the deed to a woman of his acquaintance who is in the jail. Though

the confession to the police officer was properly excluded, the confessions made after the warning given him are proper evidence. *Venable v. Commonwealth*, 24 Gratt. 639.

F. COMMONWEALTH MUST SHOW CONFESSION TO BE VOLUNTARY—CONDITION PRECEDENT.

Says the court, in *Thompson's Case*, 20 Gratt. 73: "That the confession is voluntary, being therefore a condition precedent of its admissibility, and the duty of deciding on its admissibility being a duty which devolves on the court, it follows, necessarily, that the court must be satisfied that the confession was voluntary, before it can be permitted to go before the jury; in other words, that the burden of proof that it was voluntary, devolves on the commonwealth."

G. CONFESSION INADMISSIBLE UNTIL CORPUS DELICTI PROVEN.

Until there is clear proof of the death of the person for whose murder the prisoner is accused, the admissions of the prisoner as to his having committed the act must be clear and explicit. If there is any doubt as to his meaning, he ought not to be convicted. *Smith v. Commonwealth*, 21 Gratt. 809.

H. CONFESSIONS OF ACCOMPLICE INADMISSIBLE.

Confessions or admissions of an accomplice in a felony, made after the commission and completion of the offence, are not competent evidence against the prisoner, even though a previous conspiracy and combination between the prisoner and the accomplice to commit the felony has been proved. *Hunter v. Commonwealth*, 7 Gratt. 641.

I. CONFESSIONS OBTAINED BY FRAUD.

For an instance of a confession procured by a fraud being practiced on accused, see *Page's Case*, 27 Gratt. 954.

K. ACCUSED NOT ALLOWED TO PROVE HIS OWN DECLARATIONS.

The accused is not allowed to prove his own declarations to the end of his own exculpation. *Sprouse v. Commonwealth*, 81 Va. 374.

1. Instances.—On the trial of a criminal cause, a witness for the commonwealth proves, that having in a conversation with the accused, expressed his entire conviction of a particular fact, the accused admitted the fact (which, in its nature, strongly tends to establish his guilt) but made an explanatory statement (which, if taken as true, will exculpate him). The accused then offers to prove, that he had previously, and under different circumstances, made the same declaration to another person. *Held*, such evidence is inadmissible. *Earhart v. Commonwealth*, 9 Leigh 671.

If a prisoner, in speaking of the testimony of a witness who had testified against him, says "that what W. said was true as far as he went, but that he did not say all or enough"; this is not admissible as a confession of the prisoner; nor does it lay any foundation for proving to the jury what W. did swear to. *Finn v. Commonwealth*, 5 Rand. 761.

At the examination of the prisoner by the mayor, the prisoner reluctantly at the mayor's request, wrote the name he was suspected of having forged; in doing so he made the same mistake in spelling the name, as appeared on the forged instrument. *Held*, this fact was properly admitted to the jury. *Sprouse v. Commonwealth*, 81 Va. 374.

L. WEIGHT AND DEGREE OF CREDIT TO BE GIVEN CONFESSIONS.

Perhaps no general proposition can be predicated concerning the weight and degree of credit to be given to a confession; because this must depend in every case upon the age, character and mental capacity of the party, and the share of education which he has enjoyed, and all surrounding circumstances which attended it. And this seems to be the opinion of a learned writer on the law of evidence. 1 Greenl. Ev. § 215; Smith's Case, 10 Gratt. 787.

M. ALTHOUGH CONFESSION INADMISSIBLE FACTS DISCLOSED BY IT MAY BE PROVED.

Facts disclosed or discoveries made in consequence of statements made by accused, may be given in evidence, although the confession, by which such facts were disclosed, or discoveries made, is inad-

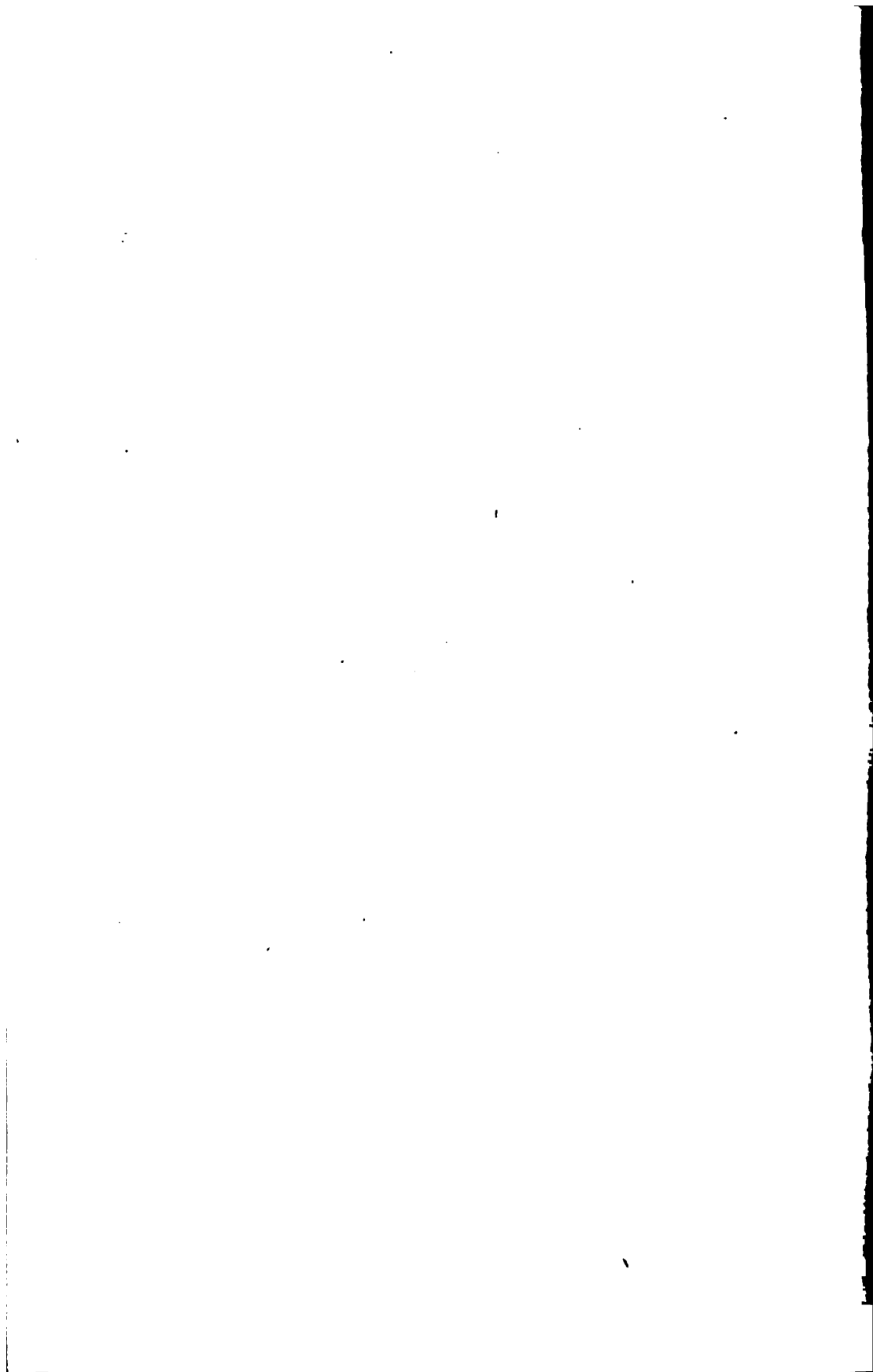
missible, on account of being improperly extorted from the prisoner. State v. Douglass, 20 W. Va. 770.

N. ADMISSIBILITY OF CONFESSIONS A QUESTION FOR THE COURT.

It is therefore declared as the condition of the admissibility of a confession, that it be free and voluntary, and not made under the influence of such a bias upon the mind of the party as will in the judgment of the law, disturb the free exercise of volition, and destroy the presumption that the confession so made is true; and this, the judge and not the jury, is to determine. Smith's Case, 10 Gratt. 787.

O. CREDIT TO BE GIVEN CONFESSIONS A QUESTION FOR THE JURY.

The weight and degree of credit to be given a confession is a question for the jury. Smith's Case, 10 Gratt. 789; Brown's Case, 9 Leigh 683.



INDEX.

ABATEMENT.

1. W sues S in *assumpsit*, in the county of J, and sends the process to the city of R, where S resides, and it is served upon S by the sheriff of R. S files a plea in abatement stating these facts, but does not say where the cause of action arose. **Held:** The plea is sufficient in this case, though it does not give the plaintiff a better writ.

Warren v. Saunders, 259

2. W having demurred to the plea, and the court having sustained the demurrer, when the cause is called for trial S moves to dismiss the cause from the docket. **Held:** The motion should have been sustained and the suit dismissed; the statute expressly providing that where the suit is brought where the cause of action arose, process shall not be directed to an officer of any other county or corporation than that wherein the action is brought. *Idem*, 259

ACTIONS.

1. When title to property taken by military authority during the war and applied to support the inmates of a lunatic asylum, is not divested, and the corporation is liable for it. See *Corporations*, No. 7, and

Eastern Lunatic Asylum v. Garrett, 163

2. When trover is the proper remedy to recover value of property taken. See

Idem, 163

3. A decree under which H loaned money to C, authorized H to lend any money of his testator's estate in his hands, upon security on real estate, and to take bonds in his own name as executor, the interest to be paid annually, and the principal when he may so require, and hold and account as executor as aforesaid. H may sue upon the bond without any further order of the court directing him to collect the money.

Cabell & als. v. Cox, 182

ADVANCEMENTS.

1. W, in his lifetime, made advancements to some of his children. By his will he gave his estate to his widow for her life, and authorized her to make advancements to their children; and he directed that at her death his estate, including these advancements, should be equally divided among his children. Mrs. W did make advancements to all the children, but to one much less than the others. She died in February 1868, but the estate was not ready for a division until October 1874. **Held:** Interest should be charged to each legatee on the excess of advancements made to him or her from the death of Mrs. W, in 1868 until the time of the division in 1874. *Cabells v. Puryear & als.*, 902

AGENTS.

1. See *Forfeitures*, No. 1, and *Powers*, No. 2, 3, and

Silliman & als. v. Fred., Or. & Char. R. R. Co., 119

APPEALS.

1. The § 7, of the act of March 2, 1866, known as the stay law, and the acts amendatory thereof, do not apply to appeals, writs of error or *supersedeas*; and therefore an appeal from a final decree made on the 1st of November 1867 cannot be allowed on the 12th of June 1871.

Rogers v. Strother & als., 417

2. A decree giving all the relief asked for in the case is a final decree, and though it may afterwards be modified directing the amount decreed to be paid to S to be paid to a creditor of S, this does not change its character. *Idem*, 417

3. To give the court of appeals jurisdiction of a cause, except in certain cases specified, the judgment or decree must amount to \$500, principal and interest, at the date of the judgment or decree, except where the claim of the plaintiff is more than that amount, and he applies for the appeal.

Gage v. Crockett, 735

4. On a creditor's bill against a railroad company, some of the debts proved are under \$500, but there is one for \$1,117.60 proved before the commissioner, and the decree of the circuit court is in favor of all of them against the company. An appeal by the company brings up all of them; and this court will pass upon all.

The Winch. & Stras. R. R. Co. & al. v. Colfert & al., 777

5. Three suits in equity are brought by the same plaintiffs against the same defendants to enforce payment of debts by attachment and sale of the same land. By order of the court these suits are directed to be consolidated and heard together, and then plaintiffs file an amended bill bringing in a third party. There being a decree dismissing the attachments, the plaintiffs may appeal to the court of appeals, though neither of the debts amount to \$500, the sum of all of them being more than that amount.

Devries & Co. v. Johnston & Wolfe & al., 805

6. There may be an appeal as of right, from an interlocutory order of a county court in a controversy concerning the establishment of a road. *Jeter v. Board & als.*, 910

7. In a suit by a vendor of land to enforce payment of the purchase money his debt is scaled, and a decree for the scaled amount

which is paid to him. Creditors come into the case, and there is a decree for a sale of the land to pay them; and widow and heirs of vendee appeal from the last decree. The appeal does not bring up the first decree, so as to entitle the vendee to have it reviewed.

Simmons v. Lyles & als., 922

APPELLATE COURT.

1. If upon a trial at law instructions are given to the jury, to which no exception is taken, and after verdict a motion is made for a new trial, on the ground of misdirection as well as that the verdict is contrary to the evidence, it is the duty of the court of trial to consider the correctness of the instructions; and if of opinion that they are not correct, and were calculated to mislead the jury, to set aside the verdict and grant a new trial; and the appellate court will supervise his action in this respect.

Stevenson v. Wallace, 77

2. In an action of *assumpsit* there is a plea of payment, and of the statute of limitations. On the trial the plaintiff asks the court to instruct the jury, that in passing upon a plea of the statute they must leave out of the computation of time all the period extending from the 2nd of March 1866 to January 1st 1869. The court refuses to give the instruction; and plaintiff excepts. The jury find a general verdict for the defendant, and there is a general judgment accordingly. **Held:**

1. That the appellate court will reverse the judgment for the error in refusing the instruction, and send the cause back for a new trial.

Danville Bank v. Waddill, 448

2. This will always be done unless the appellate court can see from the whole record, that even under correct instructions a different verdict could not have been rightfully found, or unless it is able to see that the erroneous ruling of the trying court could not have influenced the verdict. The *onus* is upon the appellee to show this, and where there are distinct issues, a general verdict is not sufficient in general to show it.

Idem, 448

3. When the appellate court will not reverse a decree against purchasers of land for failure to allow them for improvements. See *Vendor and Purchaser*, No. 4, and

Tosh & als. v. Robertson & als., 270

4. Where there is an appeal on the ground of the refusal of the court to continue the cause, the appellate court will not reverse the judgment unless the action of the court below is plainly erroneous.

Harman v. Howe, 676

5. When the appellate court should or should not reverse the action of the court which appointed a fiduciary, in removing him from his office. See *County Courts*, No. 5, and

Reynolds v. Zink, 29

6. For the principles upon which new trials will be awarded. See *New Trials*, No. 3, 4, 5, 6, and

Pryor's case, 1009

1037

*ASSIGNMENTS.

1. A case of the transfer of a number of negotiable notes "without recourse," in which it was held, looking to all the circumstances, that the words were to be construed in their literal sense; and that the transferor was not liable for the failure to recover from the endorser. If the transferee intended that they should be used in this instance in their restricted sense, he should have been careful to express his meaning, or have it expressed in plain and unmistakable terms.

Ober v. Goodridge, trustee, 878

2. After a decree for an account in a creditors' suit against an insolvent bank, a debtor of the bank obtaining assignments of debts of the bank, will only be allowed to stand in the shoes of his assignor, and have a credit on his debt for the *pro rata* share of the debts assigned to him.

Finney & als. v. Bennett, 365

3. See *Bonds*, No. 14, and

Brown, adm'r, v. Dickerson, 690

ATTORNEY AND CLIENT.

1. In 1860 attorneys at law receive two notes, and give a receipt which says: Received for collection, &c., and after describing them says: On the above notes we are to bring suit, and prosecute them to judgment, and have a fee of five dollars in each case. Though the last clause of the receipt may be construed to relieve them from the obligation to collect, and from the corresponding compensation for collecting, it cannot be construed to deny to them the authority to collect, or to limit them to the function of prosecuting the claims to judgment.

Johnson v. Gibbons, 632

2. Judgments having been recovered and executions issued, which were stayed, the debtor in April 1862, pays to the attorneys \$2,600, in part of these debts, the payment being in confederate money; neither the attorneys nor the debtors having any notice that the creditor was unwilling to receive confederate money; and the attorneys write immediately to the creditor, that they have this money for him. He holding that the attorneys had no authority to collect the money, does not reply to the letter; and neither attorneys nor debtor hear of any objection to their receipt of the money until 1874. The creditor is concluded by his failure to give his attorneys notice of his objection to their receiving the money.

Idem, 632

AUTREFOIS ACQUIT.

1. See *Criminal Jurisdiction, and Proceedings*, No. 2, 3, 4, 8, 9, and

Burrress' case, 934

Page's case, 954

BANKRUPTS.

1. When creditor of a bankrupt is concluded from proceeding in a state court to enforce

his lien. See *Equitable Jurisdiction and Relief*, No. 6, 7, 8, and
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BANKS.

1. How insolvent banks may be wound up. See *Creditor's Bill*, No. 4, and
Finney & als. v. Bennett, 365

BONDS.

1. When a bond given for the loan of money, lent out by an executor under the decree of a court may be sued upon by the executor without a decree authorizing him to do so. See *Actions*, No. 3, and
Cabell & als. v. Cox, 182

2. A blank paper is signed and sealed by a principal and three others who intend to be his sureties, and it is left with the principal to be filled up and delivered by him. He does fill it up and deliver it to the obligee named therein. It is not the bond of the three, and does not bind them. But the principal having filled it up, and delivered it when thus complete, it is his bond, and binds him.
Penn assignee v. Hamlett & als., 337

3. A state cannot tax the bonds of a railroad company held by persons living out of the state.
Commonwealth v. Ches. & Ohio R. Co., 344

4. If a bond, perfect on its face, is delivered to the obligee as an escrow, to be valid upon another person's executing it, it is valid though the condition is not complied with.
Miller v. Fletcher & als., 403

5. A deed, perfect on its face, cannot be delivered as an escrow to the grantee or obligee, upon a condition upon which it is to be a valid deed. In all such cases
1038 *the condition is void, and the deed is at once operative. *Idem*, 403

6. Parol evidence is inadmissible to prove that a deed perfect on its face, was delivered to the grantee on a condition.
Idem, 403

7. It is not necessary that the sureties of a sheriff in his official bond should acknowledge the same in court. The bond may be acknowledged by them in court, or its execution out of court proved by witnesses. And there is no statute or rule of law requiring such proof to be adduced at the time the bond is received by the court. With or without such proof the parties who had actually signed would be bound by it.
Supervisors of Washington Co. v. Dunn & als., 608

8. A person who signs, seals and delivers an instrument as his deed, will never be heard to question its validity, upon the ground that it was not acknowledged by him, nor proved at the time of delivery. It is the sealing and delivery that gives efficacy to the deed; not proof of its execution. And this principle applies to all bonds, whether executed by public officers or private persons, unless there is a statute making the acknowledgment or

proof in court essential to the validity of the instrument. *Idem*, 608

9. In an action on an official bond, if there is no record evidence, the execution of it may be established by the testimony of attesting witnesses, or if there be none, by proof of handwriting, or by discovery from the adverse party. *Idem*, 608

10. The fact that the names of two of the parties who executed and acknowledged the bond, were not in the body of it, does not invalidate it as to them. *Idem*, 608

11. A bond is given upon an injunction to a judgment for money, and in the penalty it is said "in the just and full sum of seven hundred and sixty lawful money of Virginia." The word "dollars" is obviously left out by mistake, and the bond will be treated as if the word was in it.
Harman v. Howe, 676

12. Words omitted in an instrument, and also in a record or statute, which can be clearly ascertained by the context, will be supplied by the court, and the instrument, record or statute will be read and treated as if the words were in it. *Idem*, 676

13. For bonds executed on obtaining an injunction, and especially an injunction to a judgment for money. See *Injunctions*, No. 3, 4, 5, and *Idem*, 676

14. Three bonds are executed to A and G, and are left in the possession of G. A sold the bonds to E, but did not deliver them, they being in the possession of G. G sold the bonds to D, and delivered them to him.
HELD:

1. The bonds having been executed to A and G, their joint interests appeared on the face of the bonds; and the possession of them by G could not mislead a purchaser from him.
Brown, adm'r & c., v. Dickenson, 690

2. Though each might sell his own interest, neither could dispose of the interest of the other without his consent.
Idem, 690

3. Though the bonds were sold by G and assigned to D, he only acquired G's interest in the bonds; and E is entitled to the interest of A. *Idem*, 690

4. In a contest between E and D, each claiming the bonds, G being dead, A is not a competent witness to prove that G owed him, and had agreed that he should have the bonds. *Idem*, 690

CHARITABLE INSTITUTIONS.

1. Though the statute exempts from taxation the property of orphan asylums and other charitable institutions, the exemption does not include a tax on a devise or bequest of property to such institutions.
Miller's ex'or v. The Commonwealth, 110
Barrett's adm'rs v. The Same, 110

COLLATERAL SECURITIES.

1. Where stock is delivered as a pledge or collateral security for a debt, the creditor

may sell it, but he is not bound to do so, at least without being required by the debtor; and if it perishes the creditor is not liable for it.

Richardson v. Ins. Co. of Valley of Va., 749

1039 *CONFEDERATE TRANSACTIONS.

1. In November 1857 H, an executor, lent money to G secured on real estate. In 1861 G wished to pay H, who declined to receive it, saying it was well secured, and it was not needed. But in December 1861, being urged by G, he agreed that if G would find any person who would take it he might do so. In January 1862 G proposed to C to take it, and in February C did take it, and gave his bond to H for the amount secured by deed of trust. The whole arrangement was made through G, C not having seen H, and G paid C in confederate money. It is not a confederate contract, liable to be scaled.

Cabell & als. v. Cox, 182

2. In the adjustment of confederate transactions, to lay down fixed, unbending rules of decision applicable to all cases, is not only unjust, but in the nature of things utterly impracticable. Every case must depend upon its particular circumstances. The measure of relief must vary according to the equities of the parties.

Barton v. Bowen & wife, 849

3. See *Judicial Sales*, No. 9, 11, 12, 13, and *Omohundro's ex'or v. Omohundro & als.*, 824

CONFESSIONS AND ADMISSIONS.

1. What admission and confessions of a prisoner may be given in evidence against him. The rule in *Smith's case*, 10 Gratt. 734, and *Shiffel's case*, 14 Id. 652, reaffirmed.

Page's case, 954

2. What statements of a prisoner is not competent evidence. See *Evidence*, No. 15, and *Williams' case*, 997

3. On a trial for perjury; when prisoner's own statements are not sufficient to convict him. See *Perjury*, No. 1, and

Schurtz's case, 1025

CONSTITUTION AND CONSTITUTIONALITY OF LAWS.

1. The act of April 18, 1874, Sess. Acts, ch. 214, § 22, p. 243, which forbids the planting of oysters in the waters of the state by any person not a resident of the state, is a constitutional act; not in conflict with either article 1, § 8, or article 4, § 2, of the constitution of the United States.

McCready's case, 985

2. The immunities and privileges secured to all the citizens of the United States by the constitution, are the right to protection by the government, to the enjoyment of life and liberty; to acquire and possess property of every kind; and to pursue happiness and safety. But they do not include the right to

share the property belonging to the people of the state. *Idem*, 985

CONTINUANCE OF A CAUSE.

1. A motion for a continuance of a cause is addressed to the sound discretion of the court, under all the circumstances of the case; and although an appellate court will supervise the action of an inferior court on such a motion, it will not reverse a judgment on that ground unless such action was plainly erroneous.

Harman v. Howe, 676

2. Where the circumstances satisfy the court that the real purpose in moving for a continuance is to delay or evade a trial, and not to prepare for it, then though the witnesses have been summoned, and the party has sworn to their materiality, and that he cannot go safely to trial without them, the continuance should be refused.

Idem, 676

3. Where the circumstances are such as to induce the court to doubt the motives of the party in moving for a continuance, the court may require him to state what he expects to prove by the absent witness; and if the facts which he states he expects to prove by the witness would not affect the result, the motion should be overruled.

Idem, 676

CONVEYANCES—FRAUDULENT.

1. Husband and wife agree in consideration that the husband conveys a house and lot to a trustee for her and her children, she will unite in the conveyance of his other real estate when he shall sell it; and this she does. HELD:

1. To the extent of her dower interest in the husband's real estate, the husband's conveyance to the trustee is on valuable consideration; and to that extent the wife is entitled to satisfaction out of the proceeds of the sale of the house and lot, as against creditors of the husband, for debts contracted at the time of the deed.

Johnston & als. v. Gill & als., 587

2. For debts contracted before the execution of the deed, the proceeds of the sale of the house and lot, above the value of the widow's dower interest in the husband's real estate in the conveyance of which she joined, are liable; but not to debts contracted after the conveyance by the husband to the trustee. Code of 1860, ch. 118, § 2. *Idem*, 587

2. The 7th section of the act of March 3rd, 1866, known as the stay law, suspended the statute of limitations as to suits to set aside fraudulent conveyances. *Idem*, 587

3. In a suit by legatees against an executor for an account of his administration, there are several reports by a commissioner, and at length a decree against the executor for a large amount. In a suit by these legatees against the executor and his grantees in a deed executed after his qualification, to set aside the deed on the ground of fraud, the

decree against the executor and the report on which it was founded are *prima facie* evidence against said grantees, of the indebtedness of the executor; but are liable to be surcharged and falsified by them. *Idem*, 587

4. In November 1873, N conveyed to C, certain real and personal estate, and "all his stock in trade with all accretions and replenishments of said stock," in trust to secure and indemnify certain endorsers upon negotiable notes made by said N. And if the said notes were not paid on demand, C, upon the written request of either of the parties secured, should sell the property according to law. But C was not to be responsible for any of said property until he was ordered to sell the same as aforesaid. N continued in possession and carried on his store for two years, and until all the goods in the store at the time of the deed were sold, and other goods bought with the proceeds. In November 1875, under an execution of P against N, the goods then in store were levied on. **Held**: The deed is fraudulent *per se*, and P is entitled to the proceeds of the sale of the said goods under his execution.

Perry & Co. v. Shenandoah Nat. Bank & als., 755

CORPORATIONS.

1. Corporations are included under the term "persons," in a statute, unless they are exempted by its terms, or by the nature of the subject to which it relates.

Miller's ex'or v. The Commonwealth, 110

Barrett's adm'rs v. Same, 110

2. Corporations are included in the act of 1867, ch. 64, § 3, Sess. Acts 1866-'67, imposing a tax on collateral inheritances.

Idem, 110

3. Though the statute exempts from taxation the property of orphan asylums, and other charitable institutions, the exemption does not include a tax on a devise or bequest of property to such institutions.

Idem, 110

4. See *Forfeiture*, No. 1, and *Silliman & als. v. Fred., Or. & Char. R. R. Co.*, 119

5. Persons dealing with a corporation must take notice of what is contained in the law of its organization; and they must be presumed to be informed as to the restrictions annexed to the grant of power by the law by which the corporation is authorized to act.

Idem, 119

6. In all cases, even in cases of negotiable instruments, a party contracting with an agent must enquire into his authority; and either a state or a corporation is bound only when its agents keep within the limit of their authority. *Idem*, 119

7. The Eastern Lunatic Asylum is a corporation having charge of the asylum at Williamsburg. During the late war the United States forces took possession of Williamsburg, and held it until the end of the war.

Upon their approach to the city the directors and principal officers of the asylum left it, and did not return. In January 1865, Colonel W, who was in command there, sent out a party some miles into the country, and took by force from the farm of G, who had left his home, corn and bacon, which was sent to the asylum, and used for the support of the inmates. After the war G brought trover against the corporation to recover the value of the articles so taken and used. **Held**:

1. By the laws of war such property could not be taken without compensation
1041 *for the purpose of feeding the inmates of the prison.

Eastern Lunatic Asylum v. Garrett, 163

2. The property having been taken without lawful authority, G's title was not divested, and it having been applied to the use of the asylum, he may recover its value from that corporation. *Idem*, 163

3. Trover is a proper remedy in the case. *Idem*, 163

COTERMINOUS OWNERS OF BUILDINGS.

1. As to the rights, duties and liabilities of coterminous owners of buildings. See *Easements, Passim*, and

Stevenson v. Wallace, 77

2. When and how relief will be afforded in equity. See *Equitable Jurisdiction & Relief*, No. 4, and

Berkeley v. Smith & als., 892

COUNTY COURTS.

1. The county and corporation courts have authority to remove a judge of elections for malfeasance in office or gross neglect of duty, though he has not been convicted by the verdict of a jury of any offence.

McDougal v. Guigon, judge, 133

2. For the power of county courts in removing officers who were ineligible to the office. See *Officers*, No. 4, and

Bunting v. Willis, judge, 144

3. J and C brought an action at law against W, in the county court of W, and sued out an attachment, which was served on certain real estate of W. Plaintiffs having recovered a judgment, the court made an order directing the sheriff to sell the real estate attached, and the sheriff having sold to L, the court made an order appointing a commissioner to convey the real estate to L; which was done. In ejectment by W against L to recover said real estate. **Held**: The county court being a court of general jurisdiction, no irregularities or errors in its proceedings can be enquired into in this case; but they are conclusive upon the rights of the parties to the property. *Lancaster v. Wilson*, 624

4. Under the facts of this case, the county court, in which an executor qualified as such, was warranted, in the exercise of the power vested in it by statute, in removing him from his office. See Code of 1860, ch. 132, § 11; Code of 1873, ch. 128, § 18, p. 949.

Reynolds v. Zink, 29

5. There must, of necessity, be vested in the court a very large discretion; and while it is a legal discretion, to be exercised in a proper case, an appellate court ought not to interfere, except in a case where manifest injustice has been done, or where it is plain that a proper case has not been made for the exercise of the powers which the law has specially conferred on the court from which the fiduciary derives his authority.

Idem, 229

CREDITOR'S BILL.

1. Though a creditor files a bill to subject the personal and real estate of his deceased debtor to the payment of his debt, saying nothing of other creditors, yet if he prays that the administration account may be settled, that an account of all debts and liabilities of the estate may be taken, and their priorities fixed, that the amount and value of the real estate may be ascertained, and all other accounts and orders which are proper may be taken and made, this is a creditor's bill.

Duerson's adm'r v. Alsop & als., 229

2. Under such a prayer a decree for a general account may be made; all of the creditors permitted to come in and prove their debts, and an order staying all other suits; and all the assets administered in the one suit.

Idem, 229

3. Although a bill is in behalf of all creditors, it is yet under the control of the party bringing the suit, at least until there is a decree for an account. And if his claim is proved or admitted, and the executor confesses assets, the plaintiff may at the hearing have a decree for payment; and he is not compelled to take a decree for an account.

Idem, 229

4. The bank of P was ruined by the late war; and no officers of the bank have been elected, nor has there been a meeting of the board since April 1865, and it has done no business since; and in fact it had been abandoned and ceased to exist. In April 1866, H and M, suing as well for themselves as for all other stockholders, creditors, depositors, &c., filed their bill against the bank and the president, for a settlement of 1042 its affairs and a distribution of its assets. The court appointed a receiver in the case, and in June 1866 there was a decree for an account. **Held:**

1. It is a proper case for a creditors' suit.

Finney & als. v. Bennett, 365

2. A debtor of the bank purchasing debts due from the bank, after the decree for an account, is only entitled to stand in the shoes of his assignor, and receive his proportion of the assets realized.

Idem, 365

3. In an action by the receiver against a debtor of the bank, the record in the chancery cause is evidence for the plaintiff.

Idem, 365

5. On a creditor's bill against a railroad company, some of the debts proved are

under \$500, but there is one for \$1,117.40 proved before the commissioner; and the decree of the circuit court is in favor of all of them against the company. An appeal by the company brings up all of them; and this court will pass upon all.

The Winch. & Strasb. R. R. Co. v.

Colfert & al., 777

6. See *Practice in Chancery*, No. 16, 17, 18, and *Simmons v. Lyles & als.*, 923

CRIMINAL JURISDICTION AND PROCEEDINGS.

1. In a commitment by a justice, of a person for forging an order, in setting out the order he writes out some words in full, which in the order as set out in the indictment are abbreviated, as Thomas for Thos., 23 cents for 23c., Respectfully for Resp't'y. These are not such variances as require that the accused should be sent back to a justice for examination.

Burress' case, 934

2. To a plea of *autrefois acquit*, upon an indictment for forgery, the attorney for the commonwealth cravesoyer of the former record, and demurs to the plea. The record shows that the indictment was for forging an order for forty-seven dollars and twenty-five cents, and that the order was for forty-seven dollars and twenty-three cents. This was a variance which entitled the prisoner to acquittal on that indictment; and therefore the acquittal on that indictment does not forbid the prosecution of the accused on another indictment for the same forgery, setting out the order correctly.

Idem, 934

3. By the Code of 1873, ch. 195, § 15, p. 1218, a person acquitted by the jury on the facts and merits, on a former trial, may plead such acquittal in bar to a second prosecution for the same offence, notwithstanding any defect in the form or substance of the indictment or accusation on which he was acquitted. But it must appear from the record of the first case, or be averred in the plea and proved, that his acquittal was on the merits.

Idem, 934

4. The act does not make a variance between the indictment and the forged paper immaterial. The accused must be acquitted on that ground, if no other. And if acquitted, the presumption, in the absence of evidence to the contrary, is, that he was acquitted on that ground.

Idem, 934

5. The difference between "account" as set out in the indictment and "act" as written in the order, is not a material variance, which will exclude the order as evidence.

Idem, 934

6. A person examined by a justice for a felony, may be sent on for trial to the circuit court of the county then in session, and may be arraigned and tried at that term of the court.

Page's case, 954

7. On the arraignment of a prisoner on a charge of felony, he files a special plea, to which the attorney for the commonwealth files a special replication; and to this replication the prisoner demurs. The demurrer being overruled, the prisoner cannot rejoin

to the replication without withdrawing his demurrer. *Idem*, 954

8. Upon the trial of the issue on the plea of *autrefois acquit*, an instruction to the jury, that if they believe, &c., that the house named in the indictment for the burning of which the prisoner was arraigned and tried at a previous term of the court, is not the same house, nor the same burning charged in the indictment on which he now stands arraigned, then they must find against the prisoner on the issue joined, is correct. And it makes no difference that the offences charged in the two indictments are described as the burning of the dwelling house of R, if the jury believe that in reality distinct houses and distinct burnings are referred to in the two indictments. *Idem*, 954

1043 *9. On the trial of the issue on the plea of *autrefois acquit*, R, whose dwelling house was in both indictments alleged to have been burned, and who was the principal witness for the commonwealth as to the burnings on both trials, may be asked, and may state whether or not the verdict of the jury on the first trial had relation to the house charged to have been burned in the indictment on which the prisoner was then arraigned. The enquiry is as to a fact, not an opinion. *Idem*, 954

10. Under the act, Code of 1873, ch. 202, § 10, the court may direct jurors to be summoned from another county or corporation for the trial of a prisoner on the plea of *autrefois acquit*, as well as on the general issue. *Idem*, 954

11. Whether it is a case in which a jury should be summoned from abroad, is for the court of trial to determine; and the appellate court will presume that the court of trial acted rightly in the matter unless the contrary plainly appears. *Idem*, 954

12 The issue on the plea of *autrefois acquit* having been found against the prisoner, and he being on his trial on the plea of "not guilty," eight of the jurors who had tried the first issue say on their *voir dire*, that they believed they could give the prisoner a fair and impartial trial on the evidence, notwithstanding anything that they had heard, having no impression on their minds on the question as to the guilt or innocence of the prisoner, which it would require evidence to remove. They are competent jurors. *Idem*, 954

13. On an indictment under the statute for selling liquor to minors without the consent of their parents or guardians, the indictment is for selling to minors whose names are unknown to the grand jury. If it appears from the evidence on the trial that in fact the name of the minor, to whom the liquor was sold, was known to the grand jury, the evidence does not sustain the indictment.

Morgenstern's case, 1018
Jackson's case, 1018

DECREES.

1. A decree which appointed a commissioner to convey land of L, deceased, to the plaintiff K, who was the executor of L, and

trustee under his will of married women and infant children, which land K had sold to W, but there was no conveyance by the commissioner, decreed in a suit by the *cestuis que trust* against K and W, to be void and of no effect as to these *cestuis que trust*.

Walters v. Hill & als., 388

2. A decree giving all the relief asked for in the case, is a final decree and though it may afterwards be modified, directing the amount decreed to be paid to S to be paid to a creditor of S, this does not change its character.

Rogers v. Strother & als., 417

3. What decree of the court of appeals does and does not conclude further enquiry as to the action of an executor, a party in the cause. See *Practice in Chancery*, No. 11, and

Young & wife & als. v. Cabell's ex'or & als., 761

DEEDS.

1. The deed of a deaf and dumb man acknowledged before a justice and recorded; sustained upon the proof that the deed was explained to him, and that he was believed to understand it; and there being no evidence of any fraud on the part of the grantee.

Morrison v. Morrison & als., 190

2. A deed, perfect on its face, cannot be delivered as an escrow to the grantee or obligee, upon a condition upon which it is to be a valid deed. In all such cases the condition is void, and the deed is at once operative.

Miller v. Fletcher & als., 403

3. Parol evidence is inadmissible to prove that a deed perfect on its face, was delivered on a condition. *Idem*, 403

4. As to the validity and proof of deeds, see *Bonds*, No. 7, 8, 9, 10, 11, and 12, and

Board of Supervisors of Washington Co. v. Dunn & als., 608

Harman v. Howe, 676

DESCENTS.

1. B died intestate, leaving as her heirs five children of her deceased son S, six children of her deceased son W, and a grandchild of W, the only child of a deceased daughter of W. B's real estate is to be divided into twelve equal parts, of which the five children of her son S, the six children of her son W, and the grandchild of W, representing her deceased mother, are each to take one part.

Ball & als. v. Ball & als., 325

DOWER.

1. H by his will gave certain lands, which he describes, to his sons J and D; and by another clause, he says if his son J should die without issue, he gives certain part of the land given to him to D; and if both of his sons should die without issue, then all his aforesaid lands should go to his daughters, naming them. J died without children, and the lands went into the possession of D; and D afterwards died without children, leaving a widow, to whom by his will he left all his estate, and

appointed her his executrix. He owned, however, only personal estate. More than a year after D's will was admitted to probate, his widow filed her bill against the executory devisees of H, to recover dower in the land which had come to D under the will. **HOLD:**

1. The widow of D is entitled to dower in the said lands.

Jones & wife v. Hughes & als., 560

2. The Code of 1873, ch. 106, § 4, does not apply to the case, and her right to dower is not barred. *Idem,* 560

2. M devised his lands to his son G; and if G should die without having had lawful issue of his body, the said lands were to be divided among testator's four daughters. G died leaving a widow; but without having had lawful issue of his body. G's widow is entitled to dower in the lands so devised to him.

Medley & als. v. Medley, 568

3. A widow is entitled as against creditors of her husband by lien created since the marriage, to have her dower in real estate assigned in kind, if it can be done, without regard to its effects upon the interest of his creditors. If from the nature of the property, or of the husband's interest in it, the dower cannot be assigned in kind, the court may sell the whole property, and make her a moneyed compensation.

Simmons v. Lyles & als., 922

4. It is error to decree a sale of land at the suit of creditors, until the widow's dower is assigned to her in kind, or it is ascertained that it cannot be so assigned, and a moneyed compensation to her in lieu of her dower has been ascertained. *Idem,* 922

EASEMENTS.

1. Every person has a natural right, *ex jure nature*, to support to his land from the adjacent and subjacent soil.

Stevenson v. Wallace, 77

2. This natural right to support exists in respect of land only, and not in respect of buildings; but the former right remains though houses are built on the land.

Idem, 77

3. But a right to support for buildings may be acquired; and when so acquired it is an easement. *Idem,* 77

4. An easement for support of a building is acquired by grant, which may be express, implied or presumed. And when acquired, it gives the same right of support in respect of the buildings that there was *ex jure nature* in respect of land. *Idem,* 77

5. The grant of such an easement will be presumed from twenty years enjoyment; and will be implied, in the absence of express stipulations, in every case where the owner of adjoining houses, or of houses and lands, severs the property by sale. Rights of support in such cases are mutually granted and reserved between the original owner and first grantee, and the second grantee succeeds to the owner's reserved rights. *Idem,* 77

6 M owns two adjoining lots in R. He conveys one, with a house on it, to R, and

reserves in the deed the right to join the two end walls of the house free of costs. M retained the right, which passed with the land to those who derive title under him, to join his building to that conveyed to R by an independent wall along side of it, or to make it a part of his building by joining only the end walls; and the privilege of joining R's building in the mode indicated in the reservation did not extinguish or impair his implied reservation of support. *Idem,* 77

7. If S, holding title to the second lot, had a building upon it which was supported by the land and building conveyed to R for twenty years or more, with the knowledge of the owner thereof, prior to a fire which destroyed both buildings, a grant of the easement of support will be presumed; and said easement was not lost or extinguished by the destruction of S's building, but adhered to the building S erected on its ruins; and any right of support which S derived from the reservation in the deed to R, express or implied, was not extinguished by the destruction of the old building, but survived and adhered to the new one. *Idem,* 77

8. The mere fact of contiguity of buildings imposes an obligation upon the owners to use due care and skill in removing the one building not to damage the other, even though no right to support has been acquired. *Idem,* 77

9. But if in such a case S is entitled to the support of her building by the foundation wall and land of W, claiming under R, W cannot withdraw the support without being liable in damages for the injury which occurs to S thereby. *Idem,* 77

10. In such a case S is not bound to protect her building by providing other supports, in place of the supports which W was removing, though she may have had notice that W was removing the supports. *Idem,* 77

11. If the house of S was badly constructed, and its foundation and materials were so defective that the fall could not have been arrested by timely precautions when W was excavating upon his lot in order to build upon it, these facts would not constitute a bar to the action of S against W, so as to defeat it; but they would be proper to be considered by the jury upon the question of damages. *Idem,* 77

12. Though W contracted with an experienced and competent excavator, of good standing in his business, to make the excavations upon his lot, and gave notice thereof to S in time to enable her to adopt precautions for the protection of her adjoining building, W is still liable for any damage that may have resulted to S's building in consequence of negligence or unskillfulness in the making of said excavation by reason of leaving insufficient support to S's premises. *Idem,* 77

13. See *Equitable Jurisdiction & Relief*, No. 4, and

Berkeley v. Smith & als., 892

ELECTIONS.

1. The county or corporation courts have authority to remove a judge of elections for malfeasance in office, or gross neglect of duty, though he has not been convicted by the verdict of a jury of any offence.

McDougal v. Guigon, judge, 133

EQUITABLE JURISDICTION AND RELIEF.

1. When legatees may have a decree against the sureties of a deceased executor, before proceeding against his heirs. See *Executors & Administrators*, No. 1, and

Lacy v. Stamper & als., 42

2. QUERE: If a creditor, whose debt is not yet due, may bring a suit in equity to attach the property of an absent debtor, or to set aside a deed as fraudulent.

Devries & Co. v. Johnston & Wolfe & al., 805

3. In paying his ward's expenses for board and tuition, the guardian expended the principal of her personal estate. If a court of equity would have authorized the expenditure, if application had been made to the court for authority to do it before it was done, a court of equity may approve and confirm it after it is done.

Barton v. Bowen & wife, 846

4. J by his will in 1845 gives to his son S a storehouse and lot, together with the east side or half of the privy situate on the adjoining lot west; and by a codicil he gives to his son W the said adjoining lot; and in 1848 W sold his lot to B to subject to the rights of the owner of the lot given to S, to the east side or half of the privy. The storehouse of S extended back 70 feet to his back line; that of W extended only about 55 feet, leaving a vacant space, on which the privy was located; and there was a door in the side of S's house entering into this vacant space with lights in the door. B being the tenant of S, and on his death, of his children, shut up the said door, extended his storehouse to his back line, one story high, with a flat roof, and built a privy upon the roof. HELD:

1. The title of the children of S to the door in the wall of their store and to the east half of the privy being unquestionable, they may without proceeding at law to establish their right, go at once into equity to compel the removal of the obstructions.

Berkeley v. Smith & als., 892

2. If a just compensation may be made to the plaintiffs for the injury
1046 *done to their property and rights, the court may ascertain and decree such compensation, instead of having the obstruction removed. *Idem,* 892

5. When a court of equity may appoint a receiver to take possession of an infant's estate, from the hands of the guardian, and may make a decree against the guardian for money of his ward in his hands without an account. See *Guardian & Ward*, No. 2, 3, and
Sage & al. v. Hammonds, 651

6. A creditor by judgment of a bankrupt, who proves his debt in the bankruptcy proceedings, and takes an active part in these proceedings, cannot afterwards go into a state court to subject property sold by the assignee of the bankrupt, and the proceeds distributed in that proceeding, to satisfy his judgment, on any ground of error which might have been corrected in the bankrupt court, or by appeal from the order or decree of that court.

Spilman v. Johnson, 33

7. A creditor of a bankrupt having a lien on his real estate, has two courses open to him, either of which he may adopt. He may decline to appear in the bankrupt court; and he will be unaffected by any proceeding of that court; unless, indeed, the proper steps are taken to sell the estate clear of all incumbrances; or he may elect to proceed in the bankrupt court, prove his debt there, and rely upon his security. *Idem,* 33

8. If the creditor elects to proceed in the bankrupt court, this is a waiver of his right to institute any suit or proceeding in law or in equity, which is in any way inconsistent with his election to obtain satisfaction of his debt under the bankruptcy proceedings. *Idem,* 33

ESCHEATS.

1. H, of foreign birth, died in 1867, seized and possessed of real estate in R, intestate and without any known heirs. The real estate of which he died seized vested in possession in the state without office found, or other proceeding at law.

Sands v. Lynham, escheator, 291

2. After the death of H, G sued his curator, S, for a large debt, alleged to be due from H, and there was a judgment by default. G then sued S, the curator, in equity, to subject the real estate of which H died seized, for the payment of the judgment. There was a decree for a sale and a sale in pursuance of the decree, when J became the purchaser of a part of the property. HELD:

1. The state not having been a party to the suit, the decree and sale are a nullity as to her, and gave J no title to the property. *Idem,* 291

2. If J was a bona fide purchaser, he is entitled to be substituted to the rights of the creditor G; and upon showing that the claim of G is just; to have the real estate subjected to its payment. *Idem,* 291

3. After the death of H, an inquisition of escheat was executed in 1868; and the jury, after finding the death of H without known heirs, seized of the real estate, stated that certain parties were in possession claiming under said sale. The escheator returned the inquisition in June 1869, when the property was advertised as escheated. J then filed his petition in the proper court, stating he held the property under his purchase, and asking for an injunction. The escheator and register were made parties; but before the escheator answered, the court made a decree perpetuating the injunction. The escheator then filed a bill to review the decree. HELD:

1. It was error to make a decree passing upon the rights of the purchaser of the property and perpetuating the injunction, without the answer of the escheator.

Idem, 291

2. As the title of the state does not depend upon the inquisition, it cannot be affected by any irregularities in the proceedings of the escheator. *Idem*, 291

3. The decree of the court was a decree by default; and the bill of review by the escheator may be treated as a petition for a rehearing of the decree. *Idem*, 291

4. But it was a proper case for a bill of review. *Idem*, 291

ESTATES.

1. H, of foreign birth, died in 1867, seized and possessed of real estate in R, intestate and without any known heirs. The real estate of which he died seized vested in possession in the state without office found or other proceeding at law.

Sands v. Lynham, escheator, 291

1047 *2. The real estate of which H died seized is liable for his debts, and a purchaser under a decree not binding the state, is entitled to be substituted to the rights of the creditor, upon his showing that the debt for which the real estate was sold was a valid debt against H. *Idem*, 291

3. See *Escheats*, No. 3, and *Idem*, 291

ESTOPPELS.

1. When sureties in a bond are estopped from contesting their liability under it. See *Injunctions*, No. 4 and 5, and

Harman v. Howe, 676

See *Bonds*, No. 8, and *Supervisors of Washington Co. v. Dunn & als.*, 608

EVIDENCE.

1. In controversies touching testamentary capacity, as a general rule the evidence of witnesses, unless founded on fact, except in the case of experts, is entitled to but little weight.

Young, by &c. v. Barner & als., 96

2. The evidence of the attesting witnesses is an exception to this rule. But if an attesting witness to a will attempts to impeach its validity, though his evidence will not be positively rejected, it is to be received with the most scrupulous jealousy. *Idem*, 96

3. A witness as to the handwriting of C, states that some thirteen years previous, C dug a well for him, and drew several orders on him for money, which he paid, and which C recognized afterwards. He never saw C write, but from his recollection of these orders, he believes the paper to be in the handwriting of C. This is competent testimony.

Cody v. Conly & als., 313

4. In a creditor's suit against a bank, a receiver has been appointed, and there has

been a decree for an account. In an action by the receiver against a debtor of the bank, the record of the chancery cause is evidence for the plaintiff.

Finney & als. v. Bennett, 365

5. Parol evidence is inadmissible to prove that a deed, perfect on its face, was delivered to the grantee on a condition.

Miller v. Fletcher & als., 403

6. In an action for injuries involving the loss of an arm, plaintiff may introduce evidence to show what must be the effect of his injuries in disqualifying him from pursuits requiring two hands.

Norfolk & Pet. R. R. Co. v. Ormsby, 455

7. In a suit by legatees against the executor, for an account of his administration, there are several reports by a commissioner, and at length a decree against the executor for a large amount. In a suit by these legatees against the executor and his grantees in a deed executed after his qualification, to set aside the deed on the ground of fraud, the decree against the executor and the report on which it is founded are *prima facie* evidence against said grantees of the indebtedness of the executor; but are liable to be surcharged and falsified.

Johnston & als. v. Gill & als., 587

8. On a motion against a sheriff and his sureties for the county levies he had failed to account for, the report of the clerk, who had been directed by an order of the county court to settle the sheriff's account, though made with the sheriff without notice to the sureties, is competent evidence against them to show the amount for which the sheriff is indebted. If they had notice, as the statute provides, the report would be conclusive upon them; without notice it is *prima facie* evidence of the amount of the sheriff's indebtedness.

Board of Supervisors of Washington Co. v. Dunn & als., 608

9. There is a lease under seal to W of certain property for five years, in which he contracts to make repairs upon it. At a subsequent period the lessor and W agree in writing what repairs W shall make upon the property; but in neither of these papers is anything said as to the time when the repairs shall be made. W, by verbal contract, sells his lease to C. In a contest between W and C, parol evidence is inadmissible to prove that W contracted verbally to make the repairs at a time before the end of his lease.

Colhoun & Cowan v. Wilson, 639

10. When the report of a commissioner settling an executor's account is not evidence against devisees. See *Marshaling Assets*, No. 5, and

Pugh & al. v. Russell & als., 789

11. On an indictment for forging an order, the difference between "account" as set out in the indictment, and "act" as written in the order, is not a material variance which will exclude the order as evidence. *Burress' case*, 934

12. In such a case, a genuine order by the

same drawers upon the same party, which had been paid to the accused, as the order which the accused was charged with having forged, is not competent evidence for the accused. *Idem*, 934

13. A person who states that he is perfectly familiar with the handwriting of the accused, and states the circumstances which made him so familiar with it, expresses the confident opinion from his knowledge of the accused's handwriting, that he was incapable of writing the order. This opinion is incompetent testimony, and properly excluded. *Idem*, 934

14. What admissions and confessions of a prisoner may be given in evidence against him. The rule in *Smith's case*, 10 Gratt. 734, and *Shifflet's case*, 14 Id. 652, reaffirmed. *Page's case*, 954

15. W was indicted for stealing \$150, the money of S. On the trial it was proved that J, a detective, arrested W, who made a confession, which was made under a promise, and was excluded. In this confession he directed J to go to certain gamblers and get the money back from them. J sent for the gamblers named, told them what W had said, and they paid over to J for S \$104; though one of them protested that W had not been at his house, and the others denied that he had lost the money claimed with them; the balance of the money, \$46, was paid over by the father of W. **Held:** It not being proved that the money paid to J was the same lost by S, the statement of W to J, and of what passed between J and the gamblers and the father of W, is not competent evidence. *Williams' case*, 997

EXCEPTIONS—BILL OF.

1. In an action at law which is submitted to the judgment of the court without a jury, the court renders a judgment, to which one party excepts; and it being near the end of the term, the court gives the counsel time until the first day of the next term to prepare the bill of exceptions; but the judgment is entered. The court cannot give such leave, and the bill of exception cannot be made a part of the record. *Winston v. Giles*, 530

2. Even if the court had authority to give the time until a day certain in the next term to prepare the bill of exception, if the bill of exception is not tendered to the court on that day it cannot afterwards be received. *Idem*, 530

3. In cases where it may be important to give time until the next term to prepare the bill of exception, the case should be kept open, and the judgment should not be entered until the next term. *Idem*, 530

EXECUTIONS.

1. An execution went into the hands of J, when he was deputy sheriff of F. He became sheriff, and afterwards he received a sum of money in part payment of the execution from the debtor, but he did not return the execution. Neither J nor the debtor can say posi-

tively whether the execution was or was not levied, or whether J received the money as deputy or as sheriff. After the great lapse of time, the court will presume that the execution was levied by J before the return day, and that he received the money as deputy, so as to entitle the debtor to a credit for the amount paid. *Paine, surv. &c. v. Tutwiler & als.*, 440

EXECUTORS AND ADMINISTRATORS.

1. S, of New Kent county, died in 1856, and H qualified as his executor and received as a part of his estate bonds executed without security to S, the obligors being then solvent. H did not collect the money due on these bonds; and on his death in 1862, they were turned over by his administrator to C, who had qualified as administrator *de bonis non* of S, the obligors still being solvent. C sued on the bonds, but owing to the state of things in the county during the war judgments could not be recovered upon them, and by the results of the war the obligors became insolvent. **Held:**

1. Where there are several successive administrations on the same estate, and debts due the estate might have been collected by each of the personal representatives of said estate, by the use of due diligence, but was collected by none of them, and was lost by the negligence of each and all of them; whilst *all of them are liable for said debts, their liability is in the inverse order of their qualifications as such personal representatives. *Lacy v. Stamper & als.*, 42

Crumph v. Stamper & als., 42

2. H might have collected these debts, and his estate and his sureties are responsible for the loss of them. *Idem*, 42

3. C having used due diligence to collect them after they came into his hands, and having failed to collect them owing to the condition of the county, is not responsible for them. *Idem*, 42

4. Though where an estate is to be invested to await a distribution at a distant day, a bond executed to the testator well secured on real estate, or even secured by undoubted personal security, may be continued as an investment by the personal representative, this cannot be done with a bond without security either real or personal; especially where there is a large amount of interest due upon it at the death of the testator. *Idem*, 42

5. Under the circumstances of this case the legatees of S were not bound to proceed against the heirs of H before they could have a decree against his sureties; and one decree against the administrator of H and his sureties that they should pay the amount found due from H to S's estate, into bank to the credit of the cause is not erroneous. *Idem*, 42

6. Under the circumstances interest disallowed from the 17th of April 1861 to April 10th, 1865. *Idem*, 42

7. An administrator who qualified as such in New Kent county in 1862, not held

liable for failing to sue in that county during the war, in cases in which he knew there would be defences; there having been but one court held in the county during the war, and the enemy either encamping or passing through it constantly.

Idem, 42

2. Testator dies in 1859, and directs all his estate to be sold as soon as convenient. The executor has the personal property appraised on the 21st of November, and sells it the next day. Four slaves, appraised at \$3,700, are sold for \$4,955, and bought by one of the legatees living in Missouri. The legatee was not present, but the executor on his request bought them for him. The purchaser executed his bond for the price, but without security; and the executor retained possession of the slaves until they were freed by the results of the war. The executor and his securities must account for the slaves at the price for which they were sold.

Boaz's adm'r v. Hamner & als., 382

3. It is always the duty of a personal representative to demand and take good security of every purchaser on credit of property of the decedent, wherever the purchaser may reside, and whatever may be his pecuniary circumstances.

Idem, 382

4. R dies in 1860, and by his will directs his executor to sell his land in three parcels at public auction, upon such terms as he deems best for the interest of testator's legatees. These legatees are infants. In November 1860 the executor sells the lands on a credit of six and twelve months, taking bonds from the purchasers, and retaining the title. The executor being in the army during the war, the purchasers paid the purchase money to his agent during the years 1863 and 1864, in confederate currency. **Held**: The executor was guilty of a *devastavit* in receiving the purchase money in the then depreciated currency; and the purchasers were parties to the *devastavit*; and they will be required to take the lands at their value at the time of the decree, or the lands will be again sold.

Tosh & als. v. Robertson & als., 270

5. When the court appointing a fiduciary, or in which he qualifies as such, may remove him from his office. See *County Courts*, No. 4, and *Reynolds v. Zink*, 29

EXECUTORY DEVISES.

See *Limitation of Estates*, No. 1, and *Stone's ex'or v. Nicholson & als.*, 1

FORFEITURES.

1. By statute the charter of a railroad company is extended to enable it to complete its road; and it is authorized to issue its bonds for \$1,200,000, and sell them, and secure them by deed of trust upon all the property and franchises of the company. And the 1050 act provides that unless the road is completed to a certain point by a certain day, the company shall forfeit to the state their corporate franchises and rights, together with their road track and road bed,

and all works and materials thereon, or other property; the state to hold the same as trustee for certain parties named. The company accepted the charter, issued \$480,000 of bonds, and executed a deed of trust upon its property and franchises to secure them. The company failed to complete the road to the point fixed by the time prescribed, or to expend any money on its construction; and the state proceeded to declare the charter forfeited, and to take possession of the road and the other property and franchises of the company, and to turn it all over to the *cestuis que trust*; who organized another company. Persons, one of whom was the president of the company and all were principals in the company when the said act was passed, or were connected with them, claimed that they were the holders of \$323,500 of the bonds issued, and filed their bill to enforce the deed of trust. **Held**:

1. Under the provision for the forfeiture of the charter, the state took the property and franchises of the company free from the trust.

Silliman & als. v. Fred., Or. & Char. R. R. Co., 119

2. Upon the failure of the company to complete the road to the point fixed by the day prescribed, the forfeiture became absolute and complete; and the state having entered and elected to hold under the forfeiture, no inquisition or judicial proceeding or inquest or finding of any kind was required to consummate the forfeiture.

Idem, 119

3. From the relation of these plaintiffs to the company and each other, they must be held to have had notice of the terms of the act, which authorized the execution of the deed of trust under which they claim; and as no money was expended on the road, or, as they claim, paid for interest, the strong presumption is that the company received no money for the bonds. The plaintiffs are not, therefore, innocent purchasers for value, and holders of said bonds without notice of the provisions of said act.

Idem, 119

2. What does not constitute a forfeiture of land sold to a turnpike company upon a condition that it should forever be kept open and unobstructed as a public highway, and for no other purpose. See

Alex. & Wash. R. R. Co. v. Chew & wife & als., 547

GUARDIAN AND WARD.

1. It is the duty of a guardian, whose powers as such have been revoked, to account to his wards, or to his successor as guardian, if there be one, for their estate, including evidence or claim which may have come to his hands; and if after such revocation he collects any money on account of any such claim, he and his surety as guardian are accountable therefor to the parties entitled thereto; at least provided such payment be made in good faith by a person who is not

informed of such revocation, and who believes when he makes it, that the party claiming to be guardian is so in fact, and has authority as such to receive the money.

Sage & al. v. Hammonds, 651

2. In a bill by infants against their guardian for an account and payment, it being shown in the cause that the guardian is wholly unfit for the office, the court may appoint a receiver to collect and receive the property of the wards, and require the guardian to pay over to him the money of his wards in his hands, and to transfer and deliver to him the property of the infants. *Idem*, 651

3. Where the property of the infants consists of a single claim, and the amount received upon it by the guardian is ascertained, and there is no doubt as to the amount due from the guardian to the wards, the court may decree against him for the amount, though no account has been taken.

Idem, 651

4. The mother of G in her will expressed an earnest wish that her daughter G might be educated so as to fit her for teaching; and this was the wish of G's family. Accordingly B, the guardian of G, kept her at school during the years 1860, 1861, 1862 and 1863, and paid the expenses of her board and tuition by moneys collected upon *ante-bellum* debts, a part of it his own, and a part of her estate. In settling the guardian's account, his payments are not to be scaled as of the dates of the payments; but he will be allowed what would have been a just charge in good money for the board and tuition. In this case 1051 he was allowed what *he paid for the years 1860 and 1861, and \$350 a year for the years 1862, 1863.

Barton v. Bowen & wife, 849

5. In paying the ward's expenses for board and tuition, the guardian expended the principal of the ward's personal estate. As a court of equity would have authorized the expenditure if application had been made to the court for authority to do it before it was done, a court of equity will approve and confirm it after it is done. *Idem*, 849

HOMESTEADS.

1. A householder dying, leaving a widow, without having had a homestead assigned to him in his lifetime, his widow remaining unmarried, is entitled to claim the same and have it assigned to her.

Hatorff v. Welford, judge, 356

HUSBAND AND WIFE.

1. What is not such a reduction of the wife's estate into possession by the husband as will entitle his creditors to subject it to the payment of his debts, to the exclusion of the wife's right to a settlement out of it.

White by &c., v. Gouldin's ex'ors & als., 491

2. The husband is insolvent, and has a wife and seven children. She is entitled to have the whole of her estate not reduced into pos-

session by the husband, or a part of it, as may be deemed reasonable, settled to her separate use. *Idem*, 491

3. Husband and wife agree, in consideration that the husband convey a house and lot to a trustee for her and her children, she will unite in the conveyance of his other real estate when he shall sell it: and this she does. **Held:**

1. To the extent of her dower interest in the husband's real estate, the husband's conveyance to the trustee is on valuable consideration, and to that extent the wife is entitled to satisfaction out of the proceeds of the sale of the house and lot, as against the creditors of the husband for debts contracted at the time of the deed.

Johnston & als. v. Gill & als., 587

2. For debts contracted before the execution of the deed, the proceeds of the sale of the house and lot, above the value of the wife's dower interest in the husband's real estate in the conveyance of which she joined, are liable; but not to debts contracted after the conveyance by the husband to the trustee. Code of 1860, ch. 118, § 2. *Idem*, 587

3. The agreement between the husband and wife may be proved by parol evidence. *Idem*, 587

4. E is possessed of an estate in fee in land, and marries P, and they have two children born of the marriage. Upon a bill by P, the marriage is dissolved for the adultery and desertion of E; but the decree directs nothing as to the property of the parties. Upon the dissolution of the marriage, all the husband's claims to the wife's land, which depended on the marriage, were extinguished, and she is entitled to the possession of her land. *Porter v. Porter*, 599

5. See *Trusts & Trustees*, No. 5, and *Thurmond v. Wood's ex'ors*, 727

INFANTS.

1. When the deed of infant, married woman, may be set aside by her; and whether she is liable to refund so much as consumed by her. See *Trusts & Trustees*, No. 11, and

Bedinger v. Wharton & als., 857

2. Whether a contract is executed or executory, it cannot be avoided by an infant on the ground of his infancy, after attaining lawful age, without restoring anything which may have been received by him in consideration of the contract, and which may remain in his hands on his arriving at such age.

Idem, 857

3. When a contract is executory merely, it can be avoided by the infant after attaining lawful age, without restoring anything which may have been received by him in consideration of the contract, and which may have been consumed by him during infancy, or may not remain in his hands on his arrival at lawful age. *Idem*, 857

4. **QUÆRE:** If this last stated principle applies to the case of an executed contract.

Idem, 857

5. See *Guardian & Ward, passim*, and
Gage & al. v. Hammonds, 651
Barton v. Bowen & wife, 849

INJUNCTIONS.

1. T files a bill to enjoin V from cutting timber on a piece of land which T 1052 *claims to be his, and of which he claims to be in possession, and which was adjudged to be his by the award of an arbitrator to whom the question of title was submitted by T and V. V answers denying T's title and possession, and insisting that the award was invalid, because the arbitrator was induced by T to receive evidence and decide the case in V's absence: and this is sustained by the arbitrator. **Held:**

1. The award is invalid; and T showing no other evidence of title, the injunction must be dissolved. *Tate v. Vance*, 571

2. V not claiming any relief in the case but a dissolution of the injunction and a dismissal of the bill, may rely upon the invalidity of the award in his answer; and it is unnecessary to file a cross bill for the purpose of avoiding it. *Idem*, 571

2. A bond is given upon an injunction to a judgment for money, and in the penalty it is said "in the just and full sum of seven hundred and seventy-six lawful money of Virginia." The word "dollars" is obviously left out by mistake, and the bond will be treated as if the word was in it.

Harman v. Howe, 676

3. The clerk states at the foot of an injunction bond, that it was signed, sealed and delivered in the presence of the court, and it is dated and endorsed as filed on the 23rd October, on which day it appears from the records of the court, that it was not then in session. **Held:**

1. The statute does not require the bond to be executed in the presence of the court, but before the clerk of the court in which the judgment was. Code, p. 1128, s. 20. Though its being given before the court, if it was, cannot vitiate it.

Idem, 676

2. Even if it was not in fact taken before the court, though certified by the clerk at the foot of it so to have been, the bond would not thereby be vitiated, if in fact given before the clerk, as it was.

Idem, 676

3. That the court did not sit on the day of the date of the bond, does not show that it was not executed in the presence of the court; especially when the clerk has certified that it was so executed. It may have been misdated, or executed on a day different from that on which it bears date.

Idem, 676

4. The judge granting an injunction to a judgment for money, endorses on the bill: "Injunction granted on the usual terms," without stating on what terms it was to become operative. The injunction bond is given in a penalty about double the amount of the judgment, and is in other respects as directed by the statute. **Held:**

1. The penalty being about double the amount of the judgment, and that being the amount of the penalty generally prescribed in such cases, this would seem to be a compliance with the order, and the order a compliance with the law, which directs that the judge shall prescribe the amount of the penalty. *Idem*, 676

2. But however that may be, the obligors in the bond are estopped from denying that the penalty of the bond conformed to the direction of the judge who awarded the injunction. *Idem*, 676

3. In this case it appears that the bond was executed in the presence of the court, which thereby received and sanctioned the bond, including the penalty. And this had at least as much effect in fixing the penalty of the bond as if the amount had been prescribed in the order awarding the injunction. *Idem*, 676

5. An injunction bond is executed by the obligors before the clerk of the court, and in the presence of the court; and it having been accepted and acted on as their bond, the surety is estopped from setting up the defence, that by express agreement with his principal he signed said bond upon the express condition that another person named should sign it, and that this fact was announced to the clerk at the time the said surety signed it; but the obligee knew nothing of such agreement. *Idem*, 676

INSURANCE COMPANIES.

1. Insurance companies doing business in this state, how far to be considered as domiciled here. See *Removal of Causes*, No. 1, and

Continental Ins. Co. v. Kasey, 216

1053 *INTEREST.

1. Under the circumstances interest disallowed from the 17th of April 1861 to the 10th of April 1865.

Lacy v. Stamper & als., 42

2. A creditor living within the union lines and the debtor within the confederate lines, the debt is not to bear interest during the war.

Walker v. Beauchler, 511

3. A person residing in Virginia contracted debts here, and on the breaking out of the late war he went north, and there remained until his death in 1865. His creditors who remained in Virginia, are not entitled to interest upon their debts during the war.

Fred & al. v. Dixon & als., 541

4. In such a case, the fact that the debtor had conveyed land in Virginia in trust, 1st, to pay all his debts, and 2d, to the separate use of his wife, does not entitle his creditors to interest on their debts during the war.

Idem, 541

5. When and how interest is to be charged upon advancements. See *Advancements*, No. 1, and

Cabells v. Puryear & als., 902

JOINT TENANTS.

1. B and C are joint tenants of a furnace, forge, and a large quantity of land derived from their father, and B, who had conducted the business for some years in the lifetime of his father, continues to carry it on with the assent of his sister C, without any contract with C. He must account to C for her share of the profits.

Newman v. Newman, 714

2. Though there were efforts between B and C to agree upon a rent which should be paid by B to C for her half of the property, and B seems to have thought that his proposition was acquiesced in, and did not keep such accounts as he should have kept to enable him to render the account of profits to her, yet C is entitled to have an account taken, and to have her share of the profits.

Idem, 714

3. B having been allowed all his expenses in carrying on the business, including \$1,500 a year for his services, and interest on his capital employed in it until it became self-sustaining, and then being allowed by the decree three-fifths of the net profits, he at least cannot complain of the decree.

Idem, 714

JUDGMENTS.

1. B brings an action of debt against F and M as late partners and makers of a negotiable note, and C and G as endorsers. The case stands on the office judgment docket at the next term of the court, when F files his plea of *nil debet*, which is sworn to; and on the motion of B, by his counsel, the cause is discontinued as to F. The other parties not appearing, there is a judgment by default against them. **HOLD:**

1. The judgment is a valid judgment against M, C and G. See Code of 1860, ch. 177, § 19.

Muse & als. v. Farmers Bank of Va., 252

2. The discontinuance is not a *retraxit*. A *retraxit* can only be entered by the plaintiff in person, and in open court.

Idem, 252

2. A summons in debt is served on a defendant on the 3d of February, and the judgment by default becomes final on the 3d of March. Under the statute the day of the service of the process may be counted, and therefore thirty days had elapsed between the service of the process and the judgment, and it is a valid judgment.

Turnbull, for &c. v. Thompson & als., 306

3. In debt against four obligors, one of whom is the high sheriff, the process goes into the hands of his deputy, who serves it upon him as well as the other three, to which he makes no objection; and there is a judgment by default against all of them. The process is properly served, and the judgment is valid.

Idem, 306

4. There is a judgment in debt by default

against four defendants in March 1862. In August 1872 one of the defendants moves the court to set it aside, on the ground that at the time of the judgment he was in the military service of the country. It appears, however, that at the time of the service of the process, and at the time the judgment became final, he was at home on furlough. The exemption of the defendant was a personal privilege, of which the court could not *ex officio* take notice; and the objection should have been taken during the pendency of the proceedings. *Idem*, 306

5. A judgment of a court of record cannot be impeached in another action, 1054 *except for want of jurisdiction in the court, or fraud in the parties or actors in it. *Lancaster v. Wilson*, 624

6. See *Marshaling Assets*, No. 1, 3, 4, 6, and

Pugh & al. v. Russell & als., 789

7. See *Judicial Sales*, No. 13, and *Omohundro's ex'or v. Omohundro & als.*, 824

8. What a final judgment in a controversy concerning the establishment of a road. See *Roads*, No. 1, and

Jeter v. Board & als., 910

JUDICIAL SALES.

1. In a bill by creditors to set aside a deed as fraudulent, which is done, there was a decree for the sale of the land and a sale before an account of the debts was taken. The sale of the land will not be set aside upon the objection of some of the creditors who came in after the decree, made years after the sale, when it is obvious that the land would not sell for as much as it had sold for before, and which was more than some of these creditors had expressed their willingness to take for it.

Wallace's adm'r & als. v. Treagle & als., 479

2. Whether the court will confirm a sale made by commissioners under its decree, must, in a great measure, depend upon the circumstances of each case. It is difficult to lay down any rule applicable to all cases; nor is it possible to specify all the grounds which will justify the court in withholding its approval. *Brock v. Rice & als.*, 812

3. In such a case, if there is reason to believe that fraud or mistake has been committed to the detriment of the owner or purchaser, or that the officer conducting the sale has been guilty of any wrong or breach of duty to the injury of the parties interested, the court will withhold a confirmation of the sale. *Idem*, 812

4. In such a case either party may object to the report of the commissioner, and the purchaser himself, who becomes a party to the sale, may appear before the court and have any mistake corrected. *Idem*, 812

5. The court in acting upon a report of sale, does not exercise an arbitrary discretion, but a sound legal discretion in the interests of fairness and prudence, and with a just regard to the rights of all concerned. *Idem*, 812

6. An auctioneer or crier making a sale, cannot properly act for himself or any other person in bidding for the property.

Idem, 812

7. A case in which the court refused to enforce a sale against a purchaser, on account of the misconduct of the life tenant and auctioneer, though the conduct of the commissioners was unexceptionable. *Idem*, 812

8. The sale being set aside as to the life tenant must be set aside *in toto*, though some of the remaindermen are infants.

Idem, 812

9. R, a commissioner selling lands in 1860, under a decree, is guilty of a breach of trust in receiving confederate currency from the purchaser in payment of his bonds in 1863.

Omohundro's ex'or v. Omohundro & als., 824

10. Such a commissioner, who is directed to file the bonds with his report, has no authority to collect them. *Idem*, 824

11. A commissioner who, in April 1860, is appointed to sell lands, is guilty of a breach of trust in selling them in 1863 for confederate currency. *Idem*, 824

12. S, a brother of the commissioner, who is one of the parties entitled to the land and its proceeds, induces R to collect the purchase money of the land sold, and to sell the balance, both to be received in confederate currency, and to lend it to him. S is a party to the breach of trust by R, the commissioner, and is responsible for it. *Idem*, 824

13. Upon a writing under seal given by S for the return of the money, R, in 1866, brings an action against the executor of S, and recovers a judgment, which, upon appeal, is reversed, and it is held that the debt should be scaled, and the cause is sent back for a new trial. On a bill by the other parties interested in the land sold. **Held**:

1. If the judgment of the court of appeals was final, these plaintiffs, not having been parties to the cause, would not be concluded by it. *Idem*, 824

2. The cause having been sent back, the judgment was not final. *Idem*, 824

1055 *3. Though upon the face of the paper the court might correctly hold that the contract was a confederate contract, and should be scaled, the facts connected with the transaction may, and do show, that it should not be so treated: and these facts may be received in evidence, and the bond construed by the light of them. *Idem*, 824

JURISDICTION OF COURTS.

See *County Courts, passim*.

JURORS.

1. Under the act, Code of 1873, ch. 202, s. 10, the court may direct jurors to be summoned from another county or corporation for the trial of a prisoner upon the issue of *autrefois acquit*, as well as on the general issue. *Page's case*, 954

2. As to the competency of jurors, see *Criminal Jurisdiction and Proceedings*, No. 12, and *Idem*, 954

LANDLORD AND TENANT.

1. N leased of D a house for one year commencing January 1st and ending December 31st, 1871. In March M, without the assent of D, took N's lease, and purchased his furniture on the leased premises, and having borrowed the money to pay for it from C, conveyed it in trust to secure his debt to C. M paid the rent to D, and at the end of the year held over; and in March 1872 he, without D's assent, turned over the house and furniture to P, who paid the rent to D until July or August. In the latter part of the year P failed to pay the rent; whereupon D sued out a warrant of distress, which was levied upon the property conveyed to secure C. **Held**: The holding over by M in 1872, was under a new lease; and the lien in favor of C having been upon it when the lease commenced, C's lien is valid against D's lien for the rent of 1872. See Code of 1860, ch. 138, ss. 11 and 12.

City of Richmond, for &c. v. Duesberry & als., 210

2. In November 1868 the W. S. Springs Co. by deed signed by both parties, lease to W their springs property for five years, beginning the 1st of January 1869; and W is to make repairs upon the property. On the 22nd of April 1873, the parties agree in writing what repairs W is to make. On the same day W enters into a contract with C to lease C one moiety of the property, furniture, &c. In June by a verbal contract made between W and C, C acquired the whole of W's lease, and purchased the furniture on the premises for \$13,000. In none of these written contracts was anything said as to when W should make the repairs. In October 1873, C executed his note to W for \$5,379.75, part of the \$13,000 he was to pay for the lease and furniture. W sues C on this note, and C files a special plea of failure of consideration, on the ground that W had contracted verbally with C to make the repairs in time for the springs season of 1873, and had failed to do it; whereby C was injured to the amount of \$3,000. **Held**:

1. No time having been specified in the contracts between the springs company and W, as to when the repairs should be made, W has to the end of his lease to make them.

Colhoun & Cowan v. Wilson, 639

2. Parol evidence is inadmissible to prove a contract of W to make the repairs in time for the springs season of 1873; and this applies to such evidence intended as foundation for proof of a parol contract. *Idem*, 639

3. The fact that the note sued on was executed in October 1873, when the springs season was nearly over, is a strong circumstance, if not conclusive, to prove that the claims which grew out of the transactions in June were then waived or settled between the parties, and cannot be asserted by way of defense to an action on the note. *Idem*, 639

4. As W had by his written contract with the springs company until the end of his term to make the repairs, a verbal agreement to make them at an earlier period is inconsistent with his written contract, and therefore does not come within the exception to the general rule: That parol evidence may be introduced when it establishes an agreement additional to, but consistent with, the written agreement.

Idem, 639

5. The fact that the time allowed to W to make the repairs is fixed by the law governing his contract, does not affect the general rule as to the admissibility
1056 *of parol evidence to vary or contradict the written contract. *Idem*, 639

LEGACIES AND LEGATEES.

1. I by her will gives to her niece B, for her life, the interest of a debt of £500. She then says: After the death of B, I gave the said sum of money to L, in trust for C, daughter of E; and I request that it be invested in bank stock, and applied by L for the benefit of C, as he shall think proper. *Item*: In case the said C shall die under the age of twenty one years or marries, I direct that the stock before given to L for her benefit, be vested in E her mother and M my great nieces, to be advanced to them in equal portions, as said L may think proper, free from the control of their husbands. At the death of B, C was married, and E and M were dead, leaving children. **Held**: The bequest to C is not on a condition in restraint of marriage, but is a conditional limitation; and the bequest over to E and M on the marriage of C is valid.

Selden & wife v. Keen & als., 576

2. A testator having in terms provided for an equal division of his personal estate among his three children, held, upon a consideration of the whole will, that he did not intend that certain land he gives to one of his children should be charged to him in the division of the personal estate.

Erwin & wife v. Nichols & al., 281

3. Testator directs that three of his nieces, whom he names, shall have a comfortable and genteel support out of his estate until they marry. By a codicil of same date he says: I think the sum of \$300 each, provided my estate will afford it, ought to secure the end designed. **Held**: The testator has designated what he deems a proper provision, and it will be fixed at that.

Routh & al. v. Nash's adm'r & als., 842

LIMITATION OF ESTATES.

1. Testator, by his will made in January 1807, lends to his daughter Sallie, who is one of eleven, one female slave named Phoebe, to be possessed by her during her natural life or widowhood of her present or future husband, and at her death and the death or after marriage of her husband, then to be equally divided among her children; and if she has none, then to be equally divided among all

testator's children. Testator died in 1810, Sallie being then about fourteen years old. She lived until 1857 unmarried and without children, the descendants of Phoebe then numbering twenty-five. **Held**:

1. The executory devise over to testator's children is too remote, and void.

Stone's ex'or v. Nicholson & als., 1

2. If the executory devise is not void, then it includes all the testator's children alive at his death, and Sallie as one of them. *Idem*, 1

3. An executory devise over to testator's children will always be held to refer to children living at his death, unless there is a clear indication in the will that some other period is intended. *Idem*, 1

2. A bequest in trust for C, and in case C shall die under the age of twenty-one years, or marries, then in trust for E and M. The bequest to C is not a condition in restraint of marriage; but is a conditional limitation; and the bequest over to E and M on the marriage of C is valid.

Selden & wife v. Keen & als., 576

LIMITATIONS—STATUTES OF.

1. In an action of assumpsit on the plea of the statute of limitations, the time from the 2d of March 1866 to the 1st of January 1869, is to be left out of the computation.

Danville Bank v. Waddill, 448

2. The § 7, of the act of March 2d, 1866, known as the stay law, suspended the statute of limitations as to suits to set aside fraudulent conveyances.

Johnston & als. v. Gill & als., 587

3. A deed is made in January 1859, and a bill is filed in January 1871 by creditors of the grantor to set aside the deed, on the ground that it was fraudulent as to them. The several acts of the *de facto* government of Virginia, passed during the war, suspending the statutes of limitation, were valid to prevent the running of these statutes; and therefore the suit by the creditors was not barred by the statute on the 3d of March 1866, when the 7th section of the stay law of March 2d, 1866, was passed. *Idem*, 587

1057 *4. See *Marshaling Assets*, No. 6, and *Pugh & al. v. Russell & als.*, 789

5. The § 7 of the act of March 2d, 1866, known as the stay law, and the acts amendatory thereof, do not apply to appeals, writs of error or supersedeas, and therefore an appeal from a final decree made on the 1st of November 1867 cannot be allowed on the 12th of June 1871.

Rogers v. Strother & als., 417

MARSHALING ASSETS.

1. Previous to the act in the Code of 1849, a judgment against a deceased person had priority over debts by simple contract, and was to be paid out of the personal assets, if these were sufficient for the purpose; and having been paid out of the personal assets this did not give simple contract creditors a right to

have the assets marshaled, and to have their debts paid *pro tanto* out of the real estate.

Pugh & al. v. Russell & als., 789

2. The payment of taxes due to the state out of the personal assets does not give a simple contract creditor a right to have the assets marshaled. *Idem*, 789

3. Though simple contract creditors might before the act of 1850 be substituted to the rights of a creditor by bond binding the heirs, the doctrine of marshaling assets does not apply to a judgment. *Idem*, 789

4. Before the act in the Code of 1849, if a judgment against an executor or administrator upon the bond of the deceased binding the heirs, was paid out of the personal estate, simple contract creditors may be substituted to the right of such creditor against the heirs. *Idem*, 789

5. A commissioner settling an administration account before a court of probate, states in his report that two of the credits allowed the executor were for payments of judgments, which were liens on the real estate. This is not evidence against the devisees to prove that the judgments were recovered against the executor upon a bond of the testator binding the heirs, and to entitle a simple contract creditor to marshal the assets. *Idem*, 789

6. A judgment is recovered against an executor by a simple contract creditor of his testator; and the creditor then files a bill against the devisees to marshal the assets, and subject the land of the testator in the hands of the devisees. It must be presumed that his action was not barred by the statute of limitations when the judgment was recovered; and he is not, therefore, barred by the statute in his proceeding against the devisees to marshal the assets. *Idem*, 789

MISDEMEANORS.

1. The county court authorizes W to erect a tollgate on a turnpike road in the county, and take toll thereon at a rate fixed, he being bound to keep the road in order. S & M came with their teams to the gate, which they found shut and fastened. They demanded that the gate should be opened, and the gatekeeper demanded the usual tolls before opening the gate. Thereupon S & M broke down and destroyed the gate, and passed through without paying tolls. **HELD:**

1. W having erected the gate under the authority of the county court, whether or not the court had authority to make the order, S & M were guilty of a misdemeanor under the statute. Code of 1873, ch. 188, § 28.

Smart & McKinsey's case, 950

2. If the tollgate was such an obstruction on the highway as could be regarded as a nuisance, S & M could only be justified in removing it peaceably, not in destroying it; and having destroyed it they were guilty of a misdemeanor. *Idem*, 950

MISTAKE.

1. A bond is given upon an injunction to a judgment for money, and in the penalty it is

said, "in the just and full sum of seven hundred and seventy-six, lawful money of Virginia." The word "dollars" is obviously left out by mistake, and the bond will be treated as if the word was in it.

Harman v. Howe, 676

2. Words omitted in an instrument, and also in a statute or record, which can be clearly ascertained by the context, will be supplied by the court, and the instrument, record or statute, will be read and treated as if the words were in it. *Idem*, 676

3. For mistake of date by a clerk of a court. See *Injunctions*, No. 3, and

Idem, 676

1058 *NAVIGABLE WATERS.

1. A patent for land, constituting a part of the bed of a navigable river, conveys no title.

Norfolk City v. Cooke, 430

2. The navigable waters, and the soil under them within the territorial limits of the state, are the property of the state, to be controlled by the state at its own discretion, for the benefit of the people of the state; only so as not to interfere with the authority of the government of the United States in regulating commerce and navigation.

McCready's case, 985

NEGLIGENCE.

1. Negligence as between coterminous owners of buildings. See *Easements*, No. 8, 9, 10, 11, and

Stevenson v. Wallace, 77

2. The terms negligence and ordinary care are correlative terms. Ordinary care depends on the circumstances of the particular case, and is such care as a person of ordinary prudence under the circumstances would have exercised.

Norfolk & Pet. R. R. Co. v. Ormsby, 455

3. A railroad company running cars through a populous street of a city, on which many children live, must omit nothing which can be done by the company and its agents to prevent injury to children on the street.

Idem, 455

4. A child, of two years and ten months old, cannot be capable of contributory negligence, so as to relieve a railroad company from liability for its own negligence.

Idem, 455

5. Negligence of a parent or guardian of an infant child injured by a railroad car cannot constitute contributory negligence on the part of the child, so as to exonerate the company. *Lynch v. Nurden*, 41 Eng. C. L. R. 422, approved; *Hatfield v. Roper*, 21 Wend. R. 615, disapproved. *Idem*, 455

NEW TRIALS.

1. A verdict should not be set aside on the ground of after discovered evidence, where it is only cumulative or corroborative, and which ought not to be productive on another trial of a different result.

Cody v. Conly & als., 313

2. When an appellate court will reverse a judgment and order a new trial. See *Appellate Court*, No. 1, 2, and

Stevenson v. Wallace, 77
Bank of Danville v. Waddill, 448

3. The rules in relation to new trials, stated in *Grayson's case*, 6 Gratt. 712, and *Blosser v. Harshbarger*, 21 Gratt. 214, approved and reaffirmed.

Pryor's case, 1009

4. A new trial will be granted.

1. Where the verdict is against law. This occurs where the issue involves both law and fact, and the verdict is against the law of the case upon the facts proved.

2. Where the verdict is contrary to the evidence. This occurs where the issue involves matter of fact only, and the facts proved required a different verdict from that found by the jury.

3. Where the verdict is without evidence to support it. This occurs where there has been no proof whatever of a material fact, or not sufficient evidence of the fact or facts in issue. *Idem*, 1009

5. Where some evidence has been given which tends to prove the fact in issue, or the evidence consists of circumstances or presumptions, a new trial will not be granted merely because the court, if upon the jury, would have given a different verdict. To warrant a new trial in such cases, the evidence should be plainly insufficient to warrant the finding of the jury. *Idem*, 1009

6. A case in which the evidence being wholly circumstantial, it was held in the appellate court to be plainly insufficient to warrant the finding of the prisoner guilty of the offence charged in the indictment.

Idem, 1009

NORFOLK CITY.

1. The city of Norfolk is the owner of the ground which she has not disposed of, covered by water, lying between Parker street and the port warden's line, both as riparian proprietor and as having had long possession thereof; and the city may maintain an action of unlawful entry and detainer against any intruder upon said water lots.

Norfolk City v. Cooke, 430

1059 *NOTICES.

1. A notice by the supervisors of a county to D late sheriff, and his sureties, that they will move the county court at its November term, to render a judgment against them for the sum of \$4,840.03, the same being the amount of said D's deficiency and default for county levies for the year 1869, that went into D's hands as sheriff as aforesaid, and which he had failed to account for &c., is sufficiently specific and definite to warrant a judgment thereon.

Board of Supervisors of Washington Co. v. Dunn & als., 608

2. The rule governing notices is, that they are presumed to be the acts of parties, and not of lawyers. They are viewed with great

indulgence by the courts, and if the terms of the notice be general, the court will construe it favorably, and will apply it according to the truth of the case, as far as the notice will admit of such application. *Idem*, 608

3. Where a notice is directed by the notary to endorers at B, it may be inferred that the endorers lived at B.

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1. QUERE: Whether a person holding an office of profit, &c., under the United States government, is eligible to an office of profit, &c., under the state government.

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2. The office of sheriff commences on the 1st of July. If a person holding an office of profit under the government of the United States, is elected to the office of sheriff, which is an office of profit under the state government, and holds his office under the former government until any time during the 1st of July, he thereby vacates his election as sheriff, and is not entitled to qualify as such. *Idem*, 144

3. In May 1875 B, a deputy collector of customs at Fortress Monroe, was elected sheriff of E county. On the 19th of June he sent in his resignation of his office of deputy collector to his principal at Norfolk, to take effect on the 30th June. It does not appear that his resignation was accepted, or that official action was taken upon it until the 2nd of July, when he was relieved by another officer of customs from Norfolk. On the 28th of June the papers of the American brig K were placed in B's hands for clearance; and nearly all the papers were completed on the 29th, and on the morning of the 1st of July he completed the said clearing before he attempted to do any act as sheriff. HELD:

1. B had the absolute right to resign his office of deputy collector. After such resignation becomes complete it cannot be withdrawn even with the consent of the government; though he may receive a new appointment, which may, perhaps, be given to him in the form of withdrawal by consent of his resignation of the office. *Idem*, 144

2. But a prospective resignation may be withdrawn at any time before it is accepted; and after it is accepted, it may be withdrawn by the consent of the authority accepting, where no new rights have intervened. *Idem*, 144

3. The act of B, in clearing the brig K on the 1st of July, could only have been done by withdrawing his resignation, so long as it was necessary for that purpose; and he in fact was not relieved until July 2d. He was therefore disqualified from holding the office of sheriff under his election in the month of May. *Idem*, 144

4. On the 25th of June B qualified as sheriff of E, by taking the oath of office, and entering into bond with sureties before the county court. At the same term of the court, T claiming to be sheriff of E, moved the court to set aside the order qualifying B as

have the assets marshaled, and to have their debts paid *pro tanto* out of the real estate.

Fugh & al. v. Russell & als., 789

2. The payment of taxes due to the state out of the personal assets does not give a simple contract creditor a right to have the assets marshaled. *Idem*, 789

3. Though simple contract creditors might before the act of 1850 be substituted to the rights of a creditor by bond binding the heirs, the doctrine of marshaling assets does not apply to a judgment. *Idem*, 789

4. Before the act in the Code of 1849, if a judgment against an executor or administrator upon the bond of the deceased binding the heirs, was paid out of the personal estate, simple contract creditors may be substituted to the right of such creditor against the heirs. *Idem*, 789

5. A commissioner settling an administration account before a court of probate, states in his report that two of the credits allowed the executor were for payments of judgments, which were liens on the real estate. This is not evidence against the devisees to prove that the judgments were recovered against the executor upon a bond of the testator binding the heirs, and to entitle a simple contract creditor to marshal the assets. *Idem*, 789

6. A judgment is recovered against an executor by a simple contract creditor of his testator; and the creditor then files a bill against the devisees to marshal the assets, and subject the land of the testator in the hands of the devisees. It must be presumed that his action was not barred by the statute of limitations when the judgment was recovered; and he is not, therefore, barred by the statute in his proceeding against the devisees to marshal the assets. *Idem*, 789

MISDEMEANORS.

1. The county court authorizes W to erect a tollgate on a turnpike road in the county, and take toll thereon at a rate fixed, he being bound to keep the road in order. S & M came with their teams to the gate, which they found shut and fastened. They demanded that the gate should be opened, and the gatekeeper demanded the usual tolls before opening the gate. Thereupon S & M broke down and destroyed the gate, and passed through without paying tolls. **Held**:

1. W having erected the gate under the authority of the county court, whether or not the court had authority to make the order, S & M were guilty of a misdemeanor under the statute. Code of 1873, ch. 188, § 28.

Smart & McKinsey's case, 950

2. If the tollgate was such an obstruction on the highway as could be regarded as a nuisance, S & M could only be justified in removing it peaceably, not in destroying it; and having destroyed it they were guilty of a misdemeanor. *Idem*, 950

MISTAKE.

1. A bond is given upon an injunction to a judgment for money, and in the penalty it is

said, "in the just and full sum of seven hundred and seventy-six, lawful money of Virginia." The word "dollars" is obviously left out by mistake, and the bond will be treated as if the word was in it.

Harman v. Howe, 676

2. Words omitted in an instrument, and also in a statute or record, which can be clearly ascertained by the context, will be supplied by the court, and the instrument, record or statute, will be read and treated as if the words were in it. *Idem*, 676

3. For mistake of date by a clerk of a court. See *Injunctions*, No. 3, and

Idem, 676

1058 *NAVIGABLE WATERS.

1. A patent for land, constituting a part of the bed of a navigable river, conveys no title.

Norfolk City v. Cooke, 430

2. The navigable waters, and the soil under them within the territorial limits of the state, are the property of the state, to be controlled by the state at its own discretion, for the benefit of the people of the state; only so as not to interfere with the authority of the government of the United States in regulating commerce and navigation.

McCready's case, 985

NEGLIGENCE.

1. Negligence as between coterminous owners of buildings. See *Easements*, No. 8, 9, 10, 11, and

Stevenson v. Wallace, 77

2. The terms negligence and ordinary care are correlative terms. Ordinary care depends on the circumstances of the particular case, and is such care as a person of ordinary prudence under the circumstances would have exercised.

Norfolk & Pet. R. R. Co. v. Ormsby, 455

3. A railroad company running cars through a populous street of a city, on which many children live, must omit nothing which can be done by the company and its agents to prevent injury to children on the street.

Idem, 455

4. A child, of two years and ten months old, cannot be capable of contributory negligence, so as to relieve a railroad company from liability for its own negligence.

Idem, 455

5. Negligence of a parent or guardian of an infant child injured by a railroad car cannot constitute contributory negligence on the part of the child, so as to exonerate the company. *Lynch v. Nurden*, 41 Eng. C. L. R. 422, approved; *Hatfield v. Roper*, 21 Wend. R. 615, disapproved. *Idem*, 455

NEW TRIALS.

1. A verdict should not be set aside on the ground of after discovered evidence, where it is only cumulative or corroborative, and which ought not to be productive on another trial of a different result.

Cody v. Conly & als., 313

2. When an appellate court will reverse a judgment and order a new trial. See *Appellate Court*, No. 1, 2, and

Stevenson v. Wallace, 77

Bank of Danville v. Waddill, 448

3. The rules in relation to new trials, stated in *Grayson's case*, 6 Gratt. 712, and *Blosser v. Harshbarger*, 21 Gratt. 214, approved and reaffirmed.

Pryor's case, 1009

4. A new trial will be granted.

1. Where the verdict is against law. This occurs where the issue involves both law and fact, and the verdict is against the law of the case upon the facts proved.

2. Where the verdict is contrary to the evidence. This occurs where the issue involves matter of fact only, and the facts proved required a different verdict from that found by the jury.

3. Where the verdict is without evidence to support it. This occurs where there has been no proof whatever of a material fact, or not sufficient evidence of the fact or facts in issue. *Idem*, 1009

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sheriff; and B appearing, after hearing, the court set aside the order and the bond of B, and admitted T, who was sheriff the previous year, to qualify as sheriff. B thereupon applied to the judge of the circuit court for a *mandamus* to the judge of the county court to restore him to the office. **Held:**

1. It was competent for the county court of E, at the same term, to set aside the order admitting B to qualify as sheriff and his bond. *Idem*, 144

2. It was competent for the county court to refuse to admit B to qualify as sheriff when he held a lucrative office under the government of the United States. *Idem*, 144

1060 *3. If B is not, and was not when he obtained the rule for a writ of *mandamus*, entitled to the office of sheriff, he cannot be admitted or restored to it on such writ, even though the county court had no authority to annul the order admitting him to qualify as sheriff, or to have refused originally to admit him. *Idem*, 144

OYSTERS.

1. The act of March 14th, 1872, in relation to oysters, was repealed by the act of April 1873, on the same subject. And by this last act non-residents of the state were not prohibited from planting oysters in the waters of Virginia.

McCready's case, 982

2. The act of April 18th, 1874, Sess. Acts of 1874, ch. 214, § 22, p. 243, which forbids the planting of oysters in the waters of the state, by any person not a resident of the state, is a constitutional act, not in conflict with either article 1, § 8, or article 4, § 2, of the constitution of the United States.

McCready's case, 985

PAROL EVIDENCE.

1. When parol evidence inadmissible. See *Evidence*, No. 5, 9, and

Miller v. Fletcher & als., 403

Colhoun & Cowan v. Wilson, 639

PARTIES.

1. In a suit by a holder of a negotiable note to subject the estate of a deceased endorser to satisfy it, under the circumstances of the case, the representatives of the deceased maker and of a deceased endorser should be parties, though both of them died insolvent.

Duerson's adm'r v. Alsop & als., 229

2. See *Railroad Company*, No. 8, and *The Winch. & Stras. R. R. Co. & al. v. Colfert & al.*, 777

PARTNERS.

1. R, J & G form a partnership for the manufacture of tobacco, and by their articles G is to contribute money which is to be placed to his credit and to bear interest at six *per cent. per annum*. And to protect G against any losses which may arise from the business, "they hereby pledge and assign to him all the present and future interest in the

stock, machinery, fixtures and claims of the concern." G put in \$4,200. About the commencement of the partnership they bought machinery, &c. giving notes of the firm, secured by deed of trust upon the machinery, &c. The firm failed, and the trustee sold the machinery, &c., and after satisfying the trust there was a balance left. On a contest between the creditors of the firm and G—**Held:**

1. The property never having passed to the separate possession of G, but remaining in the possession of the partnership, the unrecorded executory agreement aforesaid is fraudulent as to the creditors of the firm without notice.

Grasswilt's assignee v. Connally & als., 19

2. About the time the firm failed, to secure G for his advances, they made a note, payable to their own order, for \$4,500, secured by deed of trust on the machinery, &c.; but the note was not endorsed or delivered to G. The note not having been endorsed or delivered to him by the other partners, though he took possession of it after the dissolution, G is not entitled to it. It creates no liability without negotiation, and neither G nor either of his partners could afterwards negotiate it; and consequently the deed made to secure it is a nullity. *Idem*, 19

PATENTS.

1. A patent for land constituting a part of the bed of a navigable river, conveys no title to it. *Norfolk City v. Cooke*, 430

PAYMENTS—PRIORITY OF.

1. Creditors at large who file a bill to set aside a conveyance of land as fraudulent, and succeed, have a lien on the land for their debts from the filing of their bill.

Wallace's adm'r & als. v. Treakle & als., 479

2. The deed of H for land is set aside as fraudulent at the suit of some of his creditors, and there is a decree after the death of H, for the sale of the land, and for account of the debts of H and their priorities. The report shows that there was one judgment against H before the deed was made. Some 1061 of the plaintiffs *in the bill were creditors by judgment, one a creditor at large; a number came in by petition before the decree; and a number came in before the commissioner and by petition after the decree. In distributing the fund it is to be applied: 1st, to pay the judgment recovered before the deed was made; 2nd, to the judgments recovered before the bill was filed; 3d, to the creditors at large who joined in the bill; 4th, to the creditors by petition before the death of H, in the order in which their petitions were filed; 5th, to the other creditors, *pro rata*. *Idem*, 479

3. K made a deed to F conveying a tract of land in trust to secure the purchase money of the land, evidenced by five bonds, payable at different periods to R, the vendor. R first assigned the bond payable second in date to M; next he assigned the bond payable first,

to McG, and afterwards he assigned the last three to G. The land when sold did not produce sufficient to pay all the bonds. **Held:** The bond assigned to M, the first assignee, is to be first paid; then the bond assigned to McG, the second assignee, and the balance, if any, is to be paid to G, the last assignee.

Gordon v. Fitzhugh & als., 835

PERJURY.

1. S is examined as a witness against T charged with the crime of rape. He is asked if he and T had not agreed to commit the rape, and if he did not hear the cries of the girl whilst T had her in the bushes; and he denies both. The examination is interrupted for a few minutes, and the witness is retired into another room, when he states to two of the officers and another person that to help T he had sworn falsely; and when his examination is resumed he says, that he and T had agreed to commit the rape, and that he did hear the cries of the girl. S is then indicted for perjury in making his first statement. There is no evidence against him but his own statements. **Held:** His own statements are not sufficient to convict him.

Schwartz's case, 1025

PLEADINGS.

1. C executes a bond to H, executor of E, and commissioner under a decree of the circuit court of H, in the case of H and R, with condition reciting that C has borrowed of H, executor and commissioner as aforesaid, the sum of, &c., of the money of his testator's estate, which, by the decree aforesaid, he is authorized to put out at interest, &c. In an action on this bond by H against C, not averring any order of the court authorizing H to collect the money, upon demurrer held the declaration is sufficient.

Cabell & als. v. Cox, 182

2. What a good plea in abatement. See *Abatement*, No. 1, and

Warren v. Saunders, 259

3. In debt upon a note, defendant pleads that stock had been pledged to plaintiff as security for the debt, and remainder in the exclusive management, custody and control of the plaintiff; and that the plaintiff had so carelessly and improvidently managed and controlled said stock that it had become utterly worthless. The plea is bad, because it does not set forth and show what acts the plaintiff had done, or omitted to do, in regard to the stock; which acts were intended to be complained of in the plea. It does not therefore sufficiently appear whether such acts or omissions constitute a good defense to the action.

Richardson v. Ins. Co. of Valley of Va., 749

4. If the plea had said that the plaintiff did not sell the stock, or have it sold, but retained possession of it until it perished in consequence of the war, it would not have been a legal bar to the action. The stock being a mere pledge or collateral security for the debt, the plaintiff might have sold it, but

was not bound to do so; at least without being required by the defendant.

Idem, 749

PLEADING—IN CRIMINAL CASES.

1. On the arraignment of a prisoner on a charge of felony, he files a special plea, to which the attorney for the commonwealth files a special replication; and to this replication the prisoner demurs. The demurrer being overruled, the prisoner cannot rejoin to the replication without withdrawing his demurrer.

Page's case, 954

2. A prisoner indicted for felony files a plea of *autrefois acquit*, and makes the record of his former trial part of his plea; 1062 and he avers that the offence for which he is then on trial, and the evidence necessary to convict him on the present indictment, if introduced, would have convicted him on the first trial. The attorney for the commonwealth replies that there is no records of the trial of the prisoner for the same identical felony and offence charged in the indictment on which the prisoner is then arraigned. The replication denies one of the essential averments of the plea, viz.: that the offence was the same as that for which the prisoner had been before tried; and is therefore a good replication to the plea.

Idem, 954

3. In such a case it would not have been proper to traverse the allegation that the evidence necessary to convict him, &c. The two indictments being for similar offences, and in the same words, except as to time, which is immaterial, of course the same facts which sustain the one would, standing by themselves, sustain the other. But when it is averred and shown that the two offences, though similar, are not in fact the same, but different offences, all foundation for the plea is taken away.

Idem, 954

POWERS.

1. See *Forfeitures*, No. 1, and

Silliman & als. v. Fred., Or. & Char. R. R. Co., 119

2. Persons dealing with corporations must take notice of what is contained in the law of their organization; and they must be presumed to be informed as to the restrictions annexed to the grant of power by the law by which the corporation is authorized to act.

Idem, 119

3. In all cases, even in cases of negotiable instruments, a party contracting with an agent must enquire into his authority; and either a state or a corporation is bound only when its agents keep within the limit of their authority.

Idem, 119

PRACTICE—AT COMMON LAW.

1. If upon a trial, instructions are given to the jury, to which no exception is taken, and after a verdict a motion is made for a new trial, on the ground of misdirection, as well as that the verdict is contrary to the evidence, it is the duty of the court of trial to consider the correctness of the instruc-

tions; and if of opinion that they are not correct, and were calculated to mislead the jury, to set aside the verdict and grant a new trial; and an appellate court will supervise its action in this respect.

Stevenson v. Wallace,

77

2. A discontinuance of the cause as to one of the defendants, by the counsel of the plaintiff, is not a *retraxit*. A *retraxit* can only be entered by the plaintiff in person, and in open court.

Muse & als. v. Farmers' Bank of Virginia,

252

3. A summons in debt is served on the defendant on the 3d of February, and there is a final judgment by default on 3d of March. Under the statute the day of the service of the process may be counted, and therefore thirty days had elapsed between the service of the process and the judgment, and it is a valid judgment.

Turnbull, for &c. v. Thompson & als.,

306

4. Process against a high sheriff may be served upon him by his deputy, and if he makes no objection to it at the time, a judgment by default against him is valid.

Idem,

306

5. A personal privilege of a defendant in debt of which the court cannot *ex officio* take notice, must be set up during the pendency of the proceedings.

Idem,

306

6. A verdict should not be set aside on the ground of after-discovered evidence, where it is merely cumulative and corroborative, and which ought not to be productive on another trial of a different result.

Cody v. Conly & als.,

313

7. In an action at law, which is submitted to the judgment of the court without a jury, the court renders a judgment, to which one party excepts; and it being near the end of the term, the court gives the council time until the first day of the next term to prepare the bill of exception; but the judgment is entered. The court cannot give such leave, and the bill of exception cannot be made a part of the record.

Winston v. Giles,

530

8. Even if the court had authority to give the time until a day certain in the next term, to prepare the bill of exception, if it is not tendered to the court on that day, it cannot afterwards be received.

Idem,

530

9. In cases when it may be important to give time until the next term to prepare the bill of exception, the case should be kept open, and the judgment should not be entered until the next term.

Idem,

530

10. An action is brought in a county in which the defendant does not reside, and process is sent to the county of his residence and served by the sheriff of that county. The action should be dismissed from the docket on motion of the defendant, the statute providing that when an action is brought where the cause of action arose, process shall not be

directed to an officer of another county or corporation, than that wherein the action was brought.

Warren v. Saunders,

259

11. See *continuance of a cause*, No. 1, 2, 3, and *Harman v. Howe,*

670

PRACTICE—IN CHANCERY.

1. When legatees may have a decree against the sureties of a deceased executor, before proceeding against his heirs. See *Executors & Administrators*, No. 1, and

Lacy v. Stamper & als.,

42

2. When there may be a joint decree against the administrator or a deceased executor and his sureties. See *Idem,*

42

3. Though a creditor files a bill to subject the personal and real estate of his deceased debtor to the payment of his debt, saying nothing of other creditors, yet if he prays that the administration account may be settled, that an account of all debts and liabilities of the estate may be taken, and their priorities fixed, that the amount and value of the real estate may be ascertained, and all other accounts and orders which are proper may be taken and made, this is a creditor's bill.

Duerson's adm'r v. Alsop & als.,

229

4. Under such a prayer a decree for a general account may be made; all of the creditors permitted to come in and prove their debts, and an order entered staying all other suits; and all the assets administered in the one suit.

Idem,

229

3. Although a bill is in behalf of all creditors, it is yet under the control of the party bringing the suit, at least until there is a decree for an account. And if his claim is proved or admitted, and the executor confesses assets, the plaintiff may at the hearing have a decree for payment; and he is not compelled to take a decree for an account.

Idem,

229

6. Upon a decree by default, there may be a petition for a rehearing or a bill of review; and if necessary a bill of review may be treated as a petition for a rehearing.

Sands v. Lynham, escheator,

291

7. Under the circumstances the court refused to set aside a sale of land under a decree, though the sale was made before the account of debts was taken.

Wallace's adm'r & als. v. Treakle & als.,

479

8. When the invalidity of an award, which is relied upon in the bill, may be set up in the answer, and a cross bill is unnecessary for the purpose of avoiding it. See *Injunctions*, No. 1, and *Tate v. Vance,*

571

9. When the court may appoint a receiver of ward's estate, though there is a guardian, who is wholly unfit for the office. See *Guardian & Ward*, No. 2, and

Sage & als. v. Hammonds,

651

10. When the court may make a decree against a guardian without an account. See *Guardian & Ward*, No. 3, and

Idem,

651

11. Under a decree in a pending cause an executor invests a large amount of assets in confederate bonds. There is an appeal from subsequent decrees in the cause by legatees and next of kin, and the court of appeals settles various questions between legatees and next of kin, and affirms the decrees in all other respects. And on motion of the next of kin it was added that this decree should not prevent the next of kin from asserting by proper proceedings any claim they may be advised to assert against the executor on account of his transactions as such executor. **Held:**

1. The decree of the court of appeals does not conclude enquiry as to the moneys invested in confederate bonds; but under the reservation in the decree this may be done.

Young & wife & als. v. Cabell's ex'or & als., 761

2. To make the enquiry the next of kin should file a cross bill, raising the question of the executor's liability for the money so collected and invested by him.

Idem, 761

3. As to another claim of the testatrix which was lost, that having been
1064 *passed upon by the court, cannot be enquired into again. *Idem,* 761

12. How creditors of a railroad company may subject the road, &c., to the payment of their debts. See *Railroad Companies*, Nos. 5, 6, 7, 8, and

The Winch. & Strasb. R. R. Co. & al. v. Colfert & al., 777

13. There are two devisees, one of whom owns one-fourth of a tract of land, and the other three-fourths; and the land is held liable to pay a debt of their testator. The decree should be separate against each for the payment of his *pro rata* share of the debt, with a reservation to the plaintiff to proceed against him for so much of the share of the other as cannot be made out of that other's land.

Pugh & al. v. Russell & als., 789

14. For the grounds on which a judicial sale of real estate will be set aside or confirmed. See *Judicial Sales, passim*, and

Wallace's adm'r & als. v. Treakle & als., 479

Brock v. Rice & als., 812

15. In an injunction case, the defendant only asking a dissolution of the injunction, and dismissal of the bill, may rely in his answer upon the invalidity of an award on which plaintiff rests his case, and it is not necessary to file a cross bill for the purpose of avoiding it. *Tate v. Vance,* 571

16. A vendor of land, who has retained the title, files a bill against the widow and infant children of the vendee, for a sale of the land to satisfy his debt. The widow answers, claiming dower in the land subject to the vendor's lien. Judgment creditors of the vendee may make themselves parties to the cause, and have the land, subject to the vendor's lien and the widow's dower, applied to the payment of their debts.

Simmons v. Lyles & als., 922

17. In such case the debt of the vendor is ascertained, and a commissioner is appointed to sell the land. He reports that a friend of the widow and children of the vendee has paid to the vendor his debt, and therefore he did not sell the land. The vendor then ceases to be interested in the case, and it becomes the suit of the creditors of the vendee.

Idem, 922

18. In such a case a commissioner is directed to settle the account of the administrator of the vendee, to take an account of the vendee's debts and their priorities, and also of the present value of the widow's dower in the land; and before the commissioner makes report the court decrees a sale of the land. **Held:**

1. It was premature to decree a sale of the land before the debts of the vendee and their priorities were ascertained, and a settlement of the administration account was made. *Idem,* 922

2. It was also error to decree a sale of the land until the widow's dower was assigned to her in kind, or it was ascertained that it could not be so assigned, and a moneyed compensation to her in lieu of her dower had been ascertained. *Idem,* 922

PRACTICE—IN CRIMINAL CASES.

See *Criminal Jurisdiction and Proceedings.*

PROCESS.

See *Practice at Common Law*, No. 3, 4, 10, and

Turnbull, for &c., v. Thompson & als., 306

Warren v. Saunders, 259

PROHIBITION.

1. For the purposes for which, and the principles upon which, writs of prohibition will be awarded, see opinion of *Christian, J.*, in

Supervisors of Bedford v. Wingfield, J., 329

2. The board of supervisors of a county order that one of the jury rooms attached to the courthouse shall be prepared to be used as a part of the clerk's office of the county court; and this order is approved by the county court. The judge of the circuit court thereupon makes a rule upon the board of supervisors to show cause why they shall not be restrained from making the changes in the room. This court will not restrain him by prohibition from proceeding under the rule; but the board should make their defence in the circuit court: and any error of the judge in that proceeding may be corrected by writ of error to this court. *Idem,* 329

1065 *PROMISSORY NOTES.

1. In relation to negotiable paper, the rights and obligations of the parties are governed by the law as it was when the contract was made, and not by the law as it was when the paper becomes payable.

Duerson's adm'r v. Alsop & als., 229

2. The ordinance of the Virginia convention of the 24th of June 1861 dispensed with demand, protest and notice upon all checks, bills, and notes payable at a bank located in any city or town, if, at the time of the maturity of such instruments, the town or city was occupied, invested or access thereto interrupted, by the public enemy. By an act of the legislature, passed on the 10th of May 1862, the ordinance was amended so as to require notice of the dishonor of the bill or note to be given within ten days after the removal of the obstruction created by the presence of the enemy. A note was made and endorsed on the 11th of December 1861, payable &c., at a bank in Fredericksburg, in six months. When it fell due the town of Fredericksburg was in possession of the United States forces; but they left a few months afterwards; but no notice was given at any time to the endorsers. The rights and obligations of the parties are governed by the ordinance, which was in operation when the note was made and endorsed, and notice of non-payment was not necessary to bind the endorsers. *Idem*, 229

3. The holder of a note endorsed for the accommodation of the maker which fell due in June 1862, gives no notice that he holds it to one of the endorsers, who died in 1863, or to his representative until 1870, makes no effort to collect it of the maker, though down to 1868 he was able to pay it, and died insolvent in 1870; and waits until the other endorser is dead insolvent. Under these circumstances the presumption that the holder of a note is a holder for value fails, and he must show he gave value for it. *Idem*, 229

4. In such a case, in a suit by the holder of a note to subject the estate of a deceased endorser to satisfy it, the representatives of the deceased maker and of another endorser should be made parties. *Idem*, 229

5. In debt against the endorsers of a protested note discounted at a bank at C, the protest of the notary states that "he placed in the post office of this place, four written notices, one directed to the payer, and one directed to H and L at B, Va., endorsers, informing them, &c. On demurrer to the evidence. *Held*: The jury would have been warranted to infer from the evidence, that the residence of the defendants was in B; and upon demurrer to evidence the court must make the same inference.

Linkous for &c. v. Hale & al., 668

PROPERTY OF THE STATE OF VIRGINIA.

1. The navigable waters and the soil under them within the territorial limits of the state are the property of the state, to be controlled by the state at its own discretion, for the benefit of the people of the state; only so as not to interfere with the authority of the government of the United States in regulating commerce and navigation.

McCready's case, 985

PUBLIC BUILDINGS.

1. A judge of a circuit court has authority to control the courthouse in which he administers justice, to the extent, at least, of preventing any interference with the discharge of the public business, and of having necessary jury rooms and other conveniences for the purpose.

Supervisors of Bedford v. Wingfield, judge, 329

2. When there is any such interference by the board of supervisors of a county, or any one else, the judge certainly has the right to enquire into it. If in doing so he violates the law, or infringes upon the rights of others, his action may be corrected by a writ of error. But it is not a case in which prohibition will lie. *Idem*, 329

PUBLIC LAW.

1. See *Trusts & Trustees*, No. 3, and *Walker v. Beauchler*, 511

2. See *Interest*, No. 2, 3, and *Idem*, 511

Fred & al. v. Dixon, 541

3. See *Corporations*, No. 7, and *Eastern Lunatic Asylum v. Garrett*, 163

1066 *RAILROAD COMPANIES.

1. What property of the Chesapeake and Ohio Railroad company is subject to taxation by the state. See *Taxes & Taxation*, No. 3, and

Commonwealth v. Ches. & Ohio R. Co., 344

2. A railroad company running its cars through a populous street of a city, on which many children live, must omit nothing which can be done by the company and its agents to prevent injury to children on the street.

Norfolk & Pet. R. R. Co. v. Ormsby, 455

3. A child, two years and ten months old, cannot be capable of contributory negligence, so as to relieve a railroad company from liability for its own negligence.

Idem, 455

4. Negligence of a parent or guardian of an infant child, injured by a railroad car, cannot constitute contributory negligence on the part of the child so as to exonerate the company.

Idem, 455

5. On the creditor's bill against a railroad company, some of the debts proved are under \$500, but there is one for \$1,117.60 proved before the commissioner, and the decree of the circuit court is in favor of all of them against the company. An appeal by the company brings up all of them; and this court will pass upon all.

The Winch. & Strasb. R. R. Co. & al. v. Colfert & al., 777

6. The road and franchises of the company are liable for the payment of judgments recovered against the company.

Idem, 777

7. It appearing from the report of the commissioner that the annual rent of the railroad

is \$37,000, and the debts proved are but \$1,286.91, the road should be leased out for the shortest period for which a sufficient rent may be obtained to pay the debts and costs of the suit. And if to accomplish this object it is necessary to lease the road for a term which will yield in rents a sum far exceeding the amount of the judgments, and cannot be leased at all for a shorter term, the creditors are entitled to have it leased for the longer term. *Idem*, 777

8. It appearing that another railroad company is in possession of the road, it is proper to make said company a party to the suit, to ascertain her interest in it; and that the company not responding or showing what its interest is, a decree for leasing the road may be made. *Idem*, 777

REMOVAL OF CAUSES.

1. In an action upon a policy of insurance by a citizen of the state of Virginia, against a foreign insurance company doing business in this state, the foreign corporation is *quod hoc* domiciled in the state by virtue of the statutes authorizing the company to do business here, and is not entitled under the act of congress of 1867, to have the cause removed. *Continental Ins. Co. v. Kasey*, 216

2. After a trial of an action at law, and a new trial directed by the appellate court, a party is not entitled, under the act of congress of 1867, to have the cause removed to the United States court, upon the ground that he is a non-resident of the state. *Idem*, 216

3. If a party in an action at law would have the cause removed from the state court to the United States court, on the ground that he is a non-resident of the state, he must present his application for it before there has been a trial of the cause. *Idem*, 216

RETRAXIT.

1. A discontinuance as to one defendant, by the counsel of the plaintiff, is not a *retraxit*. A *retraxit* can only be entered by the plaintiff in person and in open court. *Muse & als. v. Farmers Bank of Va.*, 252

ROADS.

1. Upon the petition of B and others for the establishment of a road, the county court, in February 1871, made an order that M, road commissioner, do view the route proposed for the road and report, &c. In July T, the road commissioner of the township in which the road would lie, made a report, stating, that as to a part of the road there was no objection, and only J claimed damages. There was an order of court establishing that part of the road not objected to, and a summons to J, who appeared and asked for a writ of *ad quod damnum*; which was ordered, and executed and returned. The case 1067 was then continued on motion *of J.

At a subsequent term J moved the court to quash the return of the commissioner,

which was done; and then, at the same term, the petitioners applied again for the road, and there was an order for a view, &c. And B, &c., appealed from the order quashing the report.—HOLD:

1. M having been the commissioner when the order directing the report was made, and he having been succeeded in that office by T, the name of M in the order was surplusage, and it was proper for T to make the report.

Jeter v. Board & als., 910

2. But if the objection would ever have been a good one, it was not made at the proper time, and was waived by J's applying for a writ of *ad quod damnum*, moving for a continuance of the case, and contesting it on other grounds. *Idem*, 910

3. The provisions of the statute in relation to yards, gardens, &c., and as to a map or diagram of the route, are merely directory, and if any of them are not complied with, objection to the report on that ground must be made in due time, or it will be considered as waived. In this case it was not made in due time, and was, in effect, waived. *Idem*, 910

4. There may be an appeal as of right from an interlocutory order of a county court in a controversy concerning the establishment of a road. *Idem*, 910

5. The judgment of the county court was final. As to much the larger part of the road, it had been established by a previous order of the court, and the order quashing the report put an end to the cause in that court. The order for another view of the route was a new proceeding. *Idem*, 910

SET-OFF.

1. After a decree for an account in a creditor's suit against a broken bank, a debtor of the bank buying up debts of the bank, is only entitled to stand in the shoes of his assignor, and receive his proportion of the assets realized. *Finney & als. v. Bennett*, 365

SHERIFFS.

1. What is a sufficient notice to a late sheriff and his sureties, by the supervisors of a county of motion for a judgment against them. See *Notices*, No. 1, and *Board of Supervisors of Washington Co. v. Dunn & als.*, 608

2. Upon a notice to a sheriff and his sureties of a motion against them for his failure to account for taxes, they appear and move for a rule upon the attorney for the commonwealth to show cause why the record of the bond of the sheriff should not be amended, corrected or vacated; and several of the sureties file affidavits, in which each states the grounds on which he relies, to show he is not bound by the bond. In fact, however, the defendants had either acknowledged the bond before the court or a justice; and none of the conditions they mention appeared on the record or bond, or were made known to the

court. These affidavits present no ground for the release of the parties or the rule.

Idem, 608

3. It is not necessary that the sureties of a sheriff in his official bond should acknowledge the same in court. The bond may be acknowledged by them in court, or its execution out of court may be proved by witness. And there is no statute or rule of law requiring such proof to be adduced at the time the bond is received by the court. With or without such proof the parties who had actually signed would be bound by the deed.

Idem, 608

4. How official bonds may be proved. See *Bonds*, No. 8, 9, and

Idem, 608

5. On a notice of a motion against a sheriff and his sureties on his official bond, the pleas of *non damnificatus* and *nil debet* are not proper pleas.

Idem, 608

6. On a motion against a sheriff and his sureties for the county levies he had failed to account for, the report of the clerk who had been directed by an order of the county court to settle the sheriff's account, though made with the sheriff without notice to the sureties, is competent evidence against them to show the amount for which the sheriff is indebted. If they had notice, as the statute provides, the report would be conclusive upon them; without notice it is *prima facie* evidence of the amount of the sheriff's indebtedness.

Idem, 608

7. A sheriff or other officer who pays an execution in his hands for collection, without an assignment at the time, of the judgment on which it is founded, or the debt, is not entitled to be subrogated to the lien of the creditor, whose debt he has paid as against other creditors having liens by judgment or otherwise.

Clevinger & als. v. Miller, 740

STATUTES.

1. The act, Sess. Acts of 1866-67, ch. 94, § 3, imposing a tax on collateral inheritances, construed in

Miller's ex'or v. The Commonwealth, 110

Barrett's adm'r's v. The Commonwealth, 110

2. The act, Code of 1860, ch. 138, §§ 11 and 12, concerning rents, construed in

City of Richmond for &c. v. Duesberry & als., 210

3. The act, Code of 1860, ch. 177, § 19, in relation to judgments against a part of the defendants, construed in

Muse & als. v. Farmers' Bank of Va., 252

4. The act, Code of 1860, ch. 16, clause 8, p. 115, as to the days to be excluded in computing the time for giving a notice, construed in

Turnbull for &c. v. Thompson & als., 306

5. The act, Code of 1873, ch. 106, § 4, in relation to widows renouncing the will, construed in

Jones & wife v. Hughes & als., 560

6. The 7th section of the act of March 3rd, 1866, known as the stay law, construed in

Johnston & als. v. Gill & als., 58

7. The act, Code of 1873, p. 1128, § 10, in relation to injunction bonds, construed in

Harman v. Howe, 676

8. The act, Code, ch. 166, § 2, as to the sending of process, construed in

Warren v. Saunders, 259

9. The act of April 18th, 1874, Sess. acts of 1874, ch. 214, § 22, p. 243, in relation to the planting of oysters by nonresidents, construed in

McCready's case, 985

10. The act, Code of 1873, ch. 172, §§ 21, 22, in relation to parties testifying, construed in

Brown, adm'r &c. v. Dickenson, 690

And Mason & als. v. Wood, 783

11. The act, Code of 1860, ch. 117, §§ 5 and 6, in relation to trust deeds construed in

Gordon v. Fitzhugh, 835

12. The act, Code of 1860, ch. 132, § 11. Code of 1873, ch. 128, § 18, in relation to the removal of fiduciaries, construed in

Reynolds v. Zink, 29

13. The act, Code of 1873, ch. 195, § 15, in relation to criminal trials, construed in

Burriss' case, 934

14. The act, Code of 1873, ch. 188, § 28, in relation to misdemeanors, construed in

Smart & McKinney's case, 950

15. The act, Code of 1873, ch. 202, § 10, in relation to juries in criminal trials construed in

Page's case, 954

SUBSTITUTION.

1. The real estate of which H died seized, intestate and without heirs, was sold under a decree in a suit in which the state was not a party, brought by a party claiming to be a creditor of H. This decree and sale having been set aside, the purchaser of the land is entitled to be substituted to the rights of the creditor; and upon showing that the debt was a valid debt of H, to subject the said real estate to its payment.

Sands v. Lynham, escheator, 291

2. A sheriff or other officer who pays an execution in his hands for collection, without an assignment at the time, of the judgment on which it is founded, or the debt, is not entitled to be subrogated to the lien of the creditor whose debt he has paid, as against other creditors having liens by judgment or otherwise.

Clevinger & als. v. Miller, 740

2. See *Marshaling Assets*, No. 1, 2, 3, 4, 6, and

Pough & al. v. Russell & als., 789

SURETIES.

1. A and B are sureties for W in a bond to L for \$3,000, executed in 1858. In May 1862 L lent to W \$7,500 of Confederate money, and took his bond payable in two years with interest; and W executed a deed by which he conveyed to S real and personal estate, in trust to secure both debts; and it provided

that upon the prompt payment annually of the interest upon the two bonds, W should keep quiet possession of the property for two years. W did not pay the interest. **HOLD:**

1. W not having paid the interest, the parties were left in the same situation, and with the same rights and obligations, as if the agreement to extend the time had not been made. **1069**

Adams & al. v. Logan & als., 201

2. The agreement only operated to postpone a sale of the property under the deed of trust. It did not tie up the hands of L from pursuing the debtor at law.

Idem, 201

3. If L had sued W at law and recovered judgment and levied execution on the personal property embraced in the deed, he might thereby have forfeited the benefit of that security, or subjected himself to an action for damages; but a court of equity would not interfere to prevent a sale of the property under the execution, upon the mere contract to pay the interest upon debt.

Idem, 201

4. But if the agreement operated as an extension of the time of payment of the debt, as the act of the 29th of March 1862, known as the stay law, forbade the issue of execution upon a judgment, and L was under no obligation to the sureties to raise the question of its constitutionality, the agreement did not have the slightest effect upon the rights and remedies or obligations of any of the parties.

Idem, 201

5. The principle upon which an agreement for an extension of time discharges a surety is, that the creditor thereby deprives the surety of the means of relieving himself, by paying the debt and proceeding immediately against the principal; or by his filing his bill *quia timet* to compel the debtor to pay the debt; or by notice to the creditor under the statute. The sureties cannot be discharged by an act which in no manner affect their rights, or impaired the remedies of the creditor.

Idem, 201

2. W having been declared a bankrupt in the United States court, L and the assignee, by compromise, agreed that the debt of L for \$7,500 should be scaled to \$3,500, with interest from date, and L should retain the benefit of the deed of trust; and that L should not object to the exemption in favor of W, or to the allowance of 200 acres of land to his wife in commutation of her contingent right of dower; and this agreement was confirmed by the bankrupt court. S sold the balance of the trust fund, and apportioned the net proceeds between the two debts of W to L. **HOLD:**

1. A and B cannot complain of the scale applied to the debt of \$7,500, which seems reasonable in itself, and was agreed to by L and the assignee of W, and approved and confirmed by the court.

Idem, 201

2. If there was error in the decree of the bankrupt court in allowing W the exemption claimed by him, or in assigning to his wife 200 acres of land, they are acts of a

court of competent jurisdiction, and cannot be questioned elsewhere. *Idem,* 201

3. A judgment had been rendered in favor of L against W, for two years interest on the bond of \$3,000, upon an insufficient notice, and execution levied on his property. W gives L notice that he will move to have it set aside; and L, being aware of the insufficiency of the notice, releases the property. The sureties are not entitled to a credit for the amount of the judgment. *Idem,* 201

3. What is a sufficient notice to a late sheriff and his sureties by the supervisors of a county of a motion for a judgment against them. See *Notices*, No. 1, and

Board of Supervisors of Washington

Co. v. Dunn & als.,

608

4. What is a sufficient execution and proof of the official bond of a sheriff by his sureties. See *Sheriffs*, No. 2, 3, and *Bonds*, No. 8, 9, and

Idem, 608

5. On a notice of motion against a sheriff and his sureties on his official bond, the pleas of *non damnificatus* and *nil debet* are not proper pleas. *Idem,* 608

6. On a motion against a sheriff and his sureties for the county levies he had failed to account for, the report of the clerk, who had been directed by an order of the county court to settle the sheriff's account, though made with the sheriff without notice to the sureties, is competent evidence against them to show the amount for which the sheriff is indebted. If they had notice, as the statute provides, the report would be conclusive upon them; without notice it is *prima facie* evidence of the amount of the sheriff's indebtedness. *Idem,* 608

7. How far a surety of a guardian is liable for his acts or failure to act after his removal from office. See *Guardian & Ward*, No. 1, and *Sage & al. v. Hammonds,* 651

1070 *8. For sureties on injunction bonds. See *Injunctions*, No. 3, 4 and 5, and *Harman v. Howe,* 676

TAXES AND TAXATION.

1. Corporations are included in the act of 1867, ch. 64, s. 3, Sess. Acts 1866-'67, imposing a tax on collateral inheritances.

Miller's ex'or v. The Commonwealth, 110

Barrett's adm'r v. The Same, 110

2. Though the statute exempts from taxation the property of orphan asylums and other charitable institutions, this exemption does not include a devise or bequest of property to such institutions. *Idem,* 110

3. The state has not, either by statute or contract, relinquished her right to tax that portion of the Chesapeake & Ohio railroad which lies between the city of Richmond and the town of Covington, and all the property of the company, real and personal belonging to that part of the road, and a fair proportion of its rolling stock, and of the earnings of the company, to be ascertained and apportioned in such mode as may be prescribed by law. But she has relinquished the right to

tax the property of the company lying west of Covington.

Commonwealth v. Ches. & Ohio R. Co., 344

4. A state cannot tax the bonds of a railroad company held by persons living out of the state. *Idem*, 344

TROVER.

See *Corporations*, No. 7, and
Eastern Lunatic Asylum v. Garrett, 163

TRUSTS AND TRUSTEES.

1. See *Forfeitures*, No. 1, and
Silliman & als. v. Fred. Or. & Char. R. R. Co., 119

2. An unfaithful trustee of married women and infant children, though appointed by the testator, may be removed from his trust, and another trustee appointed in his place.

Walters v. Hill & als., 388

3. B owns a tract of land in A county, Virginia, on which he lives, and in 1859 he conveys it to J., in trust, to secure a debt of \$300 he owes P, who lives in Georgetown, payable in two years. In 1861, the Union forces having taken possession of the part of the country in which B lived, he removed with his family to Fairfax Courthouse, and remained there until the close of the war. In October 1864 J advertises the land for sale and sells it at public auction in Georgetown, when Mrs. B, the wife of B, and niece of P, buys it; W being present at the sale. Mr. and Mrs. B afterwards sell the land to W and S at the same price, and afterwards W bought of S, and made permanent improvements upon the land. In 1870 B filed his bill against W, &c., to set aside the sale and conveyance. **Held:**

1. B being within the Confederate lines, and P being in the Union lines, during the war, B could not legally pay or P receive his debt, and therefore the deed of trust could not be enforced; and the sale was invalid.

Walker v. Beauchler, 511

2. W having been present at the sale, and knowing the circumstances, can stand in no better condition than the purchaser at the sale; and his title is therefore invalid. *Idem*, 511

3. B is entitled to have his land, he paying to W the amount of the debt he owed R.

Idem, 511

4. R's debt is not to bear interest during the war. *Idem*, 511

5. B having delayed for four year after the war had closed, to assert his right to the property, and permitted W to put valuable and permanent improvements upon it, believing that he had an undisputed title to it, W is to be charged for the rents and profits of the land, exclusive of the improvements, whilst he held it, and to be allowed a reasonable compensation for the permanent improvements he has made upon it, though this shall be in excess of the rents and profits. *Idem*, 511

4. A railroad company, for the purpose of extending their road, determine to issue their bonds for \$10,000,000, to be secured by a deed of trust on all their property, to three trustees, one to reside in Virginia and two in New York, and they agree to pay to the trustees each \$5,000. M is selected in Virginia, informed of the terms and consents to act. The company determine to issue bonds for \$15,000,000, and to have a fourth trustee, and pay the four the \$15,000. The deed is prepared and it is executed by the trustees, M having been informed of the reduction of the compensation. The trustees execute about 2000 of the bonds, and M performs all the services demanded of him, until the company, without the knowledge of M, makes another deed to two of the trustees, omitting M; and under this last deed the company proceeds to effect the loan. **Held:**

1. M having been appointed a trustee for a specific compensation, and having been discharged by the company without his knowledge, he is entitled to have the compensation agreed upon.

Maury v. Ches. & Ohio R. R. Co., 698

2. M having executed the deed with the knowledge that the compensation was reduced by the payment to the four what was first agreed to be paid to the three, and having acted under the deed, he is entitled to recover from the company one fourth of the \$15,000; but no more. *Idem*, 698

5. In August 1858 B conveyed to T land and slaves, in trust to secure a debt due by two bonds to R. The land was the land of B's wife S, and he had but a life estate in it; and in September 1858 B and wife conveyed the land to T in trust, that B and wife should hold the land until the personal property conveyed by the first deed was sold to satisfy the debt; and if the sale of that property should not raise a sum sufficient to pay the debt, then T, upon the request of R or his assigns should sell, &c. R transferred the debt to M, and on the request of M, T advertised the sale of the slaves and land to be made in February 1860. On the day of sale, T on the request of B and his wife S, induced W the uncle of S, to pay the debt; and T gave him a receipt, in which he stated that on the receipt of the money M would assign the debts and deeds of trust to W. B died in 1862, and W died in 1869, having the bonds and deeds of trust in his possession, but not having obtained the assignment from M. His executor G afterwards obtained it, and on his request T sold the land, the slaves having been freed by the results of the war. **Held:**

1. By the assignments, G, the executor of W, had the right to require that the trusts should be enforced by a sale of the property.

Thurmond v. Wood's ex'or, 77

2. The land is liable for the debt though the slaves had been freed, and therefore could not be first sold. *Idem*, 77

3. The failure to sell the slaves having been at the request and for the benefit of

S, she cannot set up the loss of the slaves as a security for the debt, to prevent the sale of the land. *Idem*, 727

4. As against the creditor of B, S cannot be regarded as to the surety of her husband, or as a mere guarantor for the payment of the debt; and as against the creditor she can claim none of the rights of mere surety or guarantor. *Idem*, 727

5. The proofs do not show that W paid the debt intending to secure the property for S and her child. *Idem*, 727

6. R, a commissioner, selling land in 1860 under a decree, is guilty of a breach of trust in receiving confederate currency from the purchaser in payment of his bonds in 1863.

Omohundro's ex'or v. Omohundro & als., 824

7. A commissioner who in April 1860 is appointed to sell lands is guilty of a breach of trust in selling them in 1863 for confederate currency. *Idem*, 824

8. S, a brother of the commissioner, who is one of the parties entitled to the land and its proceeds, induces R to collect the purchase money of the land sold, and to sell the balance, both to be received in confederate currency, and to lend it to him. S is a party to the breach of trust by R, the commissioner, and is responsible for it. *Idem*, 824

9. Though S gives to R a bond for the money received by him, which in an action upon it by R, against the executor of S, the court holds should be scaled, this will not protect him in a suit by the other parties interested, showing the circumstances under which S received the money. *Idem*, 824

10. K made a deed to F conveying a tract of land in trust to secure the purchase money of the land evidenced by five bonds, payable at different periods to R, the vendor. R first assigned the bond payable second in date to M; next, he assigned the bond payable first to McG, and afterwards he assigned the last three to G. The land, when sold, did not produce sufficient to pay all the bonds.

Held:

1072 *The bond assigned to M, the first assignee, is to be first paid; then the bond assigned to McG, the second assignee; and the balance, if any, is to be paid to G, the last assignee.

Gordon v. Fitzhugh, 835

11. W died in 1858, and by his will, made a few days before his death, he devised and bequeathed the residuum of his estate, consisting of land, slaves, &c., to H, in trust "for the sole use and benefit" of his daughter C, his only child, then about fourteen years of age, to manage it for her, giving to her the rents during her life; with power in H and C by their joint consent and act, to sell such portions of the estate for the convenience of management as may be desirable and beneficial to G, the proceeds of sale to be invested on the same trusts; and at her death to her children then alive, and the descendants of such as were dead. If G should die unmarried or without such children &c., she to have the power of disposing of the property by will; and if no will, then over

to his brothers. G marries J in 1859, and in 1863, in a cause in which G is plaintiff, H is released from the trust, and J is appointed in his place, to hold the property for her sole and separate use. In September 1864 J and G sell and convey the land to B for \$56,860 cash in confederate money, when it was depreciated as twenty-five for one; G being then under the age of twenty-one years; though B did not know that. In August 1869 G and her two infant children file their bill against B, to set aside the sale and conveyance of the land. **HELD:**

1. That though the words "for the sole use and benefit" are not the most appropriate to vest in G a separate estate, yet, looking to the whole provision, it is obvious that such was the intention of the testator.

Bedinger v. Wharton & als., 857

2. The sale of the land for Confederate money, depreciated as it then was, and daily sinking in value, was a breach of his trust on the part of J. *Idem*, 857

3. B was privy to and participated in the breach of trust by J; and though the evidence shows that he acted in good faith in the purchase, the sale and conveyance is void. *Idem*, 857

4. G having been under the age of twenty-one years, her deed is voidable; and by her bill, in August 1869, to set aside the conveyance, she expressed her purpose to avoid it. *Idem*, 857

5. G having only come of age in 1865, and being still a married woman, in the then condition of the country and the law she had not by her laches lost her right to avoid the deed when she filed her bill in 1869. *Idem*, 857

6. Though the purchase money received from B, or a large part of it, was consumed in the support of said infant and her family, she could not become liable, on her arrival at age, to refund the consideration which had been received by J from B, or be prevented from disaffirming the said contract and recovering the land from B.

Idem, 857

7. **QUERE:** Whether to the extent that G derived her support from the consideration received from B, or actually received or enjoyed for her sole use and benefit the said consideration, he should be accountable for rent of the land purchased by him.

Idem, 857

8. Even if the power to sell vested in the trustee and G, authorized a sale of the land, the sale of the land in September 1864, for confederate money, when it was so much depreciated in value, and was daily and rapidly depreciating more and more, was a palpable breach of trust, in which B participated, unless there were very peculiar circumstances to warrant or excuse the sale; and the burden of proving such circumstances devolved on the purchaser.

Idem, 857

12. A deed of trust is executed to secure a note made by partners, but not endorsed or

delivered by them during the partnership. The deed is a nullity.

Grasswilt's ass'nee v. Connally & als., 19

UNLAWFUL DETAINER.

1. The city of Norfolk being the owner of lots covered by water within the port warden's line, may maintain an action of unlawful entry and detainer against any intruder upon said water lots.

Norfolk City v. Cooke, 430

1073

*VARIANCE.

1. In a commitment by a justice of a person for forging an order, in setting out the order he writes some words in full which in the order as set out in the indictment are abbreviated—as Thomas for Thos., 23 cents for 23 c., Respectfully for Resp'ly. These are not such variances as require that the accused should be sent back to a justice for examination. *Burriss' case*, 934

2. An indictment for forging an order sets it out as for forty-seven dollars and 25 c., and the order was for forty-seven dollars and 23 c. This is a variance, and entitles the accused to acquittal on that indictment.

Idem, 934

3. The act, Code of 1873, ch. 195, s. 15, p. 1218, does not make a variance between the indictment and the forged paper immaterial. The accused must be acquitted on that ground, if no other. *Idem*, 934

4. The difference between "account," as set out in the indictment, and "act," as written in the order, is not a material variance, which will exclude the order as evidence.

Idem, 934

VENDOR AND PURCHASERS.

1. When a purchaser of land will be affected by the defect of his vendor's title, though he is a purchaser for value and has received a conveyance. See *Trusts & Trustees*, No. 3, and *Walker v. Beauchler*, 511

2. When a purchaser of land, from whom it is recovered, will be entitled to be allowed for permanent improvements put upon it by him, in excess of his liability for rents and profits. *Idem*, 511

3. Executor sells land in November 1860 on a credit of six and twelve months, taking bonds and retaining the title. The executor being absent in the army during the war, the purchasers pay the purchase money to his agent in 1863 and 1864 in confederate currency. The executor was guilty of a *devastavit* in receiving the purchase money in the then depreciated currency; and the purchasers were parties to the *devastavit*; and they will be required to take the lands at their value at the time of the decree, or the lands will be again sold.

Tosh & als. v. Robertson & als., 270

4. Though the decree makes no allowance for improvements which the purchasers allege they have made upon the lands, yet as the rents and profits of the lands, or the interest on the purchase money, with neither

of which they are charged, would amount to more than these improvements which they claim, there is no error in the decree.

Idem, 270

WILLS.

1. In controversies touching testamentary capacity, as a general rule the evidence of witness, unless founded on fact, except in the case of experts, is entitled to but little weight.

Young, by &c. v. Barner & als., 96

2. The evidence of the attesting witnesses is an exception to this rule. But if an attesting witness to a will attempts to impeach its validity, though his evidence will not be positively rejected, it is to be received with the most scrupulous jealousy. *Idem*, 96

3. In all questions of testamentary capacity, particularly where the evidence is conflicting, the courts are much inclined to consider the dispositions contained in it. If these be in themselves consistent with the situation of the testator, in conformity with his affections and previous declarations—if they be such as might justly have been expected, this is said to be of itself persuasive evidence of testamentary capacity.

Idem, 96

4. The jury are the proper judges of the weight and credit due to the testimony of the witnesses, and their verdict, when sanctioned, as in this case, by the county and circuit judges who heard the evidence, is entitled to the highest respect in the appellate court. In such a case the deviation from the proof must be very plain and palpable to warrant the interference of the appellate court.

Idem, 96

5. If the witnesses to a will are dead, or if there is a failure of recollection on their part, the court will often presume (the will in other respects being regular,) that the requirements of the statute have been complied with in the formal execution of the instrument.

Idem, 96

6. A paper writing purporting to be a will commences: Lewinsville, August 1862. Dear wife—I am going away; I may never

1074 return. I leave my property, &c
Held in view of the language and the circumstances surrounding the writer at the time, not to be conditional on his going away and not returning.

Cody v. Conly & als., 313

7. A witness as to the handwriting of C. states that some thirteen years previous, C dug a well for him, and drew several orders on him for money, which he paid, and which C recognized afterwards. He never saw C write, but from his recollection of these orders, he believes the paper to be in the handwriting of C. This is competent testimony. *Idem*, 313

8. A testator having in terms provided for an equal division of his personal estate among his three children, held upon a consideration of the whole will, that he did not intend that certain land he gives to one of his

children should be charged to him in the division of his personal estate.

Erwin & wife v. Nichols & al., 281

WITNESSES.

1. Bonds are executed to A and G, and are left with G. A sells the bonds to E, but does not deliver them. G sells them to D, and delivers them to him. In a contest between E and G, both claiming the bonds, G being dead, A is not a competent witness under the statute to prove that G owed him and had agreed that he should have the bonds.

Brown, adm'r &c. v. Dickenson, 690

2. See *Wills*, No. 1, 2, 3, 4, 5 and 7, and *Young, by &c. v. Barner & als.*, 96

Cody v. Conly & als., 313

3. M and four others execute a bond to W for the price of a jack, and W warrants sound, and a good foal-getter. F, one of the obligors, dies, and in a suit on the bond by W against the survivors, they set up a breach of the warranty as their defence. On the trial W introduces witnesses to prove what two of the defendants said to the witnesses long subsequent to the purchase, to disprove by implication the breach of the warranty. And then the defendants offer these two to testify as to what those conversations were. **HOLD:** F being dead, W, the plaintiff, could not under the statute testify in the cause; and therefore the two defendants are incompetent to testify, though in relation to a matter which occurred after the death of F.

Mason & als. v. Wood, 783

